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THE
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WITH KEY-NUMBER ANNOTATIONS

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CASES ARGUED AND DETERMINED IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES

WITH TABLE OF CASES IN WHICH REHEARINGS HAVE BEEN
GRANTED OR DENIED

MAY—JUNE, 1910

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⁴ Died March 28, 1910.

⁵ Appointed Associate Judge of Court of Customs Appeals March 30, 1910.

⁶ Appointed May 2, 1910, to succeed William H. Hunt.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS

HUIDEKOPER v. HADLEY et al.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1910.)

No. 3,143.

1. STATES (§ 191*)—MANDAMUS AGAINST STATE OFFICERS—SUIT AGAINST STATE.

Rev. St. Mo. 1899, § 9140 (Ann. St. 1906, p. 2119), requires each county assessor to take an oath to faithfully and impartially perform the duties of his office and to assess all the property in the county at what he believes to be its true cash value. Section 9180 requires that he value and assess all property in his county at such value, and sections 9127 and 9195 require a statement or abstract of the taxes so assessed in each county to be forwarded to the State Auditor to be by him laid before the State Board of Equalization, which by Const. Mo. art. 10, § 18 (Ann. St. 1906, p. 293), consists of the Governor, State Auditor, State Treasurer, Secretary of State, and Attorney General, who are required to adjust and equalize the valuation of real and personal property among the several counties, etc. Section 9126 provides that a majority of the board shall constitute a quorum, and section 9127 prescribes the manner in which the equalization shall proceed. *Held*, that a petition for mandamus against the members of the board, alleging that a majority thereof refused to permit the board to perform its duty and to equalize the taxes, as prescribed, and seeking to compel them to perform their duty in that behalf, was not a proceeding against the state, in violation of Const. U. S. Amend. 11.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 179-184; Dec. Dig. § 191.*]

What are suits against states within the meaning of constitutional amendment 11, see note to *Murray v. Wilson Distilling Co.*, 92 C. C. A. 25.]

2. TAXATION (§ 447*)—"EQUALIZATION."

The words "equalize" or "equalization," as used in revenue statutes creating a board of equalization, means to bring the assessment of different parts of a taxing district to the same relative standard so that no one of the parts may be compelled to pay a disproportionate part of the tax.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 447.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2427, 2428.]

3. MANDAMUS (§ 117*)—OFFICERS—DUTY.

The Missouri Legislature, to execute Const. art. 10, § 3 (Ann. St. 1906, p. 275), providing that taxes shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax, provided a scheme for equalizing the valuation of property among all the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

counties of the state, based on actual value, by Rev. St. 1899, § 9127 (Ann. St. 1906, p. 2116), and to work out such scheme, created a state board of equalization, by Const. art. 10, § 18 (Ann. St. 1906, p. 293), and by Rev. St. § 9127, charged such board with the duty of equalizing property as classified by the Legislature. *Held*, that such board had no discretion to divide the counties of the state into several groups and equalize the different classes of property only within each group, and hence mandamus was maintainable to compel the members of the board other than the Governor to equalize the assessment throughout the state.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 249; Dec. Dig. § 117.*]

4. **MANDAMUS (§ 72*)—PUBLIC OFFICERS—DISCRETION.**

While the lawful exercise of discretion by public agents or officers cannot be controlled by mandamus, the writ will lie to compel the person or body in whom the discretion is lodged to proceed to exercise its discretion, and, in case the manner of such exercise has been prescribed by law, to compel the person or body not to proceed in any other way.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 134; Dec. Dig. § 72.*]

5. **MANDAMUS (§ 64*)—EXECUTIVE OFFICERS—GOVERNOR.**

The Governor of the state, while serving as a member of the State Board of Equalization, is performing an executive duty in no different sense than when performing any ministerial act devolving on him as chief executive, and hence mandamus may not be issued against him to coerce or control his action as a member of such board, though it was maintainable against the others.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 129; Dec. Dig. § 64.*]

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Petition for mandamus by Arthur C. Huidekoper against Herbert S. Hadley and others. The petition was dismissed on plea to the court's jurisdiction, and plaintiff brings error. Reversed as to all the respondents except Herbert S. Hadley, and remanded, with directions. See, also, 171 Fed. 118.

W. D. Tatlow (E. Y. Mitchell, on the brief), for plaintiff in error.

John M. Atkinson and John T. Barker (Elliott W. Major, B. R. Dy-sart, E. S. Jones, and Guthrie & Franklin, on the brief), for defendants in error.

Before ADAMS, Circuit Judge, and RINER and WM. H. MUNGER, District Judges.

ADAMS, Circuit Judge. This was a petition for a writ of mandamus against the members of the Board of Equalization of the State of Missouri, the members of a like board of the county of Macon, and the assessor and collector of the revenue of that county, to compel them to discharge duties which the relator, Huidekoper, avers they declined to perform. The Circuit Court sustained a plea to the jurisdiction, and, treating it also as a demurrer, dismissed the petition on two grounds: (1) Because the suit was against the state of Missouri in violation of the eleventh amendment of the Constitution, and (2) because the court was asked to review action of state officers resting in discretion. From that judgment error is prosecuted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In order to understand the several questions which we are called upon to decide, a general statement of the case as made by the petition seems to be required.

Pursuant to authority conferred by law, Macon county in May, 1870, made a subscription to the capital stock of the Missouri & Mississippi Railroad Company and issued its negotiable bonds in payment therefor. The only recourse the holders of the bonds had for their payment was the right to compel the levy of a tax of one-twentieth of 1 per cent. upon the assessed value of the taxable property of the county and to participate with other creditors of the county in the proceeds of a tax of one-half of 1 per cent. authorized for general county purposes. *Macon County v. Huidekoper*, 134 U. S. 332, 10 Sup. Ct. 491, 33 L. Ed. 914, and cases cited. The relator became the owner of some of these bonds with attached coupons, and on default of payment recovered final judgments thereon. The subsequent securing of warrants upon the county treasurer and other futile proceedings taken to secure satisfaction of his judgments need not, for our present purposes, be dwelt upon. Suffice it to say the relator has not been able to collect his judgments, which amount in the aggregate to over \$263,000, and has resorted to this proceeding to enable him to do so.

The gravamen of his petition is: That the annual levies of one-half and one-twentieth of 1 per cent. upon the valuation of the property in the county, as assessed by the assessor and equalized by the State Board of Equalization, are entirely inadequate to raise the necessary fund to pay his judgments. That the present assessor of Macon county and his predecessors for some time past have intentionally, purposely, and fraudulently failed to assess the property of the county at its true value in money, but have assessed it at as low a fractional part thereof as would suffice to meet local needs, and have so done for the purpose of preventing the creation of a fund to pay the indebtedness of the county. That assessors of other counties of the state have also placed low values upon the property of their counties for the purpose of escaping their just proportion of the state tax. That the State Board of Equalization well knowing these facts has for many years divided the counties of the state into groups, and, instead of equalizing the property among all the counties as required by law, has equalized it among the several groups only so that the property of the same class in one group of counties has been assessed at a different per cent. of its value than the same property in other counties or in different groups of counties. That in no case has the property of the different counties of the state been so assessed or equalized at its true value in money, but on the contrary has been assessed and equalized on an average of from 30 to 50 per cent. only of that value. That the relator appeared before the State Board at its last session and informed its members of the fact that he was a judgment creditor of Macon county, advised them that the facts already detailed prevented the collection of his judgments, and demanded that the board equalize the various classes of property in Macon county on the basis of the real value in money and certify the same to the proper officer of that

county, to the end that, by the annual levies of one-half and one-twentieth of 1 per cent. allowed by law, a fund might be created to satisfy his judgments. That after a hearing of his petition a resolution was offered by Gov. Hadley, a member of the board, in the words following:

"That the true value in money of each class of property as the same is returned to this board for equalization in each county, be ascertained by this board; that this true value in money of each class of such property in each county be set aside in a tabulation to be prepared, and that where the value of any of the classes of property in any of the counties, as returned to this board, is less than its true cash value, that such per centum of its true value be added thereto by this board as will make its assessed value as equalized by this board, equal to its true value in money, so that all classes of property in all the counties will be, and is hereby equalized and assessed on a basis of its true value in money."

That this resolution was voted down by a vote of three out of the five members constituting the board. That afterwards a resolution was offered by Mr. Cowgill, vice president of the board, providing that the true value in money of each class of property be ascertained by the board and set aside in a tabulation to be prepared, and that in the event the value of any of the classes of property in any of the counties as returned to the board is less than 50 per centum of its true cash value such per centum shall be added thereto as will make its assessed value equal to at least 50 per cent. of its true value in money to the end that all classes of property in the counties shall be equalized and assessed on a basis of not less than 50 per centum of its true value in money. That this resolution also failed to carry by a vote of three to two.

It is then alleged that by the action of a majority of the board in the particulars just mentioned and in other respects unnecessary now to be repeated it arbitrarily, capriciously, and maliciously refused to equalize the property of the state and particularly that of Macon county on the basis of its true value in money and knowingly, unlawfully, and fraudulently pretended to equalize the property of Macon county at \$8,270,123, when its members knew that its true value was in excess of \$25,000,000, that the act of the majority in so refusing was done intentionally, malevolently, and fraudulently with a view and for the purpose of assisting the officers of Macon county to defeat the payment of relator's judgments.

It is further alleged that the pretended equalization of the property of Macon county as well as that of the property of the entire state has been fictitious and fraudulent, and that the majority of the board have given out that at the sessions of the board to be held in the years 1910, 1911, and 1912, during which years they remain in office, they will continue the unlawful and fraudulent method of equalizing the property of the state by fixing the value at only a fraction of its real value not in excess of 33 per cent. thereof

In short, the petition discloses that, by a majority of its members, the State Board has resorted to a method of dividing the counties of the state into groups and equalizing the values of property in each group without reference to values in counties embraced in other

groups, and that as a result of that and other methods complained of and of a deliberately formed and expressed purpose to continue them, the property of the state as a whole has been equalized and will be continued to be equalized, not at its true value in money, but at a small fractional part thereof only. It is conceded in argument that the State Board cannot take action solely with respect to Macon county, but must act in the equalization of values on a comprehensive plan embracing the property of all the counties and independent municipalities of the state.

Notwithstanding the fact that the members of the board of equalization and the assessor and collector of taxes of Macon county are made parties to this action, it is conceded that the performance of the duty, upon which relator's remedy depends, rests primarily with the State Board; and it is only when that body shall have done its duty that the officers of the county can take effective action. In other words, it is the position of counsel for the relator that no relief can be granted to the judgment creditor as against the action of the county assessor and other county officers until the State Board, as the final arbiter of values, shall have been appealed to and shall have done its duty.

Accordingly, the argument on both sides has been directed chiefly to the question whether the members of the State Board are amenable to this proceeding by mandamus.

It is claimed by the respondents that for three reasons they are not: First, because the proceeding against them is, in effect, one against the state of Missouri and, therefore, prohibited by the eleventh amendment of the Constitution of the United States; second, that their action in declining to equalize the property of the state as requested by the relator was the exercise of a discretion which is not reviewable by the courts; third, that as respondent Hadley is the Governor of the state he is not subject to the writ of mandamus to compel him to do a duty as a member of the Board of Equalization.

1. Is this proceeding a suit against the state?

Section 9140, Rev. St. Mo. 1899 (Ann. St. 1906, p. 4210), provides that the assessor of each county shall take an oath to faithfully and impartially perform the duties of his office and to assess all the property in the county at what he believes to be its actual cash value.

Section 9180 provides that the assessor shall value and assess all the property of his county according to its true value in money at the time of the assessment.

Sections 9127 and 9195 provide that a statement or abstract of the taxes so assessed in each county shall be forwarded to the State Auditor on blanks furnished by him, to be by him laid before the State Board of Equalization.

The Constitution of the state (article 10, § 18) creates the board and ordains that:

"There shall be a State Board of Equalization, consisting of the Governor, State Auditor, State Treasurer, Secretary of State and Attorney General. The duty of said board shall be to adjust and equalize the valuation of real and personal property among the several counties of the state, and it shall perform such other duties as are now or may be prescribed by law."

Section 9126 provides that a majority of the members of the board shall constitute a quorum, and that the members shall each take an oath or affirmation that he will "to the best of his knowledge and ability, equalize the valuation of real and personal property among the several counties in the state, according to the rules prescribed by this chapter for equalizing and valuing real property."

Section 9127 provides that the board after receiving from the auditor abstracts or statements of all the taxable property in the state, and after classifying the same under certain headings, "shall proceed to equalize the valuation of each class thereof among the respective counties of the state in the following manner:

"First, it shall add to the valuation of each class of the property, real or personal, of each county which it believes to be valued below its real value in money, such percentum as will increase the same in each case to its true value. Second, it shall deduct from the valuation of each class, real or personal, of each county which it believes to be valued above its real value in money such percentum as will reduce the same in each case to its true value."

This brief epitome of legislation clearly discloses that the policy of the state requires property to be assessed on the basis of its true value in money, and that a duty is cast upon the State Board to equalize the property among the several counties of the state on that basis. Without now discussing the exact nature of that duty, its extent, or its limitations, it is sufficient, for our present purpose, to observe that it is an imperative duty imposed by the law of the state. A majority of its members constituting a working quorum refused to permit the board to perform that duty and compelled it to decline to do so. In so acting they did not stand for the state of Missouri and were not the state within the meaning of the eleventh amendment of the Constitution. A sovereign state must be presumed to be willing that its laws shall be obeyed. Through its laws it spoke to its servants and commanded them to do something. Certainly those servants by their act of disobedience do not represent or stand for the state. This suit, therefore, instead of being against the state, is against its servants to compel them to do a duty which, by accepting office, they agreed to perform.

A few authorities out of the many which might be referred to may not be out of place here.

In *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. Ed. 623, a decree restraining the Board of Liquidation of the State of Louisiana from making improper use of certain bonds was under review. The Supreme Court, speaking by Mr. Justice Bradley, said:

"The objections to proceeding against state officers by mandamus or injunction are: First, that it is, in effect, proceeding against the state itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A state, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance."

That the petition filed in this case does not seek to control the discretion of the members of the board will appear later in the discussion of that branch of the case.

In the case of *Rolston v. Missouri Fund Commissioners*, 120 U. S. 390, 7 Sup. Ct. 599, 30 L. Ed. 721, the trustees in a mortgage made by the Hannibal & St. Joseph Railroad Company sought to restrain the executive officer of the state from selling mortgaged property under a prior statutory mortgage in favor of the state on the ground that the liability for which the earlier lien was created had been satisfied, and that they, as trustees, were entitled to an assignment of the lien. Whether the suit was in effect a suit against the state and prohibited by the eleventh amendment arose. The court, speaking by Mr. Chief Justice Waite, said:

"It is next contended that this suit cannot be maintained because it is in its effect a suit against the state, which is prohibited by the eleventh amendment of the Constitution of the United States, and *Louisiana v. Jumel*, 107 U. S. 711 [2 Sup. Ct. 128, 27 L. Ed. 448], is cited in support of this position. But this case is entirely different from that. There the effort was to compel a state officer to do what a statute prohibited him from doing. Here the suit is to get a state officer to do what a statute requires of him. The litigation is with the officer, not the state."

In *Graham v. Folsom*, 200 U. S. 248, 26 Sup. Ct. 245, 50 L. Ed. 464, judgment creditors of a township, whose judgment was founded upon certain bonds issued in favor of a railroad, sought by mandamus to compel county officers to levy and collect a tax to satisfy their judgment. It was contended that those officers were state officers, and, being so, that the suit was an attempt to require the state to perform its contract, and was, therefore, in effect a suit against the state, which was prohibited by the Constitution. This contention was denied on the authority, among other cases, of *Rolston v. Fund Commissioners*, *supra*.

In *Taylor v. Louisville & N. R. Co.*, 31 C. C. A. 537, 88 Fed. 350, a suit was instituted to enjoin certain state officers from certifying a tax which they claimed the right to do by authority of the state, but which the complainant averred was without authority. Judge Taft, speaking for the Court of Appeals for the Sixth Circuit in that case, said:

"This is not a suit against the state. It is a suit against individuals, seeking to enjoin them from doing certain acts which they assert to be by the authority of the state, but which the complainant avers to be without lawful authority. The point has been so often decided by the Supreme Court of the United States that it is sufficient to refer to a few of the cases."

We find nothing in the later decisions of the Supreme Court particularly in *Ex parte Young and General Oil Co. v. Crain*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, and 209 U. S. 211, 28 Sup. Ct. 475, 52 L. Ed. 754, where the subject under consideration was exhaustively discussed, in conflict with the foregoing.

In the case of *Raymond v. Chicago Traction Co.*, 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, many expressions are found and urged upon our attention by learned counsel for respondents to the effect that the

action of the State Board of Equalization in making the assessment there involved was the action of the state, but those expressions in our opinion are inapplicable to the present case. In that case the traction company was contending that the assessment of its property as made by the board, if enforced, would violate the fourteenth amendment of the Constitution of the United States by taking its property without due process of law, and would deprive it of the equal protection of the laws. It was there held that the State Board was an instrumentality through which the state acted, and that the provisions of the fourteenth amendment prohibited the taking of property without due process of law by the state, not only through its Legislature or by its executive or judicial department, but by or through any other instrumentality whatsoever. The conclusion there announced was not that the Board of Equalization was the state within the meaning of the eleventh amendment, so as not to be suable without its consent, but that the board was an agent of the state in taking steps preliminary to the imposition and collection of taxes charged to have been illegal, and was, therefore, the state within the meaning of the fourteenth amendment. Most obviously the doctrine of this case has nothing to do with the question now under consideration.

The contention that the present suit is prohibited because against the state, and therefore in violation of the eleventh amendment of the Constitution, is not sound and cannot be sustained.

2. Was the action of the board here complained of the exercise of a discretion with which the courts cannot interfere? The learned trial court, from the showing made by the petition alone, answered this question in the affirmative. Whether that answer is correct or not depends upon the applicatory law and the facts stated in the petition which for the purposes of this case must be taken to be true.

Article 10, § 3, of the Constitution of Missouri, ordains that:

"Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

The Legislature of the state, by way of executing this constitutional mandate, provided a scheme for equalizing the valuation of property among all the counties of the state based on actual value as a standard of procedure. Section 9127, Rev. St. 1899. To work out this general scheme the State Board of Equalization was created (article 10, § 18, Const. Mo.) and endowed with the power and charged with the duty of equalizing the values of property as classified by the Legislature in the manner prescribed by section 9127, *supra*. The words "equalize" or "equalization," as used in revenue statutes of the kind now under consideration, have an accepted meaning throughout the country. Cooley, in his work on Taxation (2d Ed. p. 421), says:

"Equalization of assessments has, for its general purpose, to bring the assessments of different parts of a taxing district to the same relative standard so that no one of the parts may be compelled to pay a disproportionate part of the tax."

The statute imposing a duty upon the State Board, taken in connection with the constitutional requirements of uniformity, is imperative that the equalization shall comprehend all the counties and similar subdivisions of the state, and shall be accomplished by taking the abstracts or returns of the county and city assessors as the basis, and adding to or deducting therefrom enough to bring the equalized valuation to the true value of the property of such county or city.

With this understanding of the legal duty resting upon the State Board, let us examine the petition and ascertain therefrom what the board actually did in response to the demand of the relator that it proceed to equalize the property of Macon and other counties according to its true value in money.

In the first place, it is made to appear that the board arbitrarily divided the counties of the state into several groups, and proceeded to equalize the property in the counties composing each group without equalizing the property of the several groups themselves, and thereby, as it is claimed, defeated the uniformity of values among all the counties as contemplated by the law. It is also charged that the board ignored the statutory command requiring it to equalize the valuation of the property in the several counties and independent cities by adding or deducting from the valuation as returned by the local assessing boards such sum as would bring the same to the true value of the property, and in lieu thereof adopted a standard of valuation not in excess of 33 per cent. of the real value of the property and equalized the valuations throughout the state on that basis; that the standard so adopted and the method so employed by the State Board was by direction of a working majority arbitrarily, capriciously, and uniformly followed for many years with the intent and purpose, among other things, of aiding the officers of Macon county in defeating the collection of the relator's judgments.

The rule is well settled and fully recognized by us that when discretion is conferred upon public agents or officers their acts in the lawful exercise of that discretion cannot be controlled by mandamus. The rule is also well settled that, although the exercise of discretion will not be controlled by mandamus, yet the writ will lie to compel the person or the body in whom the discretion is lodged to proceed to its exercise. In view of these rules, we are of opinion that the discretion which cannot be controlled by mandamus is that discretion, and that only, which the law has vested in the person or body to be exercised. If the law has pointed out how or in what way the discretion shall be exercised, it is obviously not the exercise of the discretion imposed by law to proceed in any other way. To so proceed would be contrary to the law and would be the exercise of arbitrary power rather than discretion. To decline or refuse to proceed according to law or in the way pointed out by law is in our opinion equivalent to not proceeding at all. In other words, the discretion which will withstand review by the courts must be exercised under law and not contrary to law.

In *City of Madison v. Smith*, 83 Ind. 502, 516, it is said:

"It is no doubt the general rule that an inferior tribunal will only be compelled to act—not to make a decision one way or the other; but where a body not strictly judicial, although possessing quasi judicial powers, is under

an absolute duty to act, and to act only in a certain way, the performance of that duty, both as to the action and its character, will be coerced by mandate. * * * Where there is a discretion, courts will not compel its exercise in any given direction; but where, upon the facts, the duty is a plain and absolute one, it is otherwise."

In *State ex rel. v. Herrald, Com.*, 36 W. Va. 721, 15 S. E. 974, it was held that where the assessor was required to impose a value upon property as town lots, and undertook to do so by the acre or tract, its action was not the exercise of discretion, and could be corrected by mandamus.

In the case of *State Board of Equalization v. People*, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513, the State Board adopted a method of assessing property contrary to that prescribed by law. A mandamus proceeding was instituted to correct it. The trial court commanded the board to proceed to value and assess the property in the manner prescribed by law, and specified what that was. The Supreme Court, in affirming that judgment, said:

"The court does not, by its said order and judgment, undertake to control the discretion or judgment of the respondents in the valuation or assessment of the capital stock, including the franchises, of said corporations. It only lays down the rules of law which govern and the methods which should be pursued by the respondents in making such valuation and assessment. This we think proper."

In the case of *Ramsay v. Hayes*, 187 N. Y. 367, 80 N. E. 193, it was held by the Court of Appeals of that state that where a commissioner of a relief fund adopted a method for determining the amount, contrary to law, the remedy was by mandamus to compel him to fix the pension according to the rule prescribed by statute therefor. To the same effect is *People v. Supervisors of Sanilac County*, 71 Mich. 16, 38 N. W. 639, and *City of Cleveland, Tenn., v. United States*, 93 C. C. A. 274, 166 Fed. 677.

In *State ex rel. v. Adcock*, 206 Mo. 550, 105 S. W. 270, 121 Am. St. Rep. 681, the Supreme Court of Missouri sustained a proceeding by mandamus against the State Board of Health and held that the law does not place in the hands of administrative parties arbitrary power, and that their simple ipse dixit is not sufficient evidence of exercise of lawful discretion.

In *Illinois State Board of Dental Examiners v. People*, 123 Ill. 227, 13 N. E. 201, the Supreme Court of Illinois observed:

"A public officer or inferior tribunal may be guilty of so gross an abuse of discretion or such an evasion of positive duty, as to amount to a virtual refusal to perform the duty enjoined, or to act at all in contemplation of law; in such a case mandamus will afford a remedy"—citing *Tapping on Mandamus*, 66 and 19; *Wood on Mandamus*, 64.

The United States Circuit Court of Appeals for the Sixth Circuit, in the case of *Cunningham v. City of Cleveland, Tenn.*, 82 C. C. A. 55, 152 Fed. 907, in a case involving a question similar to that now before us, observed:

"So long as the board acts lawfully and in good faith, its discretion cannot be supervised by the court. But it cannot, under the guise of its discretion, be permitted to accomplish an unlawful purpose."

We conclude, therefore, that the proceedings of the State Board of Equalization in so far as they were not taken according to law and certainly in so far as they were taken in disregard and violation of the law are not protected from judicial control as the exercise of a vested discretion.

3. The conclusions already reached dispose of the objections made in the trial court to issuing the writ of mandamus in this case, but it is now urged as an additional reason against it that the Governor of the state, who constitutes one member of the Board of Equalization, cannot be coerced by the writ of mandamus to perform any executive duty, and that the balance of the board cannot be compelled to act without his co-operation. The Governor, who is the chief executive officer of the state and as such required "to perform such duties as may be prescribed by law" (article 5, § 1, Const.), including service upon the State Board of Equalization (article 10, § 18, Const., and section 9127, Rev. St.), when acting in that capacity is performing an executive duty in no other or different sense than when performing any ministerial act devolving upon him as chief executive of the state.

Mr. High, in his work on Extraordinary Legal Remedies (3d Ed. § 120), after citing and considering many authorities on the subject, says that, according to the clear weight of authority, "the chief executive of the state is, as to the performance of any and all official duties, entirely removed from the control of the courts, and that he is beyond the reach of mandamus, not only as to duties of a strictly executive or political nature, but even as to purely ministerial acts whose performance the Legislature may have required at his hands."

Judge Cooley, in delivering the opinion of the Supreme Court of Michigan in *Sutherland v. Governor*, 29 Mich. 320, 18 Am. Rep. 89, calls attention to the practical difficulty of distinguishing between political and ministerial duties, and says:

"But when duties are imposed upon the Governor, whatever be their grade, importance, or nature, we doubt the right of the courts to say that this or that duty might properly have been imposed upon a Secretary of State, or a sheriff of a county or other inferior officer, and that inasmuch as, in case it had been so imposed, there would have been a judicial remedy for neglect to perform it, therefore there must be the like remedy when the Governor himself is guilty of a similar neglect. The apportionment of power, authority, and duty to the Governor is either made by the people in the Constitution, or by the Legislature in making laws under it; and the courts, when apportionment has been made, would be presumptuous if they should assume to declare that a particular duty assigned to the Governor is not essentially executive, but is of such inferior grade and importance as properly to pertain to some inferior office, and consequently, for the purposes of their jurisdiction, the courts may treat it precisely as if an inferior officer had been required to perform it. To do this would be not only to question the wisdom of the Constitution or the law, but also to assert a right to make the Governor the passive instrument of the judiciary in executing its mandates within the sphere of his own duties. Were the courts to go so far, they would break away from those checks and balances of government which were meant to be checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something at least of the power which the people, either directly or by the action of their representatives, decided to entrust to the other departments of the government."

In *State ex rel. v. Stone*, 120 Mo. 428, 25 S. W. 376, 23 L. R. A. 194, 41 Am. St. Rep. 705, the Supreme Court of Missouri cited and considered the numerous authorities relating to this subject and stated the following conclusion:

"Abundant authority establishes the position here taken that mandamus will not issue to the Governor to compel the performance of any duty pertaining to his office, whether political or merely ministerial; whether commanded by the Constitution or by some law passed on the subject."

This doctrine was afterwards affirmed in the later case of *State ex rel. v. Meier*, 143 Mo. 439, 45 S. W. 306.

Whether, therefore, the duty imposed upon the Governor of Missouri to act as a member of the State Board of Equalization is ministerial, executive, or political in its character, he is not, according to the law of this state as interpreted by its highest judicial tribunal, responsible to the judiciary for his action. The high sense of duty which must be presumed to actuate the chief executive of a state is the sole arbiter to which appeal can be made in such matters.

Whether the decision of the highest judicial tribunal of the state exempting the Governor from coercion by the writ of mandamus is so a construction of the Constitution and statutes of Missouri or so a rule of property or action in the state, as under familiar rules bind the federal courts and forbid their independent judgment may be doubted. As to this we desire to express no opinion.

The Supreme Court of the United States, in *Burgess v. Seligman*, 107 U. S. 20, 34, 2 Sup. Ct. 10, 21, 27 L. Ed. 359, after laying down the rule governing the exercise of independent judgment by the federal courts in cases where state courts have made decisions which were not, properly speaking, controlling upon the national courts, said:

"But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts."

In view of these wise and temperate observations and of the fact that the Missouri doctrine is in harmony with the great weight of authority, we shall conform to that doctrine, and hold that the respondent, Hadley, is not subject to the writ of mandamus in the present case.

But this is not conclusive of the inquiry before us. The Governor is only one out of five members of the State Board of Equalization. Any three of them, according to the statute (section 9126, Rev. St.), constitute a quorum for the transaction of business. The reason why the Governor cannot be coerced by mandamus is that he needs no such coercion; he is conclusively presumed to be willing to perform all his executive duties. His constitutional obligation is to see that the laws of the state shall be faithfully executed (article 5, §§ 4, 6, Const.) and his oath of office requires him to support the Constitution and demean himself faithfully in office (article 14, § 6, Const.). The very reasons which exempt him from liability to the writ of mandamus are the ones

which insure the performance of his duty as a member of the Board of Equalization. Not only is this theoretically true, but the petition in this case shows that it is actually so. He led a movement in the board to secure equalization of values according to law, and it must be conclusively presumed that he will take no different course when occasion requires him to act.

But whatever the fact may be in this regard, the board is not one which requires either unanimity of consideration or of action by all its members. By special provision of law (section 9126, Rev. St.) any three of them constitute a quorum and are, therefore, competent to transact the business of the board in the absence of the other members. If the Governor should be disabled by sickness or other infirmity from attending the sessions of the board, can it be doubted that the remaining members of that body could be compelled to proceed with the performance of their duty? Obviously not. Accordingly, we think the writ of mandamus may lawfully be awarded to secure action by a statutory quorum of the board in this case when circumstances are such that the entire membership cannot be reached by that writ.

Other less important questions have been argued to us, but they involve nothing which compels a different conclusion from that which we have reached.

When the writ shall be issued, as it must be, the return made and the proof, if any, taken, the court will doubtless better understand all the facts and circumstances of the case and be better able to consider some of the contentions of learned counsel concerning the fiscal policy of the state and the proper exercise of discretion by its officers. As it is, however, the petition, to the averments of which we are necessarily confined, makes it appear that the relator's judgments against Macon county, which a just regard for civil rights requires should be paid, are rendered practically worthless by a failure to discharge a duty imposed by law upon the respondents. For such a breach of duty there ought to be a remedy.

The judgment must be reversed as to all the respondents except Gov. Hadley, and the cause remanded to the Circuit Court, with directions to proceed in the usual way in such cases and in harmony with the views here expressed.

It is so ordered.

KAMM v. REES et al. †

(Circuit Court of Appeals, Ninth Circuit. February 14, 1910.)

No. 1,762.

1. SALES (§§ 355, 363*)—ACTION FOR PRICE—ISSUES—QUESTIONS FOR JURY.

During several years defendant had from time to time purchased steamboat machinery from plaintiffs which at his request was shipped to different transportation companies with which he was connected, but in all cases the contracts and payments were made by him personally. He ordered from plaintiffs machinery for a new steamboat stating that he and others were about to organize a company. He personally superintended the building of a part of the machinery and made payments thereon, receipts for a part of which were at his request made to the company which had in the meantime been formed, and by his direction the machinery was billed and shipped to the company, and the bills therefor made in the name of the company were sent to him. All letters and telegrams to plaintiffs until some months after the machinery was delivered were signed by him in his own name. Full payment not having been made plaintiffs brought action against him to recover the balance due, which he defended on the ground that the sale had been made to the company and not to him. Plaintiffs testified that they had no dealings with the company, but contracted with defendant individually. *Held*, that there was no issue in the case as to agency or plaintiffs' right of election, but the question was as to whether the contract was made with and credit given to defendant which was one for the jury.

[Ed. Note.—For other cases, see Sales, Dec. Dig. §§ 355, 363.*]

2. CORPORATIONS (§ 174*)—STOCKHOLDERS—NATURE OF RELATION.

A stockholder is not in all relations in privity with his corporation but only as to rights arising out of his contracts of subscription for stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 649-652; Dec. Dig. § 174.*]

3. JUDGMENT (§ 627*)—JUDGMENT AS BAR TO SECOND ACTION—PERSONS WHO MAY PLEAD BAR.

In order that a defendant may plead in bar a judgment in a prior action, he must have been a party to, or represented in, the former action as an actual defendant, and in the same attitude as an adversary party toward the subject of the litigation as that in which he appears in the second action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1141-1143; Dec. Dig. § 627.*]

4. ESTOPPEL (§ 68*)—CLAIM OR POSITION IN JUDICIAL PROCEEDING—JUDGMENT AS BAR—ESTOPPEL.

A stockholder who bought property on his own credit for the use of the corporation, and afterward for his own protection procured the creditor to assign the claim to a third person, who at his instance brought suit thereon and obtained a judgment against the corporation, is estopped to plead such judgment in bar of an action by the creditor against him to recover the debt.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165-169; Dec. Dig. § 68.*]

5. EVIDENCE (§ 241*)—DECLARATIONS—STATEMENTS BY AGENT.

Where there is independent evidence of an agency declarations of the agent made in carrying out the purpose of the agency and upon which a second party acted are admissible against the principal.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 241.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

† Rehearing denied May 9, 1910.

6. SALES (§ 358*)—EVIDENCE—DOCUMENTS—CORROBORATIVE EVIDENCE.

Where a question in issue was whether defendant personally contracted for the building of certain machinery by plaintiffs as testified by them, or whether the contract was made by a corporation of which he was a stockholder and officer, plans of the machinery used in its construction and made in plaintiffs' shop, having defendant's name thereon and shown to have been seen by defendant a number of times while he was superintending the work, were admissible in evidence on such issue.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 358.*]

7. SALES (§ 358*)—ACTION FOR PRICE OF GOODS MADE UNDER CONTRACT—EVIDENCE—BOOK ENTRIES.

The fact that a manufacturer of goods charges the same to, or enters payments thereon to the credit of the person to whom they are delivered is prima facie evidence to show for whom the goods were manufactured and to whom credit was given, but is not conclusive, and the presumption may be overcome by proof that the goods were in fact made for, and the credit given to, another, and to that end other entries in the books made while the work was being done; showing that all items recorded relating to the work were in the name of such other person are admissible for the purpose of corroborating direct testimony that the work was done for him.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 358.*]

In Error to the Circuit Court of the United States for the District of Oregon.

Action by Mary Rees, Thomas M. Rees, James H. Rees, and William M. Rees, as trustees, against Jacob Kamm. Judgment for plaintiffs, and defendant brings error. Affirmed.

The defendants in error, as plaintiffs, recovered a judgment against the plaintiff in error, who was the defendant therein. For convenience, the parties will be designated herein as they were in the court below. For several years prior to the year 1889 the plaintiffs had been engaged in the business of manufacturing steam engines, boilers, and steamboat machinery at Pittsburgh. The defendant during that period was engaged in the business of transportation by steamboat on rivers in Oregon, Idaho, and Washington, and he had contracted with and purchased from the plaintiffs engines, boilers, and steamboat machinery, in all of which transactions he had caused the machinery and supplies to be charged against the particular transportation company by which they were to be used, but the evidence is, and it is not denied by him, that the credit was extended to him in all of these transactions, and that he always made the payments that were made thereon. On December 3, 1889, he telegraphed to the plaintiffs, inquiring how soon after receipt of an order they could deliver certain described stern-wheel engines, to which he received an answer on the following day. This exchange of messages was followed by a number of letters and telegrams between the parties, in all of which the defendant appears in his individual capacity and not as representing a corporation, although in his letter of December 4, 1889, he made reference to the fact that several steamboat men and himself had a steamboat enterprise under consideration, and proposed to build a steamboat for use on the Snake river, and in his letter of December 21st, he wrote that the corporation would be filed and that the company would commence to build a boat, that the capital stock had all been subscribed, that he had taken one-fourth thereof, and he expected that he would be the president and his son the secretary of the corporation. On January 15, 1890, he telegraphed the plaintiffs, over his own name, accepting their proposition, and directing them to commence immediately. During January and February, 1890, further correspondence followed, concerning details and changes in construction of the engines and boiler. On February 17, 1890, the defendant telegraphed to the plaintiffs: "I will send you a draft for \$1,000 to apply on the contract in a few days." Four days later the draft was sent. The letter which accom-

*For other cases *see* same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

panied it contains the request that the payment be applied on the contract for the 16"x7" engines for the Snake River Transportation Company, and adds, "and send me receipt for same. Yours very truly, Jacob Kamm." This is the first mention of the Snake River Transportation Company in the correspondence. Its articles of incorporation were filed on February 20, 1890, and its board of directors and officers were elected five days later. On March 28, 1890, the defendant went to Pittsburgh, where he remained about three weeks superintending the construction of the engines and boiler. Soon after his arrival he gave the plaintiffs an indorsed draft issued by a life insurance company in favor of his wife for \$3,300, of which \$3,000 was credited on account of the contract. At the time of the payment he requested that the receipt be made as for a payment by the Snake River Transportation Company. He testified: "I believe they finally made it out. There might have been some hemming and hawing about it." The testimony of the plaintiffs was that he assigned as his reason for the request that he wished to keep this account separate from his other accounts, and that they assented thereto only on the expressed understanding that their contract was with him only, and that they looked to him for the payment. On May 17 and 27, 1890, the engines, boilers, capstan, and machinery and supplies were shipped by the plaintiffs as instructed by the defendant, to the Snake River Transportation Company, at Bridgeport, Idaho. The plaintiffs testified that the boiler and machinery so consigned had been marked in the shop "Kamm" or "Jacob Kamm," and that the mark "Snake River Transportation Company" appeared only on the manifest and shipping book. All the bills for the machinery so furnished, and labor for making the drawings, and bills for freight were made out to the Snake River Transportation Company, but were sent to the defendant at his request at Portland, Or. All letters and telegrams sent by the defendant to the plaintiffs up to the date of October 15, 1890, were signed "Jacob Kamm," and all letters and telegrams of the plaintiffs were addressed to Jacob Kamm, but on October 15, 1890, the defendant affixed the word "Prest." to his signature in a letter to the plaintiffs, in which he said: "It was our attention to have made you a remittance soon after the boat commenced running, but owing to the delay, our company has instructed me to ask you for further time in making our payments."

On June 16, 1891, James Rees, one of the plaintiffs, wrote the defendant at Portland, Or., addressing him in his individual capacity, saying: "I am much in need of some ready cash just now, and would like you to arrange for a settlement, or send me a draft." A month later the defendant answered that arrangements had been made for a general meeting of the stockholders, and that the plaintiffs' account would be one of the matters brought up for consideration by the Board. The meeting took place on August 15, 1891, but in the meantime actions had been begun against the Snake River Transportation Company on debts owing from it, and an attachment and an execution had been levied on the Norma, the company's boat. On August 21st, another action was commenced, with an attachment on the boat. On that date the defendant as president wrote to the plaintiffs, reporting the action of the stockholders at the annual meeting, stating that the boat had cost \$30,000, and that the indebtedness of the corporation was \$10,000 or \$11,000, and proposing that the plaintiff take stock to the amount of \$5,000 in a proposed reorganization of the company, that sum to be credited on their claim. On August 27th, Thos. M. Rees, for the plaintiffs, wrote declining the proposition, but suggesting to the defendant that he take notes of the corporation for the amount of the plaintiffs' claim and secure the same by his indorsement. Soon thereafter the defendant consulted C. W. Miller, an attorney in Portland with reference to the claims against the boat, and Miller advised him to have all the claims assigned to one person, and to have a suit brought against the corporation in the name of that person. In carrying out this plan, the defendant gave the letter from Thos. M. Rees of date August 27, 1890, to one Dugald McMurchey, an attorney, and McMurchey went to Pittsburgh and had an interview with the plaintiffs. In that interview, according to the testimony of the plaintiffs, McMurchey stated that he had been sent there by the defendant as his attorney, that the defendant was having some trouble with his partners, and that he wished the plaintiffs to make an assignment of their ac-

count to him so that he could protect himself in a settlement with his partners, and that after McMurchey had stated that if the plaintiffs would make such an assignment he would advise the defendant as his attorney that he was morally and legally responsible for the account, the plaintiffs made the assignment to the defendant, and afterwards on the same day, at the instance of McMurchey, they made a second assignment to D. A. Shindler on the representation of McMurchey that it might be needed to protect the defendant's interests. McMurchey returned with these assignments to Portland. On September 14, after McMurchey had left Pittsburgh, Thomas M. Rees, one of the plaintiffs, wrote to the defendant a letter, in which, among other things, he stated: "We * * * finally agreed to assign our claims as we considered that you are the party whom we look to, as we did not know the Snake River Transportation Company, when we contracted. We thought it was one of your boat enterprises, and we made the assignment to you and also to D. A. Shindler, whom your attorney said you might want to use the name of to enter proceedings. * * * We desire to assist you in any manner possible not detrimental to the estate, in any trouble you may have with your company and partners." On September 23d, the defendant answered the letter of Thomas M. Rees, returning therewith the assignment which had been made to himself, and stating: "I am retaining the assignment to Mr. Shindler, which we will probably have to use some time this week in order to protect your firm. I know Mr. Shindler, and the assignment in his hands is perfectly safe. I am personally anxious if possible to protect your interest, but do not want to assume any responsibility outside of my position as president of the company." About this time the defendant, accompanied by McMurchey, went to the store of the G. Shindler Furniture Company at Portland, where he introduced McMurchey to D. A. Shindler. Shindler had been acquainted with the defendant many years and his firm had done an extensive business in supplying furniture for the defendant's boats. It had a claim of \$343.70 for furniture supplied to the Norma. The defendant asked Shindler if he would be willing to take the assigned accounts, together with his own account, and bring suit thereon against the Snake River Transportation Company, and Shindler consented to do so. The defendant asked him to recommend a lawyer, and Shindler referred him to the firm of Miller & Miller. At the request of the defendant, Shindler went with him to the office of Miller & Miller, and signed the complaint and an action was begun thereon on the assigned claims of the plaintiffs herein, the G. Shindler Furniture Company claim and two others. The defendant employed and paid C. W. Miller for his services in the action, and directed the conduct of the case, and the plaintiffs herein had nothing to do therewith. On September 25, 1891, the boat was attached in that action, subject to the prior levies and attachments. On the following day it was sold at public auction for \$4,000 on a judgment rendered in one of the prior actions. A brother-in-law of the defendant was the purchaser. Subsequently the defendant directed F. C. Miller, the cashier of the United States National Bank, of which the defendant was vice president, to advance the \$4,000 for the purchase of the boat, and to take the certificate of sale in his name, saying that he would be responsible to Miller therefor. The defendant paid the \$4,000 and took the boat as his individual property. He subsequently paid in person the claim of the G. Shindler Furniture Company in full.

On October 29, 1891, James Rees wrote to the defendant, referring to the assignment as having been made to protect the defendant, and his interest in the company, and alluding to the fact that the defendant had intimated in his letter of September 23, 1891, that he did not consider himself responsible for the payment of the plaintiffs' bill, and saying: "Let us understand this matter in plain English, so that we may know exactly the situation and enable us to act. We do not for one moment think, from our understanding with your attorney, Mr. McMurchey, that you would refuse to be responsible for the machinery, etc., which you bought in your name and other merchandise which you personally bought through our house, and received the discounts that was allowed the trade. * * * You know full well that we did not sell to you as president of the company." The defendant made no answer to that letter. On January 6th, James Rees wrote another letter to the

defendant, directing attention to his letter of October 29th, and to the fact that it remained unanswered. On January 21st, the defendant wrote the plaintiffs a letter in which he denied that McMurchev had been his attorney, and denied his liability for the debt, and stated that he would be willing to pay upon their claim the sum of \$2,500. He also stated in the letter: "The first letter I wrote you advised you that this enterprise was to be undertaken by an incorporated company." The plaintiffs answered on February 22, 1892, expressing their surprise at the defendant's statement that McMurchev was not his attorney, and stating: "When he arrived he had a letter he read from you, instructing him to come here and arrange with us," etc., and the writer denied that the defendant had ever written the plaintiffs that the enterprise was to be undertaken by an incorporated company, and called his attention to the fact that the first mention of the company was in the letter of February 21, 1890, requesting that the \$1,000 payment be applied on the contract for engines, etc., for the Snake River Transportation Company. "That," said the writer, "was the first knowledge we had of a company, and we did not know it was incorporated, and, further, we never heard that it was until after your company failed. * * * We think you should pay us, as under no account would we have given credit to a company unknown to us without security." In December, 1892, T. M. Rees came to Portland to see the defendant in relation to the plaintiffs' claim, and the defendant then offered to pay 50 cents on the dollar in settlement thereof. The offer having been declined, the present action was commenced.

The complaint sets forth five causes of action. The first is on a contract to construct, sell, and deliver to the defendant a pair of steam engines therein described, and a steam boiler, for which the defendant agreed to pay the sum of \$7,350, but had paid thereon \$4,000 only. The second is upon a contract to build, construct, sell, and deliver to the defendant a steam capstan at the agreed price of \$575, no part of which had been paid. The third is on an account for goods, wares, and merchandise alleged to have been sold by plaintiffs to the defendant at his instance and request, of the value of \$2,137.40, no part of which had been paid. The fourth is an action to recover for work and services alleged to have been rendered the defendant by the plaintiffs in making drawings and laying out pipe work for a steamboat at the defendant's request, the reasonable value of which is stated to be \$150, no part of which had been paid. The fifth cause of action is to recover freight charges paid by the plaintiffs, alleged to have been paid at the instance of the defendant, amounting to \$19.37, no part of which had been paid. The defendant answered, denying that he had contracted with the plaintiffs as alleged in the first and second causes of action and denying that the goods, wares, and merchandise described in the third cause of action had been sold or delivered to him, and denying that the work and services alleged in the fourth cause of action were performed for him and that the freight charges had been paid on his account, and he alleged as a further defense to the first cause of action that the contract had been made with the defendant, acting for and on behalf of the Snake River Transportation Company, and alleged that the \$4,000 paid thereon had been paid on behalf of said company. As a further defense to the second cause of action, the answer alleged that the contract for the construction and delivery of the steam capstan was made by J. D. Miller, the superintendent of the Snake River Transportation Company, who was acting for and on behalf of the company and not otherwise. As a further defense to the third cause of action, the answer alleged that the defendant, acting for the Snake River Transportation Company, ordered and purchased the goods in said cause of action described. The answer also alleged that by reason of the plaintiffs having charged and made out their account against the Snake River Transportation Company, and having credited said company with the payment of \$4,000, and having assigned their account to Shindler, and by reason of Shindler's action in suing on the same, and prosecuting it to judgment against the corporation, the judgment was a bar to the first cause of action, and the plaintiffs were estopped from alleging that the defendant was the party with whom and for whose benefit the contract had been made, and that the said judgment was also a bar to the second and third causes of action. The plaintiffs in their reply alleged that after the manufacture and sale of

the engines and boiler and steam capstan, and the sale of the goods, wares, and merchandise and machinery to the defendant, he requested the plaintiffs to charge all sums of money due thereafter on the plaintiffs' books to the Snake River Transportation Company, and to bill and consign all machinery, etc., to the defendant in the name of said corporation as an accommodation to the defendant to enable him to keep his accounts separate, and that at the time when said engines, boiler and steam capstan were manufactured, and before said goods, wares, and merchandise were delivered to the defendant, he agreed to pay the contract and purchase price therefor, that the plaintiffs gave and extended credit therefor solely to the defendant and not to the said corporation, and that the assignment of the account to Shindler was made solely at the defendant's request, and for his accommodation and benefit, and that the plaintiffs received no consideration therefor. On the trial the jury returned a verdict for the plaintiffs for the sum of \$7,131.79 and interest, on which judgment was rendered for \$16,117.40.

Rufus Mallory and W. W. Cotton, for plaintiff in error.

J. V. Beach, Wm. D. Fenton, R. A. Leiter, Ben C. Dey, and James E. Fenton, for defendants in error.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). The defendant assigns error to the refusal of the court to instruct the jury that if they found from the evidence that the plaintiffs at any time elected to treat the contracts as the contracts of the Snake River Transportation Company, the defendant could not be held liable thereon in the present action, and he invokes the doctrine that where a plaintiff has a right to proceed either against the principal for whom a contract was made, or the agent by whom it was made, and he elects to hold either of those liable, he thereby releases the other. We are unable to see how that doctrine was applicable to the present case. According to the testimony of the plaintiffs, they never at any time had the right to make an election and never did make an election, but they contracted with and gave credit to the defendant in his individual capacity, and not as the agent of another. According to the theory of the defendant, as set forth in his answer and in his testimony, the plaintiffs had no right of election, but, contracted with, and gave credit to, the Snake River Transportation Company only. Not only did the plaintiffs testify that the defendant was the principal in the transaction and that they dealt with him individually, but it is shown that at the time when the contract was made the Snake River Transportation Company was not yet in existence. The corporation was not referred to in the communication in which inquiry was made as to the time within which the engines and boiler could be constructed, nor in the final communication by which the defendant closed the contract, and, although the plaintiffs subsequently credited the payments which were made thereon to the Snake River Transportation Company, they testified that they did so at the request of the defendant for reasons which he gave, and that they never, at any time, looked to the corporation for payment, or gave credit in fact to any one save the defendant in his individual capacity. The

question with whom was the contract made, and to whom was the credit extended, was the leading question in the case, and the court, under proper instructions, submitted it to the decision of the jury.

Several assignments of error present the question whether or not the judgment rendered against the Snake River Transportation Company at the suit of Shindler is a bar to the present action. It is contended that a stockholder of a corporation is in privity with the corporation, and that, since the defendant was a stockholder of the corporation defendant in that action, the judgment therein was binding upon him, and he may plead it in bar of the present action. To this contention there are two answers: First, a stockholder is not in all relations in privity with his corporation, and it is generally held that he is in privity only as to rights arising out of his contracts for subscription for stock. *Clausen v. Head*, 110 Wis. 405, 85 N. W. 1028, 84 Am. St. Rep. 933; *Andrews v. National Foundry & Pipe Works*, 76 Fed. 172, 22 C. C. A. 110, 36 L. R. A. 139; *State Bank v. Bobo*, 11 Rich. Law (S. C.) 597. In the second place, in order that a defendant may plead in bar a judgment in a prior action, he must have been a party to or represented in the former action as an actual defendant, and in the same attitude as an adversary party toward the subject of the litigation as that in which he appears in the second. There is evidence in this case which tends to show that the defendant not only did not appear, and was not represented in the capacity of a defendant in the Shindler case, but that he was in a sense the real party in interest therein as plaintiff, that the action was brought at his instance and for the protection of his own interests, and that he was the actual manager of the conduct of the case for the plaintiff, and bore the expense thereof. If it be true that the plaintiffs in this case assigned their claim to Shindler at the instance of the defendant, and on the agreement and understanding that it was for his benefit and that the assignment was not to affect their right of recourse against him as their debtor, the defendant is in no position to advance the plea of estoppel by the former judgment. He is himself estopped to allege estoppel.

Error is assigned to the admission of testimony tending to show that McMurchey was the agent of the defendant, and evidence of statements and admissions made by McMurchey at the time of his visit to Pittsburgh, and to the instruction of the court to the jury that, if McMurchey went to Pittsburgh at the defendant's instance and as his agent, the defendant would be bound by all that he said and did within the scope of his agency or the purpose for which he was sent, and to the refusal of a requested instruction that no promise or representation made by McMurchey to the plaintiffs to the effect that he would advise the defendant that the latter was bound to pay the plaintiffs any amount whatsoever, could be considered by the jury in undertaking to arrive at their verdict. It is argued that inasmuch as the declarations of a person assuming to act as the agent of another, or claiming to be such agent, are not admissible in the first instance to prove the agency, nor to prove the extent thereof, it was error to permit the plaintiffs to testify that McMurchey represented himself

to be the agent of the defendant. But the evidence of McMurchey's agency does not consist alone in his own declarations. There is direct and competent evidence that he was such agent in the testimony of William M. Rees, who testified that, when McMurchey came to Pittsburgh, "He had one of our letters and a letter from Jacob Kamm introducing him to us as his attorney. I read the letter from Jacob Kamm introducing Mr. McMurchey as his attorney." The witness had had a long course of dealing with the defendant, by correspondence, and he must have known the defendant's handwriting. No attempt was made to show that he did not. James McAfee, who at that time was an employé of the plaintiffs, also testified that Mr. McMurchey came to Pittsburgh "with a letter of introduction as Mr. Kamm's attorney." Such a letter would stand for a power of attorney for all the declarations and representations of the agent made in connection with the business on which he was sent. It was competent to show that he said that the defendant was having trouble with his partners, and that he wanted the plaintiffs to make an assignment of their account to him and also to another person, for the purpose of protecting him in a settlement with his partners. McMurchey's statement that the defendant was morally and legally responsible for the debt, while it was not competent evidence for the purpose of proving the defendant's liability, since it was a declaration of an agent as to a past transaction of his principal, was nevertheless competent and proper for the purpose of showing by what representations the plaintiffs were induced to assign their account, and upon what they relied in so doing. There is other evidence in the record tending to show that McMurchey in obtaining the assignment acted as the defendant's attorney. It is true that he had been the attorney of the Snake River Transportation Company, but it is evident that if he went to Pittsburgh at the instance of the defendant, to obtain for him, or to another for his use, an assignment of the plaintiffs' account, to be used in a settlement of his difficulties with his partners, and for his own protection as against them, McMurchey was acting in a capacity hostile to the corporation and to the other stockholders, and was representing the defendant only. There is other testimony in the record tending to show that he was the defendant's attorney. Shindler testified that the defendant and McMurchey came to his store, bringing an assignment from the plaintiffs, and that the defendant wanted him, Shindler, to sue on that and two other accounts. He testified:

"Mr. Kamm said he had this claim assigned to me. I understood at the time it was through Mr. Kamm's request that the Reeses assigned their claim to me."

C. W. Miller testified that Mr. Kamm came to his office and employed him to bring the suit. He testified that he had advised the defendant to have the claims all assigned to one person, and that that was the course pursued, and that McMurchey gathered up the claims. "He got them assigned for Mr. Kamm, as I understood it." We find no error, therefore, in the admission of the evidence, or in the instruction of the court, or in the refusal to instruct as requested by the defendant.

The defendant assigns error to the admission in evidence of certain drawings made by the plaintiffs' draughtsman for use in the shop in constructing the boiler, engines, and other machinery which were the subject of the contract. The draughtsman testified that the defendant was introduced to him as the man who was getting the boat built, and that he saw the defendant on an average of twice a day during the time of his stay in Pittsburgh; that after the witness had prepared the drawings he submitted them a number of times to the defendant, and that at the defendant's instance numerous changes were made therein. Thomas M. Rees also testified that the defendant saw the drawings and that a blue print of one of them, with the name "Jacob Kamm" upon it, was subsequently sent to the defendant at Portland. The defendant did not deny that he assisted the draughtsman in preparing the drawings, and did not testify that he did not see the inscriptions "Jacob Kamm" thereon. The name "Snake River Transportation Company" does not appear on any of the drawings, but on each of them is written the name "Jacob Kamm" or "Kamm," or "Kamm engine," or "Kamm boiler" or "for Kamm." It is true that no witness testified that the attention of the defendant was ever directed to his name as it appeared on the drawings or that he actually observed it. But, in view of his failure to deny that he noticed his name thereon, there was clearly no error in submitting the drawings, with the inscriptions thereon, to the jury, that they might give them such weight as in their judgment they were entitled to in determining the question: To whom was the credit originally given?

Error is assigned to the admission of certain entries in the plaintiffs' books of accounts, entries made in January, February, and March, 1890, in an account of the time of the men while working on the boilers and engines, entries made in March, 1890, in a book containing an account of the material used in the construction of the boilers and engines, entries made in March, April, and May, 1890, in a book of goods purchased, to be used in carrying out the contracts, and entries made in a book placed in the hands of the foundry foreman, in which to keep the weights of the various articles manufactured. These books were introduced for the purpose of showing that the name of the defendant appeared on such accounts. They bear such headings as "Kamm Engines," or "Engines Kamm," "For Kamm Boiler," "For Kamm," and the last thereof is headed "Captain Jacob Kamm." The defendant had shown that on the ledger of the plaintiffs the \$1,000 payment of March 1st, and the \$3,000 payment of March 29, 1890, appeared as credited to the Snake River Transportation Company. The plaintiffs had testified that those payments were so entered to the credit of the corporation at the request of the defendant, and for the reason, as he stated, that he wished to keep this account separate from his other accounts, and wanted to have control of the shipment for the purpose of protecting himself. The defendant contends that the entries of credits so made are conclusive evidence that credit was given to the corporation, and that the promise of the defendant, if any he made, was that of a guarantor, void if not in writing, and that in any view of the original transaction, the sub-

sequent entries in other books tending to show that credit was given to the defendant, were self-serving in their nature and incompetent, and that the rights of the defendant could not be varied by entries which were not contemporaneous with the transaction and not made in the due course of business as part of the *res gestæ*. The fact that a manufacturer of goods charges the same to, or enters credits thereon in an account with the person to whom they are delivered is *prima facie* evidence to show for whom the goods were manufactured, and to whom the credit was given, but it is not conclusive evidence, and the presumption may be overcome by proof that the goods were in fact manufactured for, and the credit was in fact given to another. *Clark v. Jones*, 87 Ala. 474, 6 South. 362; *Lusk v. Throop*, 189 Ill. 127, 59 N. E. 529; *Winslow v. Dakota Lumber Co.*, 32 Minn. 237, 20 N. W. 145; *Lance v. Pearce et al.*, 101 Ind. 595, 1 N. E. 184; *Burkhalter v. Farmer*, 5 Kan. 477. We think that the entries so admitted were, in contemplation of law, contemporaneous with the transaction, and part of the *res gestæ*. It is true that they were not made at the very date when the contract was made. The majority of them seem to have been made in March, 1890. Some were made in April and May of that year, and some in January and February, several weeks prior to the first entry of the name of the Snake River Transportation Company on any of the plaintiffs' books. But they were all made, either at the beginning or during the progress of the work on the contracts, and before any of the machinery had been manufactured or shipped from the plaintiffs' shop. "The entry need not be made exactly at the time of the occurrence, but it is sufficient if it is made within a reasonable time. In this particular every case must be made to depend upon its own peculiar circumstances, having regard to the situation of the parties, the kind of business, the mode of conducting it, and the time and manner of making the entries." 17 Cyc. 384. It has been held that entries made at the completion of a continuous transactions are admissible (*Bolton's Appeal*, 3 Grant Cas. [Pa.] 204), and that, where a vendor has sold goods to be delivered at a distance, entries made at the time of their delivery to the carrier are competent evidence of the sale and delivery (*Keim v. Rush*, 5 Watts & S. [Pa.] 377). Applying these principles to the present case, it seems clear that all entries made during the progress of the construction of the machinery in the due course of business, before the delivery of the goods, and before any controversy had arisen concerning the person to whom the same were chargeable, are contemporaneous entries. A more serious objection is that the entries were not made with intent to make a charge against the defendant, but were entries made in the accounts of the plaintiffs for their own use and convenience. But, in view of the following considerations, we are not convinced that it was reversible error to admit them: (1) They were but cumulative evidence of the facts shown by the drawings; (2) all the material evidence contained in the entries was brought out in the deposition of the witness Shields without objection, and the deposition was read to the jury without objection; (3) the entries were offered and received, not for the purpose of charging the defendant, but for the pur-

pose of corroborating the plaintiffs' testimony that credit was given to the defendant and not to the Snake River Transportation Company. Book entries are often admissible for the purpose of corroborating a witness, although they may not be admissible as substantive evidence for the purpose of proving items of account. *Donahue v. Connor*, 93 Pa. 356; *Gill v. Staylor*, 93 Md. 453, 49 Atl. 650; *Wright v. Towle*, 67 Mich. 265, 34 N. W. 578; *Perry State Bank v. Elledge*, 99 Ill. App. 307; *Petit v. Teal*, 57 Ga. 145; *Bean v. Lambert* (C. C.) 77 Fed. 862.

It is assigned as error that the court permitted Shindler to testify that he always looked to the defendant for payment, and that he looked to him for the payment of the claim of the G. Shindler Furniture Company against the steamboat Norma. This testimony was given on the redirect examination of the witness, after he had testified on cross-examination by defendant's counsel in answer to the question: "You had never trusted Mr. Kamm, had you?" to which he answered:

"Well, that is who we did trust. We furnished four or five steamboats for him, and Mr. Kamm came in the store and ordered anything. We never worried about who to charge it to, the different corporations he was in. We always did business with Mr. Kamm."

He had further testified on the cross-examination that his company had furnished goods for five steamers for the defendant and that the charges therefor had been made against the different boats and different corporations at the defendant's request, "But we always looked to him for the money." The testimony so brought out by the defendant on cross-examination covers all the evidence given on the redirect examination which is the subject of the assignment of error, and there was no error, therefore, in its admission.

We find no error in the record for which the judgment should be reversed. It is accordingly affirmed.

COWELL v. McMILLIN et al.†

(Circuit Court of Appeals, Ninth Circuit. February 28, 1910.)

No. 1,682.

1. CORPORATIONS (§ 316*)—DIRECTORS—VALIDITY OF CONTRACT WITH CORPORATION.

A director of a corporation is not precluded from making a contract with the corporation in which he is personally interested, where he has acted with that candor and fairness which equity requires in dealings between him and the corporation and the transaction is open and fair.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1401-1415; Dec. Dig. § 316.*]

Power of officers of corporations in individual capacity to deal with corporation, see note to *Bensiek v. Thomas*, 13 C. C. A. 466.]

2. CORPORATIONS (§ 189*)—STOCKHOLDERS—SUITS AGAINST CORPORATION.

An individual stockholder cannot enjoin the execution of a contract made by the corporation *intra vires* unless fraud is shown.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 706-711; Dec. Dig. § 189.*]

3. CORPORATIONS (§ 316*)—OFFICERS—CONTRACTS WITH CORPORATION—VALIDITY.

Defendant, who was president, general manager, and a director of a lime company in Washington, contracted individually for the exclusive license for the state to use a patent barrel-making machine. The company afterward by the unanimous vote of the other directors, defendant not voting, leased to him its barrel-making plant, and contracted with him to furnish all the barrels required in its business at a stated price. Defendant installed one of the machines in the plant, and, under successive renewals of the lease and contract, furnished such barrels for a number of years at a profit. Defendant did not, at the time of the contract, own a controlling interest in the company nor control the other directors, each of whom owned a considerable amount of stock. The patent machine was first offered to the company, was discussed by the directors, and its acquirement was strongly urged by defendant, but its successful operation with the timber used was questionable, and the other directors refused to risk the money for the experiment, and acquiesced in its acquisition by defendant. At the time of the contract they had as full knowledge of it as defendant, but did not share his confidence in its successful operation. The contract price of the barrels was less than the average cost had previously been to the company. *Held* that, under such facts, the contract and lease were not fraudulent nor illegal, but fair and valid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1401-1415; Dec. Dig. § 316.*]

4. CORPORATIONS (§ 308*)—OFFICERS—INCREASE OF COMPENSATION.

The fact alone that a majority of the directors of a corporation who voted to increase the president's salary materially had previously contracted to sell him their stock on credit does not render their action illegal where they were men of business standing, and in the absence of any evidence that they acted corruptly, or that the salary voted was excessive in view of the magnitude of the corporation's business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1334-1349; Dec. Dig. § 308.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied May 9, 1910.

5. CORPORATIONS (§ 189*)—OFFICERS—SUIT AGAINST, BY MINORITY STOCKHOLDER.

Various charges of fraud and deceit by an officer of a corporation made in a suit by a minority stockholder considered, and *held* not sustained by the evidence.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 189.*]

6. CORPORATIONS (§ 317*)—DIRECTORS—GENERAL POWERS.

The fact that the president of a corporation as the holder of a majority of the stock controlled the election of directors, and that some of the directors owned but a single share of stock, does not lessen their powers as directors, nor impeach the integrity of their acts.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 317.*]

Appeal from the Circuit Court of the United States for the Northern Division of the Western District of Washington.

In Equity. Suit by Ernest V. Cowell against John S. McMillin and the Tacoma & Roche Harbor Lime Company. Decree for defendants, and complainant appeals. Affirmed.

Ernest V. Cowell, a citizen of California, sued John S. McMillin and the Tacoma & Roche Harbor Lime Company, a corporation doing a large business making and selling lime at Roche Harbor, on the island of San Juan, Wash. The corporation has a capital stock of 1,000 shares of the par value of \$100 each.

The bill alleges, in substance, that Henry Cowell owned 275 shares of the capital stock when he died on August 4, 1903, and that Ernest V. Cowell, his son, the complainant herein, owns 34 shares; that Helen E. Cowell is executrix of the will of said Henry Cowell deceased; that after the corporation was organized the defendant McMillin owned 180 shares of stock, and that the remaining shares of stock were issued to some seven persons whose names are given in the bill; that McMillin was president and manager of the company after its organization, and lived at Roche Harbor; that McMillin's salary was fixed by the first board of trustees at \$2,500 per annum, but on January 29, 1889, it was raised to \$3,000, and that on January 26, 1891, the board of directors, through the procurement of McMillin, increased his salary to \$500 per month; that during the years 1888, 1889, 1890, 1891, and 1892, the company did a very large business and increased its assets, and out of the earnings for said five years paid cash dividends to the amount of 35 per cent. of its capital stock. It is alleged that in the course of its business, the company had erected a mill to manufacture barrels for use in marketing its lime, and built warehouses adjacent to the mill, and that it cost the corporation about 31 cents for each barrel; that during the year 1892 the Waterman-Chapman Barrel Machine Company, of Michigan, sent a representative to the corporation's place of business, and made a proposition to the corporation to install a patent machine for the manufacture of barrel staves in place of the machine then used by the corporation, said barrel machine company to receive compensation for the use of their machine by way of a royalty of 1½ cents upon each barrel manufactured; that McMillin agreed that one of the patent machines could be installed for trial, and in 1892 such patent machine was put in place and used; that McMillin, while manager, ascertained that barrels could be made by the use of the machine at a total cost, including the payment of the royalty, of 21 cents per barrel, and that in January, 1893, after having experimented with the patent machine, he made a proposition to the trustees of the company to lease the stove mill and buildings and machinery connected therewith in the manufacture of barrels from the corporation at \$200 per month rental, and to sell barrels to the company at the rate of 30 cents per barrel, and that he fraudulently concealed from the trustees the fact that by using the patent machine barrels could be made at a cost of 21 cents each, and that he falsely represented the facts to the board of trustees in regard to the use of the mill machinery and the cost and expense of making the barrels, and fraudulently represented to the board of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

trustees the character and value of the patent machine, and that in violation of his duties and trust, he entered into a contract with the barrel machine company in his own name for the use of the machine and the sale of the patent invention within the state of Washington; that McMillin was the only trustee who knew anything about the manufacture and sale of lime or barrels; that the trustees other than McMillin had then entered into an agreement with McMillin by which McMillin was to purchase their shares of stock at stated prices, and that thereupon McMillin fraudulently, through the representations referred to, induced the board of trustees to accept the proposition and to execute a lease in the name of the company to him for the stave mill and machinery used in the operation of the mill for five years from March, 1893, and that McMillin caused the corporation to agree with him to buy barrels at the rate of 30 cents per barrel under an agreement which provided that it might be terminated by McMillin at his option at the end of one year. It is alleged that the value of the property included in the lease was more than \$40,000, and that by the terms of the lease, the company was obliged to pay all taxes and insurance and repairs, the cost of which have amounted approximately to the total sum of the rent reserved to the defendant in and by the terms of the lease. It is averred that by the terms of the agreement for the sale of the barrels by McMillin to the company, the company became bound to purchase all barrels required in its lime business upon substantially the following terms: First, the company was to bear all expense of inspecting, measuring, and delivering all material or supplies for the mill to be used in the manufacture therein in the booms or on the wharf, at the mill, and also for the delivery of all cooperage stock; second, to furnish McMillin the free use of the shops and tools and necessary storage for barrels and materials and free wharfage on all supplies; third, to receive from McMillin all staves and heads when manufactured, and to credit him therefor at the rate of 14 cents per set for staves, and 4 cents per pair for heads, payment to be made on the first day of each and every month during the continuance of the lease, and any extension thereof, and to pay the further sum of 12 cents for each barrel when the barrel is complete ready for shipment.

Complainant next alleges that, after making said contract and lease, McMillin, in fraud of the rights of the company, conducted the barrel business in his own name and on his own behalf, and sold barrels to the company, and collected therefor at the rate of 30 cents per barrel until September, 1893, when the mill was destroyed by fire; that thereupon McMillin caused the company to rebuild the mill at an expense of over \$40,000, and caused another barrel manufacturing machine to be installed and that after June, 1894, when the new plant was complete, McMillin continued to operate the mill and to sell the barrels to the company at the rate of 30 cents per barrel, although he manufactured them at a cost of not to exceed 21 cents per barrel; that this continued until January 1, 1905, and that McMillin made profits of more than \$20,000 per annum by making the barrels up to that time, and that he fraudulently diverted said profits from the company to himself. It is alleged that in 1893 McMillin made an agreement with all the stockholders of the company except Cowell, deceased, and this complainant, to buy all the remaining shares of the capital stock of the company not then owned by him, and that he agreed to pay in installments the purchase price of the said stock and that the stock was thereafter turned over to McMillin, and that he has since then owned and controlled all the shares of the capital stock of the company except the 309 shares owned by complainant and Henry Cowell, and his executrix, and that since the purchase of the stock, McMillin has caused the same to be voted for such persons as he selected, and has refused to elect Henry Cowell as a trustee, but has chosen "dummy" trustees who, since January, 1893, have obeyed his directions so that really he has had and has control of the corporation; that at a meeting of the trustees in March, 1895, for the purpose of defrauding complainants and other minority stockholders, and for the purpose of enabling McMillin to pay for the stock which he had bought from the other trustees out of the assets and earnings of the company, McMillin caused the trustees to pass a resolution fixing his salary at \$12,000 per annum, to take effect from January, 1895, and that since said date he has collected said salary although his services have not been worth more than

\$3,000 per annum, inasmuch as he has held other positions which required his time, and although he has lived in the city of Seattle and not at the place of business of the defendant company. It is further alleged that in furtherance of his fraudulent plans in January, 1895, McMillin organized a corporation under the name of the "Staveless Barrel Company," with a capital stock of \$250,000, consisting of 2,500 shares of the value of \$100 each; that this last-named corporation was organized by McMillin and two others, McMillin subscribing for all of the shares except two; that McMillin prepared the articles of incorporation, and charged the company \$200 for the service, which sum was used in payment for the two shares of stock subscribed by the two other stockholders, and that, for the purpose of making a pretended payment for the shares of stock in the corporation subscribed for by him, McMillin made his note to the company in the sum of \$249,800, and that thereafter in order to escape liability as a stockholder and to make a pretended payment of the capital stock, McMillin made a pretended proposition to the corporation to sell to it his lease of the stave mill and other property of this defendant company, and of his contract for the sale of barrels to the defendant company, and of all pretended rights which he had fraudulently acquired from the barrel machine company for the use of the patent machine for the sum of \$249,800, and that he agreed to accept in payment therefor the delivery to him of his promissory note, and that he thereupon caused the trustees of the Staveless Barrel Company to accept the proposition and to deliver the note to him and to issue to him the capital stock, and that thereupon he assigned the lease and agreements to the Staveless Barrel Company, and then procured the "dummy" trustees of this defendant corporation to ratify the assignments and transfers and to substitute the Staveless Barrel Company for McMillin in the agreements; that prior to the expiration of the contract and lease in 1897 McMillin caused the "dummy" trustees of the defendant company to execute a renewal of the contract in the name of the Staveless Barrel Company for the further period of five years upon the same terms and conditions; that at the expiration of the second period of five years, about January 26, 1903, McMillin again caused his "dummy" trustees of the defendant company to renew the contract and lease for five years more, and that since January, 1895, McMillin has carried on the barrel factory in the name of the "Staveless Barrel Company"; that since January, 1895, McMillin has directed the business of the manufacturing of barrels for the use of the defendant company, and has conducted the stave mill and managed and kept the books; that the Staveless Barrel Company has paid no salary to McMillin; that between January 1, 1895, and January 1, 1905, the Staveless Barrel Company declared dividends out of the pretended earnings of its manufacturing business amounting in all to the sum of \$125,000, and has made a profit therefrom in undeclared dividends of more than \$25,000, no part of which has ever been credited to the defendant company.

It is alleged that through the fraudulent acts aforesaid McMillin has wronged the defendant company and complainant, and that it was made to appear that the defendant company suffered an actual loss from 1893 to 1898; that in 1894 McMillin, through his "dummy" trustees, caused the defendant company to authorize the issuance and sale of its negotiable bonds in the sum of \$125,000, which are still outstanding in the hands of McMillin, though actually satisfied and paid, and that a portion of said bonds were fraudulently issued to McMillin upon the pretense that he was a creditor of the defendant company; that the shares of stock so fraudulently purchased and acquired by McMillin in January, 1893, and the bonds so fraudulently acquired by him, were retained for the purpose of gaining control of the defendant company and of its assets, and to injure the complainant and Henry Cowell and his estate, and that unless enjoined from so doing McMillin will cause the bonds to be transferred and delivered to third persons. It is charged that McMillin has used the property of the defendant for personal and private use and gain, and has failed to account to the defendant company therefor; that notwithstanding the value of the property of the defendant company and the value of its business, if it had been efficiently managed, no dividends have been paid since January, 1893, except \$10,000 in January, 1893, and \$6,000 in January, 1906. It is alleged that McMillin has denied to complainant or to the said

Henry Cowell an opportunity to examine the books and accounts of the defendant company until some time in 1903, when, under threat of counsel, he assented to an examination, and that it was from the report of the accountants that this complainant for the first time gained information of the true condition of the assets and liabilities of the company as shown by its books and records; that, until just before the beginning of this action, complainant had no knowledge or information concerning the frauds set forth; that McMillin has entered into arrangements to sell the property, and will do so unless enjoined.

Complainant prays for a restraining order which will prevent McMillin from selling and transferring, or agreeing to sell and transfer, any of the business of the company or any of the capital stock acquired by him since January, 1893; that he be enjoined from selling or disposing of the shares of the stock of the defendant company acquired by him since January, 1893, or of any of the bonds of the defendant company now owned or held by him; that a receiver be appointed to take possession of all the property and assets of the defendant corporation, and carry on the business until the determination of the action, and that the receiver be authorized to bring actions as may be directed against the defendant McMillin or the Staveless Barrel Company, or such other actions as may be necessary, and that the receiver be authorized to pay the debts of the company and to wind up its affairs; that an account be taken between McMillin and the defendant company; that all of the stock of the defendant company pretended to have been bought by McMillin since January, 1893, be adjudged to have been acquired out of the moneys belonging to the defendant company, and that a decree be made distributing said stock ratably between the persons lawfully holding the remaining shares of the capital stock of the defendant company; that the pretended lease of the stave mill plant and real estate connected therewith be declared null and void, and that the contract for the sale of the staves to the defendant company be declared null and void; that the business and affairs of the defendant company be wound up and that its debts be paid, and that the proceeds be distributed ratably between complainant and other bona fide stockholders of the corporation according to their interests; and for general relief.

The defendants filed a joint answer. They deny the allegations of the complainant as to subscriptions for shares of stock alleged to have been made by persons other than McMillin about the time of the incorporation of the defendant company, and allege that when it was organized McMillin subscribed for 686 shares and that the entire capital stock was paid for by the purchase and transfer of all the property and assets of the Tacoma Lime Company and certain real estate and personal property belonging to the said McMillin, and one Masterson, at Roche Harbor, Wash. The defendants allege that the defendant has done a large business, and has enlarged its plant from 2 primitive mills to 13 of the most approved character, and has increased the output of the property from 100 barrels per day to 1,400 or 1,500, and that its assets have increased from a value of \$100,000 to \$600,000 approximately; that it has extended its markets, and has increased its business about \$400,000 or \$500,000 per annum; that it is prosperous and practically out of debt; that it has retired all of its bonded indebtedness and has an exceedingly valuable trade. McMillin pleads that his salary was raised by the board of trustees without his procurement. He admits the payment of dividends for the first five years of the operation of the business, and says that it would have paid more had it not been hindered and harassed by the hostility of Henry Cowell, the father of the complainant in this suit. It is denied that the barrels were manufactured at a cost of 31 cents as alleged, and set forth that the average cost of the barrels for the five years preceding March 5, 1893, was 32½ cents per barrel. It is admitted that in 1892 the Waterman-Chapman Barrel Machine Company, of Detroit, wanted to install one of their patent machines, and it is averred that the machine had not been tested on the timbers of the state of Washington, and that it was problematical whether it would be successful or not; but it is alleged that McMillin examined the machine and believed that it was mechanically correct, and presented the proposition of the barrel machine to the trustees of the defendant corporation. It is set forth that he discussed the matter in detail with the trustees, pointed out the advantages of the machine if it should prove successful and the bene-

fit of using the new machine, telling them that it would be unwise to permit the machine to fall into the hands of competitors of the defendant corporation, and that he went into detail concerning its superiority; that the trustees considered and discussed the matter in detail and declined to accept the proposition, but suggested that the defendant McMillin should take the machine on his own account, and put it in the mill of the company at Roche Harbor, and demonstrate its value at his own expense with the understanding that the defendant company, should it prove successful, would have the first opportunity to receive the output of the mill; that thereafter, the defendant McMillin made the contract with the barrel machine company, which contract is made a part of defendant's answer; that in 1891 and 1892 one of the machines was installed and experimented with until September, 1892, when the stove mill, together with the barrel machine was destroyed by fire; that McMillin incurred heavy expense in testing the machine which did not do the work claimed for it, until about August, 1892.

The allegations of the bill to the effect that McMillin learned that barrels could be made for 21 cents each on the first machine are denied, and it is averred that nothing could be determined with accuracy concerning the experiments made with the machine although defendants admit that about January 14, 1893, McMillin made a proposition to lease the stove mill and building and machinery from the defendant corporation at \$200 per month, and made a proposition to sell barrels to the corporation at the rate of 30 cents per barrel. All allegations of concealment of knowledge concerning the machine and false misrepresentations and all violation of duties of trust are denied. It is averred that after the destruction of the mill by fire, the corporation proceeded to rebuild its mill, and that while the mill was being rebuilt, McMillin proposed to the defendant to replace the barrel machine that had been destroyed by fire, and that the proposition was accepted on January 14, 1893; that the matter was discussed by the trustees, and all of the facts that were known to McMillin about the machine were fully laid before the trustees, and that the proposition was considered in detail by the board, and that with full knowledge and information upon the subject, the board, on March 15, 1893, authorized the execution of a lease of the mill plant, machinery, etc., and a contract for the sale of barrels by McMillin to the corporation, which contracts are made part of the answer. It is alleged that the contract was fair and just and advantageous to the corporation in that it procured a better barrel at a cost of 30 cents as against 32½ cents that had been paid for the barrels used before then. It is alleged that the financial condition of the corporation was not thought to be good enough to justify the cost and expense of experimentation with the machine, and that in the development of the machine defendant McMillin spent several thousand dollars. The defendants admit that McMillin and one Cartwright were the only trustees who lived at Roche Harbor, but deny that the trustees had no knowledge or experience in the manufacture of barrels, and aver that for several years the trustees were familiar with the cost of manufacturing lime and barrels by the defendant; deny that the trustees or any of them made any agreement with McMillin by which McMillin was to purchase their shares of stock at any price, or that any agreement of purchase by McMillin was made until long after the execution of the contract and lease of March 15, 1893, except a purchase from Cartwright made in 1891. All allegations concerning misrepresentation or concealment on the part of McMillin in respect to the lease and contract are denied, it being set forth that the contract and lease were made by the trustee, defendant McMillin not voting, and were made at a time when McMillin did not own in excess of 300 shares of the capital stock of the company. It is averred that on September 10, 1892, the property included in the lease was not worth any more than \$35,000; and admitted that, under the terms of the lease, the defendant corporation was to pay for renewals, taxes, and insurance, but denied that repairs were to be paid for by the corporation. Defendants admit that the company was to buy all the barrels required in its business from McMillin during the continuance of the lease, and that the corporation was to bear all expense of inspection, measuring, and delivery of material and supplies in the mill to be used in the manufacture of barrels in the booms and on the wharves of the mill, and also for the delivery of all cooperage stock, but aver-

red that, under the old method of manufacturing, all expenses of inspecting, measuring, and delivery were all borne by the corporation, and that the defendant corporation was compelled to maintain its mill, wharves, docks, booms, and machinery. McMillin admits the conduct of the Staveless Barrel Company in his own name; admits collections from the defendant company at the rate of 30 cents per barrel, but denies all fraud as against the defendant corporation, and avers that the new barrel-making machine was put into operation about June 1, 1893, from which time barrels were delivered to the defendant company and collections made at the rate of 30 cents per barrel, in compliance with the contract of March 15, 1893, and says that the barrels cost him on an average of 23½ cents per barrel, exclusive of royalties; avers that he furnished no barrels to the company after the first of the year 1895, when he assigned his contract with the defendant corporation to the Staveless Barrel Company, and that thereafter the Staveless Barrel Company furnished barrels to the defendant company at the price hereinbefore named. He says that the assignment to the Staveless Barrel Company was made with the consent and approval of the trustees of the defendant company, and that the lease and contract were extended with the consent of the company; and it is denied that the Staveless Barrel Company is indebted to the defendant company as alleged in the complaint.

Defendants deny that McMillin made an agreement with all of the stockholders, except Cowell and the complainant, in 1893, or ever, to buy the remaining shares of stock of the defendant corporation, and deny that by virtue of any agreement McMillin was to pay for such stock in installments at future dates, but they say that McMillin agreed to buy the stock of certain stockholders without any understanding or agreement with any other stockholder, and set forth that whenever he bought stock, and did not pay for it, the stock was held in escrow or as collateral by the seller until payment was made; deny that McMillin has held and controlled all of the shares of the defendant corporation except 309, owned and held by complainant and Henry Cowell, since 1893; admit that McMillin refused to help elect E. V. Cowell or Henry Cowell as trustees; deny that he ever at any time elected or caused to be elected "dummy" trustees, but say that McMillin has voted his stock for stockholders who were men of character and experience in business affairs. Defendants deny that since January 1, 1893, the trustees have obeyed the direction of the defendant McMillin or that he has directed or controlled the corporate acts of the trustees, but aver that McMillin has been general manager and president, has had charge and general direction of the business subject to the board of trustees; aver that he has not attempted to urge any policy that he did not think to be the best interests of the company, and that he opposed the election of the Cowells because they controlled the Henry Cowell Lime & Cement Company, which was a competitor in business of the defendant company, and that since the date of the organization of the Tacoma & Roche Harbor Lime Company, Cowell had carried on a vigorous attack upon the defendant corporation endeavoring to destroy defendant company's markets, forcing the price of lime down to the cost of production, and in many instances below the cost of production, and in every way annoying the defendant corporation, so that by reason of such acts the defendant corporation was prevented from making profits that it should have made, and that it was impossible to pay dividends largely by reason of the hostile attitude of the Cowells, and that the defendant McMillin did not consider them proper persons for trustees. It is alleged that McMillin's salary was raised to \$12,000 by resolution of the trustees and without any fraudulent motive, and that such a salary was fair and reasonable; that McMillin, as president and general manager, has always rendered faithful and honest services to the corporation, and that he now exercises full control over the operations of the plant of the defendant corporation, looks after defendant's business, and devotes such time as is necessary to supervising, controlling, and conducting the business of the corporation.

The answer then alleges that the Staveless Barrel Company was organized without any fraudulent purpose in view and for the convenient handling of the business of McMillin and the other stockholders of the Staveless Barrel Company; that in 1891, 1892, and 1893 the defendant McMillin, in order to experiment with the barrel machine, obtained funds from his wife, who mort-

gaged her separate and individual estate to raise money to enable experiments to be conducted; that after the Staveless Barrel Company was organized McMillin held 932 shares of the preferred stock of the Staveless Barrel Company and 1,485 shares of the common stock transferred to his wife, and that 1 share was given to J. M. Keene, and 11 shares to William Schultz; that the wife of said McMillin draws her dividends upon the stock as does Schultz; that after the assignment of the lease and barrel contract of March 15, 1893, to the Staveless Barrel Company that company performed all agreements made under the contract with the defendant company, and that in March, 1897, the lease and contract were renewed for five years with the Staveless Barrel Company, and that again there was a renewal on January 26, 1903, and that all of said contracts and leases were fair and honest. It is admitted that the Staveless Barrel Company has earned probably \$130,000, and it is averred that the defendant corporation is in no wise interested in said dividends; that all the expenses in installing, buying, experimentation, building, operating, and maintaining the barrel machine and the manufacture of barrels have been borne by McMillin and the Staveless Barrel Company, and that the accounts between the barrel company and the lime company have been honestly carried on in accordance with the contract of March 15, 1893, and the extensions thereof. It is averred that the books of the defendant company have been honestly kept, and that no attempt has been made to divert any of the funds of the company. It is admitted that \$125,000 of negotiable bonds were issued in 1894, but it is alleged that such issue of bonds was for the benefit of the company to fund its debts, and that all of said bonds so issued have been fully paid. It is denied that McMillin intends to place the bonds beyond the jurisdiction of the court. All improper use of the property of the defendant is denied, and it is averred that the defendant McMillin has always faithfully accounted for the proceeds of all sales of property and assets to the defendant company. It is averred that the assets of the company are of the value of \$600,000, and that under the management of the defendant McMillin, the value of the assets has increased from \$100,000 to \$600,000, and that dividends have not been declared in order that the property might be improved, the business developed, and the trade extended. It is averred that the value of the stock has increased from \$100 per share to \$600, and that additional profits could have been made had it not been for the interference of the Cowell interests. It is set forth that McMillin never has denied access to the books and that the corporate books were at various times examined by Henry Cowell and the complainant, but that defendant McMillin did not believe that the books of account should be examined by said Henry Cowell or the complainant because they were competitors in business and were seeking the information for an improper purpose, and that for years it would not have been safe to have permitted the Cowells to examine the books, but that in 1903 counsel for Cowell was given permission to examine the books, and that then an expert was sent to go over them, and that everything connected with the affairs of the company was laid before the expert, and that complete information could have been obtained concerning the defendant company and the Staveless Barrel Company. It is alleged that the Cowells knew of the existence of the barrel contract since 1893, and that they should be estopped from questioning any of the transactions as to the salary or the course of dealings between the defendant corporation and McMillin and the Staveless Barrel Company. It is averred that McMillin was negotiating with capitalists for the sale of his stock in the defendant company, and that the negotiations would have been consummated had this suit not been instituted, and that it has been brought for the purpose of annoying McMillin and to prevent the consummation of the sale of his stock; that McMillin never contemplated the sale of the property and assets of the defendant company, and it is denied that he is about to sell or transfer the assets of the company or that the corporation is about to do so. It is averred that the corporation and McMillin are solvent, and able to meet all demands against them, and that all transactions between McMillin and the defendant company have been fully and completely known and understood by the trustees, and that the trustees have always controlled the business of the company.

Exhibit 1, attached to the answer, is the agreement dated March 16, 1891, between Bowering, trustee for the Waterman-Chapman Barrel Machine Com-

pany and John S. McMillin, concerning the barrel-making machine patent. In the agreement (so far as it is material to consider it in this case) the barrel machine company gives to McMillin the exclusive right to use and operate the barrel making machines within certain states. It is agreed that the barrel machine company shall deliver the machines to McMillin, McMillin agreeing to pay an amount equal to the actual cost of the machines not to exceed \$1,500 each, and to pay the freight, which sums are to be repaid to McMillin out of the royalties to become due under the agreement.

Exhibit 2, made a part of the answer, is a letter from McMillin to the board of trustees of the Tacoma & Roche Harbor Lime Company dated January 14, 1893. In this letter, McMillin states that he owns the patents for the barrel machine for the Pacific coast, and that the test had demonstrated that a barrel could be made that would be better than the ordinary stave barrel which had been used by the company. He refers to the fire of September 10, 1892, and says that he intends to have a new machine set up, and he proposes to lease the mill and furnish the company with all barrels complete and free of all expense, as set forth in the letter and proposition so to lease the plant, including mill, wharves, docks, machinery, dry kilns, sheds, yards, structures, tools, and appliances belonging to the plant and the foreman's residence, for the period of one year, with the privilege of five; defendant corporation to proceed to complete the mill and equip it, placing the machine in it, McMillin to take all bolts on hand and booms as per inventory, and to operate the mill at his own expense, at a rental of \$200 per month, McMillin agreeing to supply the company with all barrels it might require in its lime business, the lime company to furnish the mill power, and to bear the expense of inspecting, measuring, and delivering all material or supplies to be used in manufacturing, in the booms or on the wharf at mill, as McMillin might require, free of all charges, except for purchase price of such material; the company to deliver all cooperage stock; McMillin to have the use of cooper shops and tools, etc., and storage for barrels and barrel material, the company to pay McMillin 30 cents each for all barrels used; that when staves and heading were delivered in the warehouse at mill, the company should receive the same as fast as manufactured, and should credit McMillin at the rate of 14 cents per set for staves, and 4 cents per pair for heading, McMillin to pay branding, heading, and repairing of barrels before shipment, and when on dock ready for shipment, McMillin to receive a further credit of 12 cents. The company was to keep up good and sufficient booms, wharf, and mill plant, and to make payments monthly, free wharfage to be given McMillin for supplies going over its dock.

On March 15, 1893, the company entered into a lease and agreement with McMillin, the lease practically covering the real and personal property referred to in the letter of McMillin to the company. This lease was signed by the corporation by C. P. Masterson, vice president, and J. M. Keene, secretary, and John S. McMillin, lessee. As an exhibit to the answer there is also attached an agreement of March 15, 1903, between the lime company and McMillin. In this contract, the company agreed to buy from McMillin all barrels to be used in its lime business, and to bear the expense of inspecting, measuring, and delivering all material, substantially as had been specified in the letter proposition made by McMillin to the company. Barrels were to be furnished to the company for a total of 30 cents per barrel. This contract was signed by the defendant company by its vice president and secretary as parties of the first part and McMillin individually as party of the second part.

Upon these issues, substantially as stated, the testimony was heard before the master. Thereafter, the cause was heard by the court, and later an order was made dismissing complainant's bill. Complainants appeal.

Warren Olney and Hughes, McMicken, Dovell & Ramsey, for appellant.

Kerr & McCord, James A. Kerr, and E. S. McCord, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

HUNT, District Judge (after stating the facts as above). Study of the pleadings already substantially stated, and of the testimony heard, discloses that the main point in this case relates to the license to use the patent barrel machine with which the defendant corporation made the barrels it used for the shipment of its lime product from Roche Harbor. Addressing themselves to this matter, counsel for complainants earnestly contend that, when the facts are ascertained, it will appear that McMillin, a corporate officer, was guilty of fraud; that he violated his trust by leasing and purchasing the property of the corporation, and by making a contract with the corporation for his own personal benefit, and that, as a consequence, the law will regard him as a constructive trustee liable to an accounting or such other obligations as equity may properly impose. It would extend this opinion to an unnecessary length were we to state and analyze the voluminous testimony in the record, so we will but briefly refer to such parts of the whole evidence as have impressed us as particularly helpful in arriving at a correct result.

Going back of the time of the barrel machine matter, we find these things of general interest: McMillin went to Tacoma, Wash., in 1884, and soon thereafter acquired a fourth interest in a lime plant at Roche Harbor, Wash. In addition to this one-fourth interest so purchased, he obtained an option upon the other three-fourths of the properties referred to, such option to expire July 18, 1886. The property consisted of 160 acres of land, containing lime ledges, together with lime kilns and some log buildings. In June, 1886, he went to California for the purpose of trying to induce a firm, of which complainant's father was a member, to buy an interest in the property at Roche Harbor. Mr. Cowell was very largely interested in lime manufacture, and had much to do with the control of prices of that product on the Pacific coast. But Mr. Cowell did not take any interest in the property, and McMillin thereafter enlisted several business men in Tacoma—Mr. Masterson, Mr. Manning, and Mr. Wallace—who were respectively the president, vice president, and cashier of the Pacific National Bank of Tacoma. Mr. Cowell, however, notwithstanding his refusal to join Mr. McMillin in 1886, acquired much knowledge of McMillin's interest in the properties at Roche Harbor, and without disclosure of his plans to McMillin, thereafter bought certain lime lands then under lease to McMillin at Roche Harbor, and soon began the manufacture of lime there under the name of the "San Juan Lime Company," and in time became a powerful competitor of the defendant company.

The defendant corporation was organized in 1886, and at once purchased the property rights of two other companies which had been owned or controlled by McMillin defendant and C. P. Masterson. McMillin and his associates owned 686 shares in the new company, and two years thereafter the elder Cowell bought 309 shares. Between 1886 and 1892, the new company, now defendant herein, increased its assets, enlarged its plant, and the value of its shares became much greater. It paid dividends amounting to \$35,000, between 1888 and 1892, but has paid none since, although its assets have been added to in many ways and its trade has been extended.

In 1889 McMillin heard of a patent machine whereby a staveless barrel could be made. The question of barrels was an all-important one to the lime company, inasmuch as it used quantities of them, and the cost of making them had been and was the principal incident of its lime business. So McMillin corresponded with the patentee, the letters of McMillin indicating that his inquiries were as manager and in behalf of the defendant corporation of which he was not alone general manager, but executive head. About September, 1890, C. T. Bowering, agent for the patentee, came to Roche Harbor, and discussed the matter of the patent machine with McMillin and a Mr. Cartwright, then one of the trustees of the lime company. Bowering showed them his letters patent, and had a set of staves for a keg which he said had been made by the machine. Bowering was in or about Tacoma two months and discussed the merits of the patent barrel machine in a general way with several, if not all, of the trustees of the defendant company, and showed them the claimed merits of his invention, but he says that the trustees, other than McMillin, took very little interest in the patent. Bowering testified in effect that although he knew he was dealing with McMillin individually, yet he believed McMillin was representing the defendant company when he made the contract with McMillin for the rights to the patent machine.

McMillin himself says that he first saw the barrel machine operated at Detroit, in June, 1892; that Bowering claimed that the machine would be a great economy; that it would manufacture from 3,000 to 4,000 barrels per day, and that the package, when made up, would be practically air-tight, which would prevent air slacking. He says that the proposition to purchase the patent barrel right was discussed by Bowering and members of the board of directors from September, 1890, to March, 1891; that the discussions were informal, but that the matter was before the board of directors several times, and that he frequently urged the board to take up the patent, calling their attention to the salient features of the machine, and reminding the directors that the barrels in which the lime was being shipped were costing more than the lime itself, and that the proposition ought not to be passed if there was a probability of the successful development of the machine. The practical utility of the machine was unknown, however; it was an experiment in Washington. He says that he told the board that if the machine was not taken up by them, defendant's competitor Cowell might get it. But the board declined to become interested because of the financial condition of the company, and of the country at large and because of doubts of the success of the patent. McMillin says that Masterson, one of the directors, at a meeting when the patent question was under discussion, turned to him and said, "Why, McMillin, if you think it is such a good thing, why don't you take it up yourself?" to which he replied:

"For simply one reason, Mr. Masterson, and one only, * * * simply because I am president of this company, and, if this should prove to be a good thing, it ought to belong to the corporation; it ought not to belong to any individual member of it. It is an important feature of the company's business, and the institution itself ought to own or operate it. Whatever is done, it ought to be done by the company, and not by an individual."

Masterson replied to the effect that the question was settled; that the company would not take it; that it had "had its day in court," and that McMillin was at perfect liberty to take it if he wanted to, and could experiment with it at the corporation's plant. McMillin also says that it was then understood that if the machine should develop to be a thing of practical utility, the company should have the first opportunity to obtain its product. He testifies that thereafter he negotiated with Bowering on an individual basis, and that on March 16, 1891, he entered into an individual agreement with the barrel machine company (Exhibit 1, referred to in the statement), after telling Masterson, one of the directors, just what he was doing. The contract between Bowering and McMillin was deposited in Mr. Masterson's bank, and was read over by Masterson.

In December, 1891, the first machine reached Roche Harbor, and in the spring of 1892 was installed by an employé of the manufacturers, who had come out from Michigan. McMillin also says, and he is corroborated in the matter, that this machine was not a success; that it was weak in construction; that its parts bent and broke, and that the agent himself was not satisfied. It seems clear that the machine could not supply defendant's need for barrels. In September, 1892, fire destroyed the stave mill and the machine that had been set up. McMillin, still hopeful that success would follow experiments with the machine, ordered that a new and stronger one should be built. Later, such a new one was installed at the company's plant at Roche Harbor, and in time it proved to be successful and of great value in manufacturing barrels.

We gather from the testimony of Manning, who was one of the directors at the time of the refusal to take up the patent, and who was a witness for complainant, that Bowering submitted his proposition concerning the barrel machine to the board of trustees of the company, and that he (Masterson) and Wallace frequently talked with McMillin about the machine; that it was a question in their minds whether it would make satisfactory barrels out of the timbers of the state of Washington. He says that, considering the fact that the machine was untried, that it was doubtful whether it would be successful, and, regarding also the financial conditions at about the time the patent was offered, it was concluded that it would not be well for the company to undertake its acquisition. Manning also says that before the contract was made with McMillin, it was suggested to McMillin that he should take it up individually, as "he seemed to be the only one who was reasonably satisfied that it (the patent) might prove to be something for the benefit of the company." He also testified that the trustees were familiar with the negotiations between McMillin and Bowering, and that they consented that McMillin should install the machine before it was ordered, and that McMillin was given to understand that it would be satisfactory to the board for him to go ahead and acquire the machine individually if he cared to do so.

Mr. Wallace, who was also one of the directors of the defendant company when the patent was under consideration, says that he talked frequently with McMillin about the barrel machine while Bowering

was in the state of Washington; that the matter of its acquisition by the corporation was considered at a number of meetings of the trustees, and that after a good deal of discussion it was decided that the company would not install the machine; he says that he recalls that it was doubtful whether the machine would be a success, and he was not convinced that they were warranted in appropriating money to put into it. He says that McMillin presented the matter to the board and urged the company to take it from the beginning. "I am very clear on this," said the witness, "that time and again Mr. McMillin urged the company to take the machine and operate it itself, time and again. * * * I do not remember the terms, but I do know that he was anxious for the company to take the machine and operate it, but it was finally turned down. * * * He talked of the delicacy of his situation" about taking up the machine himself, because he was president and general manager, and he therefore urged that the company take it up with the patentee and experiment with it. Mr. Wallace also says that McMillin took up the matter on his own sole responsibility, and that the board took it for granted he was making a profit on his barrel contract or he would not have undertaken it.

Mr. Cartwright, who at different times was the bookkeeper and superintendent for the defendant company, says that McMillin was exceedingly anxious that the company should acquire the rights to the machine, although he (Cartwright) had no confidence in it, because he did not believe it would work on the fir of the state of Washington.

Mr. Keene, who was secretary of the company in 1890, testified that he distinctly recalled a meeting of the board when the barrel machine was discussed by the trustees. He says it was offered to the board and the board refused to take it over for the company, for the reason that the trustees thought they could not afford to experiment with it. He testified that McMillin thought the company should have it, and that McMillin looked upon the machine as an experiment, but one worth making. The board, however, declined to become interested.

We cannot find that McMillin concealed from the board of directors of the defendant company any knowledge that he possessed in respect to the probable success of the machine, or that he misrepresented anything. That he had much more confidence than his associate directors had in the potential success of the patent is evident, but the machine had not been operated, much less had it been proved a success in Washington, when the board refused to go ahead with the experiment. McMillin himself did not then know that it would turn out to be the success that it afterwards proved to be. A circumstance to sustain this is found in the right which was given to McMillin to cancel the contract at the end of a year. Again, the other directors of the company were largely interested, and while to a great extent, they relied on McMillin's integrity and business abilities in and about the management and policies of the company and its affairs, they acted against his advice in this instance, and did so under the belief that they were guarding the best interests of their company; and, consistent with their past conduct, their attitude in this suit is not only not one of complaint against McMillin's actions in the premises, but of

affirmance of what transpired between him and themselves, and of the good faith of the whole transaction of the barrel patent license and contract.

The record shows that when the original contracts with McMillin were entered into, McMillin owned 280 shares of stock in the defendant company, Masterson owned 150 shares, Manning 75 shares, T. B. Wallace 100 shares, Hugh Wallace 65 shares, Cartwright 20 shares, Keene 1 share, and complainant 309 shares; furthermore, the evidence is that McMillin did not vote upon the question of entering into the contract or lease, and that when the contract was made he had not contracted for the purchase of any of the holdings of other stockholders. The fact that afterwards, in 1894, he bought the stock of other directors is immaterial, unless the facts or circumstances surrounding such purchase tend in some way to show fraud on McMillin's part, or conspiracy between the associate directors and McMillin to serve McMillin at the expense of the corporation's and complainant's interests when the contract was made.

In so far as the industrial features of the contract need be referred to, it appears that for five years before the contract with McMillin was made, the company had been paying various prices for barrels. Complainant makes deductions of average cost of barrels in the years 1890, 1891, and 1892 only, and then argues that the average cost of barrels was 31½ cents. He says, too, that in this average the expense of towage, cartage, and insurance was charged into the cooperage account, and was therefore necessarily included in the cost of the barrels, while under the McMillin agreement, whereby barrels were to cost 30 cents each, the expense of towing, carting and insurance had to be borne by the company, and that because of these matters, in making a comparison between the former cost of the barrels and the cost under the McMillin contract, the expense of towage, cartage, and insurance must either be deducted from the former cost or added to the latter. To an extent, this reasoning is persuasive, but it loses its force when it is applied to the added facts that the company made barrels prior to 1890 at a cost which increased the average to about 32½ cents for the period between 1889 and 1893, and when there is also included the cost of items of heading up, nails, nailing the barrels, branding, and repairs of all breakage which amounted to several fractions of a cent, and which did not enter into the cost of manufacture, under the older methods, but which under the terms of the 1893 agreement were to be done by McMillin. There is evidence that the item of towage was to be borne by the company for the reason that it was easy for the defendant company to furnish it at an almost nominal cost, because of its having steam tugs in constant use. The company also used its teams daily, and witnesses say staves could be conveniently delivered at an actual cost of one-third of a cent per barrel. It appeared that insurance amounted to a fraction of a cent per barrel.

We shall not enter upon a detailed analysis of the evidence of the figures. Suffice it to say that after the strictest examination of the accounts, expert witnesses disagreed somewhat in their inferences, but the differing conclusions do not vary enough to justify a finding that

there was any fraud or cheating or bad faith on McMillin's part in respect to the provisions of the contract to supply the barrels. On the contrary, after carefully studying all the evidence, it appears affirmatively therefrom that the contract price of 30 cents per barrel was less than the company had been paying for its barrels when it bought or made them before 1892 and was less than barrels were selling for in the market at the time of the institution of this suit.

We may therefore generally summarize our discussion of the foregoing important features of this case by saying that it is our opinion that McMillin acquired the title to the barrel machine in good faith with the knowledge and consent of the board of directors of the corporation, and after the board knew all that McMillin knew of the merits of the machine and had expressly refused to become interested in it; that there was no concealment from the board of directors on McMillin's part; that McMillin made the lease of the property and the contract for supplying barrels in good faith, and that the contract when entered into was not unreasonable, unfair or illegal.

We would not, to the slightest extent, depart from the salutary rule that directors and other officers of a corporation, occupying a fiduciary relation towards a corporation, are not permitted to assume positions which will bring their private interests into conflict with their duties to act solely in the interests of their corporation; nor would we argue upon the wisdom as well as the morality of the doctrine that where a corporation has made a contract with one of its directors, or a contract wherein one of its directors is personally interested and the interested director has taken part in the making of the contract, the corporation may elect to avoid the agreement so made even though it is in fact free from fraud. But these principles are not those which control in the present case, for here the transaction, when viewed as a whole and in its several parts, between the director and his company, was entirely free from fraud, and the contract was unanimously authorized by a board of disinterested persons, the interested director not voting. Thus, the case is brought within the rule recognized by the Supreme Court of the United States, namely, that where the director has acted with that candor and fairness which equity imposes as the guide for dealing between him and the corporation, and the transaction is open and free from blame, the director is not forbidden from making a contract with the corporation, or from entering upon a transaction in which he is personally interested. *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328. See, also, *Marshall on Corporations*, § 377; *Figge v. Bergenthal*, 130 Wis. 594, 109 N. W. 582, 110 N. W. 798; *Barr v. Pittsburgh Plate Glass Co.*, 57 Fed. 86, 6 C. C. A. 260. And an individual stockholder cannot enjoin the execution of a contract *intra vires* unless fraud is shown. "So long as the agents of a corporation act honestly within the powers conferred upon them by the charter, they cannot be controlled. The individual shareholders have no authority to dictate to the company's agents what policy they shall pursue or to impair that discretion which was conferred on them by the charter." *Morawetz on Corporations*, § 243; *Jesup v. I. C. R. R. Co.* (C. C.) 43 Fed. 483; *Ranger v. Cotton Press*

Co. (C. C.) 52 Fed. 609; Thompson on Corporations, § 4059; Bristol v. Scranton (C. C.) 57 Fed. 71.

In reaching the conclusions arrived at with respect to the main proposition in the case, we have not overlooked the positions assumed by complainant upon the several other points. We have considered them deliberately, one and all, and will briefly refer to a few on which the learned counsel have dwelt. We may say, too, our examination has been had under the conviction that the transactions involved should be very closely scrutinized, and that it has devolved upon McMillin to show that his conduct was honest, candid, and free from wrong.

Let us refer to the argument that McMillin did not intend to install the first barrel machine at his own expense, but schemed to throw the burden of such charge upon the corporation. The books disclose that while the experiments were being carried on, McMillin's salary was accumulating in a sum far in excess of any cost of installation, and that although the corporation's checks were drawn in the first instance to meet expenses, the expense of installation, together with interest, was afterwards charged to McMillin and paid by him. The bookkeeping system was somewhat intricate, and it is true the charge against McMillin was not finally entered until 1894; but there is nothing to warrant the belief that the action of McMillin was wrong or that the entries in the books were false or intended to mislead the company or any of its shareholders, or did mislead them. It is urged that the organization of the Staveless Barrel Company was a colorable transaction, designed and executed by McMillin to shield himself against the alleged inconsistent position he occupied as general manager of the defendant company, in attempting to carry out the contract made with the board. But the Staveless Barrel Company was not organized until December 28, 1894, nearly two years after the contract and lease had been entered into between McMillin and the defendant company. McMillin's business affairs were then becoming somewhat extended, and he, and others interested with him, had a right to avail themselves of corporate organization if it was thought best; hence it becomes immaterial to this suit whether he incorporated his barrel-making business or conducted it individually, unless such action as he did take, either by itself, or in connection with other acts or circumstances and facts, bears in some way upon the question of his antecedent conduct in the acquisition of the barrel patent rights and the making of the contract and the lease with the defendant corporation. We can find no such relation, however, and the matter must therefore be disregarded.

It is said that because McMillin's salary was raised by the directors to \$12,000 per annum from January 1, 1895, such action was collusive and fraudulent, and was part of a design to enable McMillin to extract illegal gain from the defendant company with which to acquire the stock of his associates on the board. If this contention is sound, it must rest upon the premise that the collusion and fraud involved the members of the board of directors of the defendant company as well as McMillin himself. It is true that, when this salary was voted to McMillin, three of the four individual members of the board of

directors, who voted for the increase from \$6,000 to \$12,000, had contracted to sell all their shares, except one each to him; but they retained the stock as collateral, and reserved the power to control and vote the stock until the purchase price notes which had been given by McMillin, the purchaser, were paid. Of course, they were interested in the payment of the notes due by McMillin, but such interests were not incompatible or necessarily in conflict with their interests in the success of the corporation, which presumably were sufficient to prevent them from sacrificing its welfare or from corruptly wasting its funds. We find no satisfactory evidence upon which to base a conclusion that the trustees who voted to increase McMillin's salary acted either corruptly or under false motive. They were men of business standing, holding very responsible positions in mercantile affairs, and it is not at all reasonable to believe that their action as directors was prompted by any course other than careful regard for what seemed to them to be the interests of the corporation. *Rogers v. Nashville Ry. Co.*, 91 Fed. 229, 33 C. C. A. 517.

The point is made that McMillin was not in financial condition to buy the stock of his associate directors, which he agreed to purchase in 1894. It is beyond successful dispute that the sale by the shareholders to McMillin was in good faith. McMillin paid for the stock he purchased, partly in cash, and for the balance he gave notes. That he was in debt at the time of the purchase is indisputable, but the fact is proven that he had assets and credit other than his salary, and was enabled to make the payments for the stock in ways which were satisfactory to those who sold to him, and to do so without in any manner affecting the questions directly pertinent to this controversy. Granting that he used part of his salary from time to time to help pay his notes as they became due, that fact does not warrant a finding that the directors increased McMillin's salary in 1895 with the ulterior purpose in mind of giving McMillin means wherewith he could pay his stock purchase notes. In other words, under the evidence, McMillin's willingness to incur heavy debt to buy the stock does not carry with it an imputation of wrongdoing on his part, or on the part of those directors who voted to increase his salary.

Complaint is made that McMillin concealed from the minority stockholders all facts which would tend to throw light on the Staveless Barrel Company's transactions, and upon matters of pecuniary interest to his fellow trustees, and upon the ownership by him of the majority of the stock, and upon the question of his salary. Counsel's suggestions are partly met by the evidence which shows that in January, 1895, complainant, by his attorney, examined the barrel contract and lease and knew just what they contained. It also appears that in 1903 complainant employed an expert to examine the books of the defendant corporation, and that five months were consumed by the expert in going over the accounts and papers. He made report to the complainant. Inasmuch as McMillin's personal account was credited with the amount of his salary on the books of the corporation, it is impossible to believe that complainant did not know what salary was being paid. It is also a fair inference from *Mr. E. V. Cowell's*

evidence alone that in 1903 he well knew of the salary paid to McMillin. As to the reasonableness of the amount of the salary there is the circumstance that business men of sound judgment and large experience in and about Tacoma and Seattle testified that the salary of \$12,000 paid to McMillin after 1895 was not excessive, considering the value and extent of the corporation business (the plant had increased from a value of \$100,000 in 1886 to about \$750,000 when this suit was brought) and the degree of responsibility which went with its management.

McMillin is charged with deception and concealment at a stockholders' meeting in January, 1895, in withholding information from Mr. Cowell and his counsel, who there appeared. It appears, though, that at that meeting McMillin presented a full statement, copy of which is in the record, of the assets and liabilities of the company, as they existed on January 1, 1895. He and other directors say, too, that he answered many questions propounded orally by counsel and by Mr. Cowell. McMillin admits that he refused information to the Cowells at various times pertaining to questions of cost of manufacture, business of the agencies, contracts with customers and affairs relating to the defendant's creditors, because he felt that they wished to know such matters in order to use them against the company. His statement that the course he pursued was in pursuance of legal advice sought in an endeavor to prevent his company from being forced out by the Cowells is reasonable, and, whether his conduct was legally justifiable or not, it induces the opinion that it was prompted by no purpose other than protection of what he believed were the best interests of his corporation.

Suspicion is grounded on the fact that the first barrel contracts between McMillin and defendant company were renewed under the circumstances connected with the renewals. It appears that one of the renewals or extensions was dated May 7, 1897, and ran to April 1, 1903; another, the last, was dated January 26, 1903, and ran until 1908. Complainant is accurate in saying that a majority of the directors who authorized the renewals only owned 1 share each, when they voted to renew, having previously sold their holdings to McMillin, and that at the time of the renewals, the stock so previously purchased by McMillin had not been transferred on the books or reissued to McMillin. Failure on McMillin's part to have had the stock reissued to him is a circumstance against McMillin, but if his conduct and the actions of the board in authorizing the renewals were honest, as they were, and within the power of the board to take, as they were, and the contracts were not of disadvantage to the corporation, and they were not, this complainant was not wronged, and cannot complain of McMillin's failure to have had the stock transferred on the books. As to the last renewal in 1903, the board's action was ratified by the stockholders, all holders of stock having been previously notified of the stockholders' meeting. Here again, no fraud in fact or bad faith toward the corporation appearing, and the contracts themselves being of advantage to the company, these minority stockholders have not been wronged and cannot complain. It is insisted, however, that the directors were dummies when they voted for the renewals, because they

were elected by the vote of McMillin, the holder of the majority of the shares of stock. This must be considered in connection with all other evidence. In the sense that they owed their positions as members of the board to McMillin, complainant is correct; but, in the sense that they were mere creatures, willing or obligated to do McMillin's bidding, and to aid him in executing fraudulent designs, or knowingly to do any act beyond the law, or that was unfair or oppressive, or against the defendant company's interests, the contention is without merit. It is needless to do more than to state the elementary rule that the majority of the stockholders usually elect the directors, and that a corporation is represented by its directors, not by the stockholders. So, it is to the directors of a company that the management of its concerns and the power to make contracts are given. Nor does the fact that a director only owns one share in a corporation ordinarily alter the general rule by lessening the power vested in him as a director, the board of directors being expressly or impliedly authorized to do all acts which are proper to carry out the corporation's chartered purposes. Directors who administer the affairs of the corporation must always use the utmost diligence, good faith, and fairness to the minority shareholders, but this duty does not affect the principle that ownership of a majority of the capital stock of a corporation gives to the holders legal power to control the corporation, lay down its policies, make themselves, or those whom they select, its directors or agents, and fix their compensation. *Jesup v. I. C. R. R. Co.* (C. C.) 43 Fed. 483.

The fact that the defendant lime corporation apparently lost money between the years 1892 and 1897, and that the Staveless Barrel Company made money during that same time, would be significant if the facts or circumstances showed that the relation of one concern to the other was initiated in fraud, or, after being entered upon, became fraudulent in any way. But they do not. The lime company appears to have saved money in the item of barrels by its agreement to buy them at 30 cents; and the evidence of its losses in its lime business during the particular years mentioned shows that general business depression obtained at that time and bore heavily upon most commercial enterprises. The general results of the investment to the stockholders in the defendant lime company for the 16 years between 1888 and 1903 show a profit of \$290,000 on the original investment of \$100,000, and a profit each and every year except during the years of business dullness above mentioned.

Many of the cases cited by complainant's counsel in their brief upon the law are upon facts showing actual fraud. Among such are *Jackson v. Ludeling*, 21 Wall. 616, 22 L. Ed. 492; *Wheeler v. Abilene Bank Building Co.*, 159 Fed. 391, 89 C. C. A. 477, 16 L. R. A. (N. S.) 892; *Jones v. Missouri Edison Electric Co.*, 144 Fed. 765, 75 C. C. A. 631; *Barker v. Montana Co.*, 35 Mont. 351, 89 Pac. 66; *Miner v. Belle Isle Ice Co.*, 93 Mich. 112, 53 N. W. 218, 17 L. R. A. 412. The principles of law therein announced do not apply to the facts in the case under consideration.

The action of the Circuit Court in dismissing the bill was right, and the decree is affirmed.

WINTERS v. BALTIMORE & O. R. CO.

(Circuit Court of Appeals, Sixth Circuit. January 4, 1910. On Petition for Rehearing, March 29, 1910.)

No. 1,924.

1. MASTER AND SERVANT (§ 286*)—ACTION FOR INJURY TO EMPLOYÉ—NEGLIGENCE—QUESTION FOR JURY.

Plaintiff, as an employé, was being carried with others on a work train along a switch track of defendant's railroad incidentally to his employment, when the car on which he was riding was derailed by striking a loose plank at a crossing, and plaintiff received an injury for which he brought suit. The crossing had been in for several years, and the track there had recently been repaired; but it appeared that both before and after the repairs the planks and other materials used in making the crossing were not spiked down, but left loose and were liable to be moved out of place by crossing wagons. *Held* that, aside from any question of presumption arising from the accident itself, there was sufficient evidence to require the submission of the question of defendant's negligence to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1021-1022; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 198*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—FELLOW SERVANTS.

A member of a floating track gang on a railroad, which was carried by a work train to and from its places of work, was not a fellow servant with the employé charged with the duty of keeping the track in a safe condition for the passing of trains, which duty was that of the master, and was not precluded from recovering from the railroad company for an injury resulting from the defective condition of the track.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 493-514; Dec. Dig. § 198.*]

3. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

When, in an action to recover damages for a personal injury, the inference to be drawn from the facts is not so plain as to make it a legal conclusion that the plaintiff was guilty of contributory negligence, the question must be left to the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

4. NEGLIGENCE (§§ 68, 82*)—CONTRIBUTORY NEGLIGENCE AS PROXIMATE CAUSE OF INJURY.

To constitute contributory negligence, which will prevent a plaintiff from recovering for the negligence of defendant resulting in his injury, there must have been a want of ordinary care on his part, combining and concurring with the negligence of defendant, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 92, 112; Dec. Dig. §§ 68, 82.*]

5. NEGLIGENCE (§ 59*)—PROXIMATE CAUSE OF INJURY—NATURAL AND PROBABLE CONSEQUENCES.

To warrant a finding that negligence or an act not amounting to wanton wrong was a proximate cause of an injury, it must appear that the injury was the natural and probable result of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 72; Dec. Dig. § 59.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. NEGLIGENCE (§ 136*)—ACTIONS—QUESTIONS FOR JURY—PROXIMATE CAUSE OF INJURY.

The question as to what was the proximate cause of an injury is ordinarily one of fact, for the jury to determine in view of the surrounding circumstances.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 327-332; Dec. Dig. § 136.*]

7. MASTER AND SERVANT (§ 289*)—ACTION FOR INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—WHEN QUESTION FOR JURY.

Plaintiff, a track hand employed on defendant's railroad, while being carried with others on a work train in the course of his employment along a switch track, was injured by the derailment of the car on which he was riding, caused by its striking a plank used in making a crossing, and which was not spiked down, and had become displaced, and lay across the rail. The train was moving at a speed of only five or six miles an hour, and plaintiff was sitting on the top of one of the work cars with a brakeman, while his fellow workmen were inside another car and were not injured. It appeared that the workmen were in the habit of riding on the tops of the cars, as well as inside, to the knowledge of the foreman and conductor, who made no objection. *Held*, that in view of such fact, and that the train was moving on a switch track at a slow speed, plaintiff could not be held as matter of law to have been guilty of contributory negligence, but that the question was one for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

On Petition for Rehearing.

8. TRIAL (§ 165*)—DIRECTION OF VERDICT—INFERENCES FROM EVIDENCE.

On a motion by defendant for direction of a verdict, the court should not draw inferences from the proof against the plaintiff in matters which may be subject to reasonable explanation, or exclude from consideration an explanatory hypothesis favorable to the plaintiff and consistent with the evidence; but, on the contrary, the plaintiff is entitled to the benefit of every inference in his favor which may fairly be drawn from the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

9. MASTER AND SERVANT (§§ 101, 102, 229*)—PLACES TO WORK—CARE REQUIRED OF MASTER AND SERVANT RESPECTIVELY.

Because it is the primary duty of a master to use reasonable care to see that the place where the servant is required to work is safe, on the performance of which the servant has the right to rely, while both are required to use reasonable care, the master is bound to a higher degree of care than the servant to know the condition of such place.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171-184, 674-683; Dec. Dig. §§ 101, 102, 229.*]

10. MASTER AND SERVANT (§ 288*)—ASSUMPTION OF RISK—WHEN QUESTION FOR JURY.

In an action by a track hand on a railroad to recover for an injury caused by the derailment of a car on which he was riding in connection with his work, caused by the defective condition of the track, where the evidence did not show clearly and conclusively that plaintiff knew the condition of the track, or that he was working up to the time of the injury in such proximity to the place that its condition was plainly observable to him, the question of his assumption of the risk was one for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Action by Edward Winters against the Baltimore & Ohio Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

See, also, 163 Fed. 106.

Frank S. Monnett, for plaintiff in error.

Frank A. Durban, for defendant in error.

Before WARRINGTON, Circuit Judge, and McCALL and SANFORD, District Judges.

SANFORD, District Judge. This is an action brought by the plaintiff in error, Winters, against the defendant railroad company, to recover damages for personal injuries sustained by him through the alleged negligent derailment of a car in a work train of the defendant on which Winters was riding. At the close of the testimony offered by the plaintiff, the defendant moved the court to direct a verdict in its favor on the ground, in effect, that the testimony failed to establish its negligence and showed that the plaintiff was guilty of contributory negligence. The court, while of opinion that there was evidence to go to the jury of the defendant's negligence, sustained the motion on the ground that the plaintiff had been guilty of contributory negligence and directed a verdict in the defendant's favor.

The errors assigned all relate to the action of the court in thus directing the verdict. The material facts appearing from the testimony are as follows:

The plaintiff, Winters, was a section hand in the employ of the defendant company as a member of a "floating gang" of about 20 men engaged in repairing track at different points along the line of road, in a section about 33 miles long, extending from Columbus to Newark, Ohio. In doing this work they were carried from point to point on the road in a work train, consisting of an engine, caboose, and two box cars, or camp cars, and other cars when needed. This work train took the men back and forth to and from Pataskala, their headquarters, where they stayed at night. The plaintiff, who had been a member of this gang several months, testifies that he "most generally rode any place" on this train; that whenever they got ready to go, the section foreman would tell them to "get on," without saying where, and they got on wherever they could; that he and the other men rode any place on the train, and rode on top of the cars about all the time when going backwards and forwards; that this was done in the presence of the section foreman, who himself rode up there with them, while the train conductor would also always see them up there, although he did not ride up there himself; and that they had kept this up all summer.

On the day of the accident, November 15, 1905, the work train had been hauling stone in flat cars at Union Station, but in the afternoon took off the flat cars at Summit Station, leaving only the engine, caboose, and the two camp cars, and went to Taylor's. At Taylor's the work train backed in on a switch about three-fourths of a mile in length leading to a tile or brick plant, and ran northward on this

switch in order to get some Italian laborers working in there, ditching the track; the purpose being after getting them to go back home to Pataskala, which was about eight miles away. In backing in on this switch the engine was farthest south; next, the caboose; next, the camp car of the Italians; and, last, the camp car of the "floating gang," which was at the north or front end of the train as it backed in.

In running from Summit to Taylor's, Winters had ridden in the caboose; but when the train stopped to let them in on the switch he got out of the caboose and climbed up on top of the camp car of his gang, at the north or front end of the train, as it backed in. He found the brakeman on top of this car, and they continued to ride on top together. All the other members of the work crew were in their camp car. It was then about 4:45 p. m., and just about dusk. The train was running about five or six miles an hour. At the time of the accident the train was running northwestwardly. Winters and the brakeman were looking west toward the brickyard. When near the brickyard the brakeman said there was a plank on the track, "right onto it, the way he talked," and halloed, "jump." The brakeman then jumped from the car, and Winters jumped after him in the same direction. The north or front trucks of the camp car on which he was riding were thrown off of the track; and while the brakeman jumped clear of the train, Winters landed between the tracks, and his leg was caught about the knee, and run over by the south trucks of the car, which did not leave the rails; the train stopping in a short distance after the north pair of trucks left the rails. His leg was so badly crushed that it had to be amputated. The other members of the "repair gang" riding inside of the camp car appear not to have been injured.

A subsequent examination of the track showed that just at the point where the switch track was crossed by a wagon road that led across to the brickyard, part of the material in the crossing had been carried off to the north, including a plank six or eight feet long, about two inches thick, and six to eight inches wide, which was found lying crosswise of the track, across one rail, at the north end of the camp car, from six inches to a foot from the north trucks; this plank having some splinters knocked off and showing fresh wheel marks. It further appeared that the switch track leading from Taylor's to the brickyard had been there for some five or six years, since the brick plant was started, and was used by the railroad company every day to take brick out from the brick plant, running some five or six trains every day. The road crossing at which the derailment occurred had been there for some years. It was the crossing that gave access to the brick plant, and was also used generally by the people who lived across the switch track, and crossed daily by a number of foot passengers and two or three wagons.

A short time prior to the accident this switch track had been raised at this point by the gang to which Winters belonged. They had worked on the track a couple of weeks altogether, off and on, and had worked close to this crossing for several days, raising the track along there from six inches to a foot. One witness states that they had been working there from two weeks to eight days before the accident; an-

other that they had worked there up to the time of the accident. It further appeared that there had formerly been thrown in this crossing planks of different lengths, ties, and fence rails; that when the "floating gang" began work at the crossing they threw this material out, and after they had raised the track they put back the old planks, ties, and fence rails in the crossing, without spiking or nailing down either the planks or fence rails; and that after this repair work had been done these planks and rails remained as before, so loose that when a buggy passed over the crossing they would flop up and down, and would give up and down when a footman passed over. There is evidence that they were loose in this way for several days before the accident, and one witness testifies that on the morning of the accident the condition of these loose planks and rails was such that when he crossed with his buggy he did not feel like riding across and got out and led his horse over. Winters himself states that when the foreman of the "floating gang" had them throw back the planks, ties, and rails in the crossing, he "never heard him order it spiked down." It does not appear, however, how many days this was before the accident, or whether Winters was one of the last men to work there, or whether he knew that no further work had been done at the crossing since that time, or whether this track was inspected by any other employés of the company after the "floating gang" finished working there.

Under these facts we are of opinion that the court was in error in directing a verdict in defendant's favor.

1. There was clearly evidence tending to show negligence on the part of the defendant in leaving this track in the condition in which it was at the time the derailment of the car occurred. The court below, in the opinion on the plaintiff's motion for a new trial, expressed, inferentially at least, the opinion that the plaintiff was a passenger at the time of the accident, and that the proof of the derailment and the plaintiff's injury were prima facie proof of the defendant's negligence. The defendant earnestly insists, however, that the plaintiff is not to be regarded as a passenger at the time of the accident, but that under the doctrine laid down by this court in *Louisville & N. R. Co. v. Stuber*, 108 Fed. 934, 48 C. C. A. 149, 54 L. R. A. 696, he must be regarded as being carried to and from his place of work as a servant of the railway company, and not as a passenger, and that hence, under the doctrine of *Texas & P. R. Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136, and *Patton v. Texas & P. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, as the plaintiff occupied the relation of an employé at the time of the accident, no presumption of negligence arises from the mere fact of the accident.

While it seems fairly inferable from the facts appearing in the record that the members of the "floating gang" were being carried to and from their place of work as a necessary incident to the discharge of the duties of their peculiar employment, and not for a purpose disconnected with that employment, so that under the doctrine of the *Stuber Case* they should be regarded as being carried as employés, rather than as passengers, we are of opinion that, independently of this

question and of any presumption of negligence that might have arisen from the relation of carrier and passenger, there was sufficient affirmative evidence tending to show negligence in the repair and maintenance of the track at the road crossing to have required the case to have been submitted to the jury on this question. It is clear that, even if Winters was being carried as a servant in the discharge of his duty and as an incident of his employment, the negligence of the employé charged with the master's personal and positive duty of maintaining the road-bed in safe condition for the performance of the work required of the servants, would not be negligence of a fellow servant, under the fellow servant doctrine, but negligence of the master for which it would be responsible. *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *Gardner v. Railroad*, 150 U. S. 349, 355, 14 Sup. Ct. 140, 37 L. Ed. 1107; *Swift v. Short* (C. C. A., 8th Cir.) 92 Fed. 567, 34 C. C. A. 545; *Snow v. Railroad*, 8 Allen (Mass.) 441, 85 Am. Dec. 720; *Ford v. Railroad Co.*, 110 Mass. 241, 14 Am. Rep. 598. See, also, the opinions of this court in *Valley Ry. Co. v. Keegan*, 87 Fed. 849, 31 C. C. A. 255, *Herrick v. Quigley*, 101 Fed. 187, 41 C. C. A. 294, and *Lake Shore Ry. Co. v. Eder* (decided Dec. 7, 1909) 174 Fed. 944, 948.

2. We are of the opinion that under all the circumstances of this case the court was in error in holding, in effect, that the evidence established as matter of law the contributory negligence of the plaintiff, so as to require that this question be withdrawn from the consideration of the jury and peremptory instructions given in defendant's favor. When, in an action to recover damages for personal injuries, the inference to be drawn from the facts is not so plain as to make it a legal conclusion that the plaintiff was guilty of contributory negligence, the question whether he was or was not so guilty must be left to the jury. *Northern Pacific Railroad v. Egeland*, 163 U. S. 93, 16 Sup. Ct. 975, 41 L. Ed. 82.

Contributory negligence has been well defined as a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred. 7 Am. & Eng. Enc. Law (2d Ed.) 371; *Alaska Gold Mining Co. v. Keating* (C. C. A., 9th Cir.) 116 Fed. 561, 566, 53 C. C. A. 655; *Alabama Gaslight Co. v. Railroad Co.*, 86 Ala. 372, 5 South. 735; *Moakler v. Railway Co.*, 18 Or. 189, 22 Pac. 948, 6 L. R. A. 656, 17 Am. St. Rep. 717; *Woodell v. Improvement Co.*, 38 W. Va. 23, 40, 17 S. E. 386. See, also, 1 Beach on Cont. Negl. § 7; *Missouri Pacific Ry. Co. v. Moseley* (C. C. A., 8th Cir.) 57 Fed. 921, 925, 6 C. C. A. 641; *Southern Bell Tel. & Tel. Co. v. Watts* (C. C. A., 4th Cir.) 66 Fed. 460, 466, 13 C. C. A. 579; *Motey v. Marble & Granite Co.* (C. C. A., 8th Cir.) 74 Fed. 155, 157, 20 C. C. A. 366; *Plant Inv. Co. v. Cook* (C. C. A., 5th Cir.) 74 Fed. 503, 20 C. C. A. 625. In 7 Am. & Eng. Enc. Law (2d Ed.) 375, it is said:

"These elements of contributory negligence, namely, the want of ordinary care and the proximate causal connection of that want of care with the injury, being considered in their order, we find the doctrine established by an overwhelming weight of authority that there must have been a want of ordinary care, under the circumstances of the case, contributing to the injury as

an efficient and proper cause thereof, before contributory negligence can exist"—citing many cases in support of this proposition.

However, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable cause of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. *Milwaukee Ry. Co. v. Kellogg*, 94 U. S. 469, 475, 24 L. Ed. 256; *Scheffer v. Railroad Co.*, 105 U. S. 249, 252, 26 L. Ed. 1070; *Missouri Pac. Ry. Co. v. Moseley*, *supra*; *McDonald v. Snelling*, 14 Allen (Mass.) 290, 92 Am. Dec. 768. See, also, *St. Louis Railway Co. v. Bennett* (C. C. A., 8th Cir.) 69 Fed. 525, 16 C. C. A. 300.

The question as to what is the proximate cause of an injury is ordinarily one of fact, for the jury to determine in view of the accompanying circumstances. *Milwaukee Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Southern Pac. Co. v. Yeargin* (C. C. A., 8th Cir.) 109 Fed. 436, 439, 48 C. C. A. 497.

Under all the circumstances of this case, especially in the absence of clear proof that Winters knew or had reason to know that this crossing had not been put in safe condition after he saw the last work done upon it, and in view of the previous habit of the employes of riding upon the top of the camp car with the knowledge both of the section foreman and the train conductor, under such circumstances that a license to ride upon the top of the car may, it seems, be fairly implied (*Ellsworth v. Metheney*, 104 Fed. 119, 122, 44 C. C. A. 484, 51 L. R. A. 389), and in view of the fact that the train was moving at a slow rate of speed upon a switch track, we are of opinion that the evidence, as a whole, did not warrant the conclusion, as a matter of law, that the plaintiff was guilty of negligence in riding upon the top of the car which contributed to the injury as one of its proximate causes, and that it should have been left to the jury to determine whether in thus riding upon the top of the car he was under the circumstances guilty of negligence of which the injury received was a natural and probable consequence which ought to have been foreseen in the light of the attending circumstances, so as to make it a proximate cause of the injury and bar any recovery to which he might otherwise have been entitled.

The present case is, in our opinion, clearly distinguishable from those of *Railroad Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506, and *Eric Railroad Co. v. Kane*, 118 Fed. 223, 55 C. C. A. 129, upon which the defendant chiefly relies.

In *Railroad v. Jones*, *supra*, in which it was held that a laborer, who was riding on the pilot of a locomotive, without knowledge of any agent of the railroad company, and after he had been on several occasions forbidden to ride there, and was injured in a collision with another train, was guilty of contributory negligence that barred recovery, the plaintiff's position on the pilot, as said by Mr. Justice Swayne in delivering the opinion of the court, was "next to the cowcatcher, and obviously a place of peril, especially in case of a collision." And in the subsequent case of *Northern Pacific Railroad v. Egeland*, 163 U. S. 93, 96, 16 Sup. Ct. 976, 41 L. Ed. 82, this case and

that of *Kresanowski v. Northern Pacific Railroad* (C. C.) 18 Fed. 229, were distinguished by the court in these words:

"The persons injured in those cases were seated in the first case on the pilot of the engine, and in the other on the front beam of the engine, with his feet over the pilot. The positions were most dangerous, and the danger was plain and obvious at the first sight. No other place on either train was as dangerous. The great and obvious danger of the positions in which the plaintiffs voluntarily placed themselves is the material and controlling fact upon which the cases were decided."

In *Erie Railroad Co. v. Kane*, supra, it was held by this court that where the fireman on a switch engine, while it was running with several cars in front of it, had without reasonable cause left his proper place in the cab, and was riding on the front of the engine, engaged in cleaning the number below the headlight, when this work was not required, or even authorized, and while so engaged was killed as the result of a collision with another switch engine, his own contributory negligence barred recovery. This holding was, however, plainly rested in the opinion upon the rule of "obvious" danger laid down in the *Jones*, *Kresanowski* and *Egeland* Cases; it being stated in the opinion of the court (page 233 of 118 Fed., page 139 of 55 C. C. A.) that riding upon the front of the engine—

"is so dangerous that it must be regarded that it is negligence for one to be there under such circumstances. In the event of a collision there is no place so dangerous for one to be as between cars, or between a car and an engine, as here, except it be on the front of the engine with no cars in front of it."

The facts in the present case are materially different from those in the *Jones* and *Kane* Cases, both in the obvious danger of the position assumed, a position on the top of a car being less dangerous than one on the front of an engine, and in the proximate character of the negligence as a cause of the injury, there being evidently more ground for reasonably anticipating an injury from a collision by riding upon the front of an engine than for apprehending injury from derailment by riding upon the top of a car.

The same distinction applies to many other of the cases relied on by the defendant, in which the proximate causal connection between the negligence and the injury received was more clear and direct than in the case at bar, as, for example, in *Atchison Railroad Co. v. Lindley*, 42 Kan. 714; 22 Pac. 703, 6 L. R. A. 646, 16 Am. St. Rep. 515, in which a person riding on the top of a car was injured by a sudden jerk of the train, and *Ft. Scott Ry. Co. v. Sparks*, 55 Kan. 288, 39 Pac. 1032, in which a person riding on the top of a caboose was injured by being knocked off by an overhead bridge.

It is true that in *Little Rock v. Miles*, 40 Ark. 298, 48 Am. Rep. 10, it was held that a driver riding on the top of a cattle car, and injured by derailment of the train, was barred from recovery by his contributory negligence; it being said in this case that a passenger who voluntarily and unnecessarily rides upon the top of a car is not in the exercise of that discretion which the law requires. This expression has been repeated in other cases. We do not, however, concur in this as the statement of a general rule of law applicable in all cases, and as implying that a person riding upon the top of a car, without regard to the

speed of the train, the character of the road and other circumstances, is necessarily, as a matter of law, to be held guilty of negligence which contributes as a proximate cause of an injury resulting from a derailment of the train or other like cause.

The case will accordingly be remanded to the court below, with directions to set aside the judgment in favor of the defendant and grant the plaintiff a new trial.

On Petition for Rehearing.

We are of the opinion that the petition which has been filed in behalf of the defendant in error does not present sufficient grounds for a rehearing.

1. While the plaintiff's amended petition in the Circuit Court, stating his cause of action, is somewhat inartificially drawn, the allegation that the "defendant was negligent and careless in failing to furnish a safe and secure track to convey said plaintiff to and from his work for the purpose of running said train backward," etc., when read in connection with the other averments of the amended petition, is, we think, sufficient to bring the question of the defendant's negligence in leaving the track at the road crossing in the condition in which it was at the time the derailment occurred fairly within the scope of the pleadings. And it was evidently so treated in the court below by all parties and tried on that theory; no exception having been made to the introduction by the plaintiff of evidence as to the condition of the track.

2. After a careful re-examination of the evidence as to Winters' knowledge of the condition of the track at the time of the accident, we think that the reference in our former opinion to "the absence of clear proof that Winters knew, or had reason to know, that this crossing had not been put in safe condition after he saw the last work done upon it," is warranted by the evidence. While it does appear that the floating gang to which Winters belonged had worked on the switch track about two weeks, probably up to the day of the accident, it does not definitely or clearly appear when they did the work at the road crossing. While one witness states generally that before the accident they had worked at the road crossing, or close to it, for eight or ten days, owing to the ambiguity of his language, especially in the use of the words "before" and "there," it does not clearly or satisfactorily appear whether they had continued working at or near this point up to the day of the accident, or had ceased working at this point some days before. A like ambiguity exists in Winters' own statement that the rails and plank in the crossing had been in that shape "all the time they worked down there"; it not being clear whether he refers to its condition prior to the time that he worked on it, or afterwards, especially in view of the fact that he fails in this answer to respond specifically to the first part of the question inquiring "how long they left it in this shape." There is, furthermore, no specific evidence as to whether Winters was one of the last men to work at the crossing, or whether, after the time when he states that the plank and other material was thrown back in the crossing, he continued to work at the crossing or so near thereto as to make its condition clearly observable by him. And in the vague condition of the testimony we cannot regard

his statement that he never heard the foreman order the planks and material to be spiked down as necessarily involving the inference that all the work was then completed at the crossing, or that he knew, or had reason to know, that thereafter its condition was left unchanged up to the time of the accident. We are therefore of the opinion that the testimony is not sufficient, when considered upon the defendant's motion for peremptory instructions, to necessarily charge Winters with knowledge of the condition of the crossing at the time of the accident.

The contention of the defendant that, in passing upon the motion for peremptory instructions, no inference should be drawn that Winters may not have had knowledge as to the condition of the track at the time of the accident, is, we think, unsound, in that it asks the court, on defendant's own motion for peremptory instructions, to resolve all doubt as to the testimony against the plaintiff, to exclude an inference favorable to the plaintiff fairly consistent with the testimony, and to hold him necessarily chargeable with notice of the condition of the track at the time of the accident because it appears that he had knowledge of its condition an indefinite number of days before the accident, when, so far as is definitely shown, the work at the crossing may not have been completed, and in the absence of clear proof that he continued from that time to the day of the accident to work at the crossing or so near thereto that its condition was plainly apparent to him.

That, however, the court on the defendant's motion for peremptory instructions should not draw conclusive inferences from the proof against the plaintiff in matters which may be subject to reasonable explanation, or exclude from consideration an explanatory hypothesis favorable to the plaintiff and consistent with the evidence, is shown by the case of *Kane v. Northern Central Ry.*, 128 U. S. 91, 95, 9 Sup. Ct. 16, 32 L. Ed. 339, in which the question was whether peremptory instructions had been properly given in favor of the defendant on the ground of the contributory negligence of the plaintiff, a brakeman, who, after observing that a step was missing from one of the cars, had been injured in subsequently attempting to let himself down from it to reach another car. The testimony showed that at the moment the plaintiff let himself down from the top of the car he forgot that the step was missing; the plaintiff himself testifying that he could not remember how his mind was occupied at the time, and that his mind was only on going to his post. While, however, he did not claim in his evidence that there was anything which prevented him from recognizing this car as the one upon which he knew that a step was missing, the court, in holding that peremptory instructions for the defendant had been erroneously given, said:

"In the case before us, the jury may, not unreasonably, have inferred from the evidence that while the plaintiff was passing along the tops of the cars, for the purpose of reaching his post, he was so blinded or confused by the darkness, snow, and rain, or so affected by the severe cold, that he failed to observe, in time to protect himself, that the car from which he attempted to let himself down was the identical one which, during the previous part of the night, he had discovered to be without its full complement of steps."

We are of opinion, under the authority of this case, and under the general rule stated by this court in *Mt. Adams, etc., Ry. Co. v. Lowery*, 74 Fed. 463, 20 C. C. A. 596, that it is the duty of the court, when a motion is made to direct a verdict, to take that view of the evidence most favorable to the party against whom the motion is directed, that, giving to the plaintiff the benefit of every inference that can fairly be drawn from the testimony, it is not necessarily to be inferred in favor of the defendant, from the meager and indefinite testimony in this case, that the plaintiff either knew, or had reason to know, that the condition of the track had remained unchanged from the time he is shown to have worked upon it until the time of the accident.

3. The defendant's argument that if the plaintiff was guilty of negligence in reference to the condition of the track, which was a proximate cause of the injury, Winters must necessarily also have been guilty of negligence contributing as a proximate cause of the injury, furthermore fails to take into account, first, the fact that Winters' contributory negligence is to be determined, not merely by such knowledge as he may have had of the condition of the track, but also by the rate of speed at which the train was moving and all the other surrounding circumstances at the time of the accident, and, second, the different degree of care required of the master and servant in reference to discovering or knowing the dangerous condition of a place of work. In *Railway Co. v. Jarvi* (C. C. A., 8th Circuit) 53 Fed. 65, 3 C. C. A. 433, the court said, in reference to this last question:

"But the degrees of care in the use of a place in which work is to be done, or in the use of other instrumentalities for its performance, required of the master and servant in a particular case, may be, and generally are, widely different. Each is required to exercise that degree of care in the performance of his duty which a reasonably prudent person would use under like circumstances; but the circumstances in which the master is placed are generally so widely different from those surrounding the servant, and the primary duty of using care to furnish a reasonably safe place for others is so much higher than the duty of the servant to use reasonable care to protect himself in a case where the primary duty of providing a safe place or safe machinery rests on the master, that a reasonably prudent person would ordinarily use a higher degree of care to keep the place of work reasonably safe, if placed in the position of the master who furnished it than if placed in that of the servant who occupies it."

This statement was quoted and approved by Judge Taft in delivering the opinion of this court in *Norman v. Wabash R. Co.*, 62 Fed. 727, 729, 10 C. C. A. 617.

4. It is unnecessary to determine whether under the rule stated in *Adams v. Shirk* (C. C. A., 7th Circuit) 104 Fed. 54, 43 C. C. A. 407, and the practice of this court, as stated by Judge Lurton in *Louisville & N. R. Co. v. Womack*, 173 Fed. 752, 97 C. C. A. 559, decided November 2, 1909, the defendant, not having included the defense of assumption of risk as one of the grounds for the motion for peremptory instructions in the court below, can rely on this defense in this court for the purpose of sustaining the action of the trial judge in granting the peremptory instructions, since we are of opinion that, as above stated, the proof taken as a whole fails to show clearly and conclusively either that Winters either knew that the work on the track at the crossing had

been completed and that it remained in the condition in which he had seen it up to the time of the accident, or that he worked thereafter in such proximity to this crossing that its condition was plainly observable to him, so as to bring the case, on the motion for peremptory instructions, within the doctrine of the assumption of risk by continuing in service without objection, as stated in *Texas & P. Ry. Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188, and *Choctaw Ry. Co. v. McDade*, 191 U. S. 64, 68, 24 Sup. Ct. 24, 48 L. Ed. 96, even if the language of those cases is to be considered as relating to the opportunity of the employé to observe the condition of the defective appliances, rather than to the obvious character of the defect itself.

5. On the whole we are of the opinion that to support the defendant's contention as to the contributory negligence of the plaintiff, or his assumption of risk, would, in the present condition of the record, require the court to weigh the evidence, in contravention of the rule stated by this court in *Mt. Adams, etc., Ry. Co. v. Lowery*, *supra*, and that the evidence is not such as to clearly and satisfactorily establish either of these defenses as matter of law.

The petition for rehearing is accordingly denied.

UNITED STATES v. CONKLIN et al.†

(Circuit Court of Appeals, Ninth Circuit. February 7, 1910.)

No. 1,751.

PUBLIC LANDS (§ 120*)—SUIT BY UNITED STATES FOR CANCELLATION OF PATENT—GROUNDS.

The United States cannot maintain a suit for the cancellation of a patent to public lands patented in lieu of other lands within a forest reservation conveyed to it in exchange, on the ground that such conveyance was procured from the owners by means of false representations made to them by a third party, where it is not shown that such owners were defrauded, that the United States did not acquire a good title to the reserve lands, or that it has sustained or will sustain any pecuniary loss or injury.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 120.*]

Appeal from the Circuit Court of the United States for the Northern District of California.

In Equity. Suit by the United States against Mollie Conklin, W. H. Metson, administrator with the will annexed of the estate of Patrick Reddy, deceased, Sybil Coleman, personally and as administratrix of the estate of Emily M. Reddy, deceased, B. B. Jackson, personally and as executor of the last will of Carolyn S. Reddy, deceased, John Reddy, and Katherine Mahar (née Reddy), C. L. Hovey, and Thomas B. Walker. Decree for defendants (169 Fed. 177), and complainant appeals. Affirmed.

Robert T. Devlin, U. S. Atty., and George Clark, Asst. U. S. Atty. N. E. Conklin and A. E. Bolton, for appellees.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied March 7, 1910.

HUNT, District Judge. The United States brought this suit to annul and set aside a patent issued by the United States to Mollie Conklin and Emily M. Reddy, as executrix, and Edward A. Reddy, as executor of the last will and testament of Patrick Reddy, deceased, for the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 8, township 39 North, and the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 18, township 40 North, of range 8 East, of the Mt. Diablo Meridian in California, containing 200 acres of land, upon the ground that the same had been obtained by fraud. Certain of the defendants demurred. The court sustained the demurrer, and decreed a dismissal of the bill. Complainant appeals.

The case as made by the complainant in its bill is substantially as follows: In August, 1900, Mollie Conklin was the owner of an undivided one-half interest, and Emily M. Reddy and Edward A. Reddy, as devisees under the last will and testament of Patrick Reddy, deceased, each owned, subject to administration of the estate of said deceased, an undivided quarter interest in some 9,000 acres of land, known as the "Monache Lands," situated in Tulare and Inyo counties, and within the Sierra Forest Reserve, in the state of California. An oral agreement for the sale of said lands to one John A. Benson was made at that time at the office of Messrs. Campbell, Metson & Campbell, attorneys, at San Francisco, Cal., between Benson and Mollie Conklin and Emily M. Reddy, the latter agreeing to sell to said Benson, and said Benson agreeing to purchase, within 90 days, the said lands at a price of \$3.80 per acre. It was agreed that the lands might be purchased in parcels, and separate deeds for different parcels should be executed, and the law firm of Campbell, Metson & Campbell were to act for both Mollie Conklin and Emily M. Reddy in the preparation of said deeds, and in attending to their execution and delivery in accordance with the agreement as made between the parties. Deeds were to be executed by the owners to Benson, to be placed and held in escrow, and delivered to Benson upon the payment of the purchase price at the rate of \$3.80 per acre, but no deeds were to be delivered until such payments were made. Mollie Conklin and Emily M. Reddy were both far advanced in years, and their mental faculties had become greatly impaired by reason of old age. They relied upon the members of the law firm of Campbell, Metson & Campbell, in whom they had reposed great confidence and trust, to see to it that the agreement of sale was carried out according to its terms and provisions. It is then alleged that subsequent to the making of said agreement Benson forwarded to Mollie Conklin and Emily M. Reddy, by an unknown person, but who was acting under the directions of said Benson, a large number of instruments for execution. He represented to said Mollie Conklin and Emily M. Reddy that he brought the instruments from the office of Campbell, Metson & Campbell, and that they were the deeds which were to be executed by them in pursuance of the agreement made in the month of August, 1900; that they had been prepared by said firm of attorneys; that said Mollie Conklin and Emily M. Reddy should sign them and return them by bearer to said attorneys, whom he claimed to represent in the matter as their agent. It is alleged, generally, that

these representations were false, and known, by the person making them and by said Benson, to be false, and were made for the purpose of taking advantage of said Mollie Conklin and Emily M. Reddy and of the trust and confidence reposed by them in their attorneys, and in order to cause to be violated the terms of their said agreement, and to procure from them their said lands, other than in accordance with their said agreement, and contrary to their will, wish and consent; that Mollie Conklin and Emily M. Reddy signed the instruments, without reading or examining the papers before doing so, relying upon said representations and believing them to be true, and believing that they were acting upon the advice of their attorneys, and that they were carrying out their agreement with Benson, and that they would not have signed them if said false representations had not been made. The instruments were in part deeds, purporting to convey and relinquish to the United States the "Monache Lands," in part lieu selections in blank, containing no description of the lands therein selected or of the land relinquished, and in part powers of attorney in blank, undated, and without the name of any attorney mentioned therein. One of said deeds was for a tract of 200 acres of the "Monache Lands," and one of said lieu selections was made use of as the means of procuring an equal amount of land, for which the patent, herein sought to be annulled, was afterwards issued, in exchange for the tract conveyed to the United States. After the execution of these instruments by Mollie Conklin and Emily M. Reddy in the manner stated, they were delivered and surrendered, by the person who had brought them, to Benson, and placed under his control, contrary to the will, wish, consent, or agreement of said Mollie Conklin and Emily M. Reddy, and without paying to them "any sum on account of his said receipt and control thereof." It is further alleged that Benson caused the deed to be delivered to the United States in pursuance of the laws, rules, and regulations of the Department of the Interior permitting the surrender of lands within forest reserves to the United States, and the selection of other lands in lieu thereof, together with an abstract of title; that the deed was never acknowledged by the grantors, but that the certificate of acknowledgment appearing thereon was falsely made and forged. A lieu selection of land of an equal amount as that described in the deed was thereupon filed and approved, and patent therefor issued on July 22, 1902, to said Mollie Conklin and Emily M. Reddy, as executrix, and Edward A. Reddy, as executor of the last will and testament of Patrick Reddy, deceased, and the patent delivered to said Benson and the defendant C. L. Hovey, all of which, it is alleged was done without the knowledge or consent of, and without any authority from, the said Mollie Conklin and Emily M. Reddy.

Prior to the approval of said lieu selection, C. L. Hovey, pretending to act under a power of attorney to him from Mollie Conklin and Emily M. Reddy, conveyed the lands described in the patent to the defendant Thomas B. Walker. It is alleged that the said Hovey had no authority to do so, and that the filling in of the blanks in the power of attorney under which the conveyance was made, was wholly unauthorized, and said Mollie Conklin and Emily M. Reddy never know-

ingly or intentionally executed said power of attorney, except under the supposition and belief that the same was a deed prepared by their attorneys in accordance with the agreement made in August, 1900; that Emily M. and Edward A. Reddy had no authority to convey any of the estate of Patrick Reddy, deceased, except by authority of the superior court of the state of California, which had never been obtained; that the name of Edward A. Reddy appears signed to all of said instruments, but complainant is not advised or informed as to the circumstances under which said Edward A. Reddy signed the same. It is alleged that the administration of the estate of Patrick Reddy had not been brought to a close, and that the expenses of administration have not been paid; that claims aggregating a large amount have been allowed and approved against said estate, which have not been paid, and that the lands conveyed to the United States are subject to the payment of such expenses, claims and debts against said estate; that the officers of the complainant, in approving said lieu selection and issuing said patent, acted inadvertently and through a mistake in assuming that the said deed from Mollie Conklin and Emily M. and Edward A. Reddy conveyed a complete title. It is alleged that Benson paid to Mollie Conklin certain sums of money aggregating between \$2,000 and \$3,000, which were accepted by her under the mistake and belief that the same were paid in pursuance and in execution of the agreement of August, 1900; that prior to the commencement of this suit, and upon discovery of the facts stated, she offered to return the moneys received by her to said Benson, upon a return to her of her interest in the lands by her surrendered to the United States, and is desirous and will, on return to her of said lands, return said money to Benson, or his assigns, or the person entitled thereto; that the United States desires that any title it may have to said lands may be, by decree, transferred and conveyed to said Mollie Conklin and Emily M. Reddy. Decree is prayed for the annulment of said patent, the canceling of the deed from Mollie Conklin and Emily M. Reddy to the United States, of the lieu selection, and the power of attorney from Mollie Conklin, Emily M., and Edward A. Reddy to C. L. Hovey, and for the cancellation of the deed executed to Thomas B. Walker by Hovey as the attorney in fact of Mollie Conklin and Emily M. and Edward A. Reddy.

The "Monache Lands," of which the tract conveyed to the United States was a part, were situated in the Sierra Forest Reserve, and the relinquishment of the 200 acres to the government, and the selection in lieu thereof of the lands described in the patent, were made pursuant to the act of Congress approved June 4, 1897, c. 2 (30 Stat. 36 [U. S. Comp. St. 1901, p. 1538]), which provides for an exchange of lands held under a bona fide claim, or patent, within the limits of a public forest reserve, for a tract of vacant public land open to settlement, not exceeding in area the tract covered by such claim or patent. The transaction resulted in no loss or damage to the government, and it was not deprived of any land, or any other thing of pecuniary value, with which it would not have willingly parted in exchange for the lands relinquished, except for the alleged fraud. Nor is it pretended that the United States did not secure, in exchange for the lands for which it

issued its patent to Mollie Conklin and Emily M. and Edward A. Reddy, all it asked for or expected to obtain, except that the title to the lands which it received was subject to the payment of administration expenses and debts owing from the estate of Patrick Reddy, deceased. But together with the deed there was delivered to the Department of the Interior an abstract of title to the lands relinquished to the United States, and it is not claimed that the abstract did not fully and correctly disclose the condition of the title, and show that the property belonged to an estate still in course of administration. Nor is it alleged that the estate was not possessed of sufficient other property to satisfy all claims and demands against it, or that by reason of the want of other assets sufficient to pay the estate's indebtedness, the lands relinquished to the government might become liable for the payment of such debts.

It must therefore be assumed that the Department of the Interior was advised at the time it approved the selection of the lieu lands that the tract of land offered to be surrendered in exchange therefor was the property of an estate still in process of administration, and chargeable with the payment of administration expenses and the debts of the estate. There are, it is true, some general allegations to the effect that representations were made by John A. Benson to the government officers in connection with the delivery of the deed and the making of the selection of the lieu lands, which were false and untrue, but these alleged misrepresentations were mere statements made by Benson as to his right and authority to deliver the deed and make the selection, which, it is insisted, he did not have, because the conveyance had not been made, and the deed had not been delivered to him by the owners of the property, in the manner provided by the terms of the agreement made in August, 1900, which required deeds to be made to John A. Benson and to be placed in escrow to insure the payment of the purchase price. The fraud complained of, and with which the transaction is said to be tainted, is the course pursued by Benson in obtaining the deed from the owners of the land, in that it departed from the agreement of August, 1900, in the particulars stated in the complainant's bill, and in making the lieu selection in the names of Mary Conklin and Emily M. and Edward A. Reddy without their authority, knowledge, or consent.

The object of the suit is not restitution to the government of property, or anything of pecuniary value, of which it has been wrongfully or fraudulently deprived; nor is its purpose to restore to the former owners any lands for which they have not been fully paid. What is really sought to be accomplished is the annulment of the patent and of the conveyance of the lands therein described to the defendant Walker, in order that the tract of 200 acres of the "Monache Lands" may be returned to the original owners, or, as stated by the government's counsel, if the selection made in lieu of the Monache lands "should stand on account of the fact that the United States acted without knowledge of the fraud practiced upon Mrs. Conklin and Mrs. Reddy, and without knowledge of the fraud that was being practiced upon it," the patent, and conveyance of the patented land to Walker,

should be set aside, "in order that the appellant may confer these lands upon the persons entitled thereto by virtue of the selection, if such selection is in fact legal"; and that, "if the selection should be allowed to stand, then the patent which was issued erroneously should be canceled, so that the proper transfer could be made by the federal government to Mrs. Conklin and Mrs. Reddy by a new patent." In short, the main object and purpose of this suit is to clear the way for a return to Mrs. Conklin and Mrs. Reddy of the lands sold by them to Benson and for which they have been fully paid, or, if that cannot be done, then to reinvest them, by the issuance of a new patent, with the title to the land once before patented to them, in exchange for the 200 acres of the Monache lands.

The government unquestionably may maintain an action for the annulment of its patents, and recover property of which it has been defrauded. But, like any other party coming into a court asking for redress, it must, in its complaint, state facts *prima facie* sufficient to entitle it to the relief demanded; "* * * the respect due to a patent, the presumption that all the preceding steps required by law have been observed before its issue, the immense importance and necessity of the stability of titles depending upon these official instruments, demand that suits to set aside and annul them should be sustained only when the allegations on which this is attempted are clearly stated and fully sustained by proof." *U. S. v. Stinson*, 197 U. S. 200, 25 Sup. Ct. 426, 49 L. Ed. 724. If the title to the land involved in the suit was fairly acquired, it matters not what wrongs may have been done by the defendants in acquiring other lands. The inquiry is confined to the question whether the lands described in the patent, whose validity is attacked, were fraudulently obtained from the government. *U. S. v. Budd*, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384. Mere moral delinquency, or abstract wrongs, do not furnish a basis sufficient to authorize the interposition of the courts. "Courts of equity do not, any more than courts of law, sit for the purpose of enforcing moral obligations or correcting unconscientious acts which are followed by no loss or injury." 1 Story, Eq. Jur. 203; *U. S. v. Cent. Pac. R. Co.* (C. C.) 26 Fed. 482. The specific facts, constituting the fraud, must be clearly shown, and alleged with certainty, and the particulars in which statements and representations made by the defendant are alleged to be false should be set forth. *U. S. v. Atherton*, 102 U. S. 372, 26 L. Ed. 213; 1 Street, Fed. Eq. Pr. pars. 196, 197; *U. S. v. Martindale* (D. C.) 146 Fed. 280.

In the case of *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273, 8 Sup. Ct. 850, 31 L. Ed. 747, the Supreme Court of the United States, speaking through Mr. Justice Miller, said:

"But we are of opinion that since the right of the government of the United States to institute such a suit depends upon the general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the government must show that, like a private individual, it has such an interest in the relief sought as entitled it to move in the matter. If it be a question of property, a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud which would render the

instrument void, the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use, in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such action than any private person could under similar circumstances.

"In all the decisions to which we have just referred it is either expressed or implied that this interest or duty of the United States must exist as the foundation of the right of action. Of course this interest must be made to appear in the progress of the proceedings, either by pleading or evidence; and if there is a want of it, and the fact is manifest that the suit has actually been brought for the benefit of some third person, and that no obligation to the general public exists which requires the United States to bring it, then the suit must fail."

Considering, therefore, the complainant's bill in the light of the principles thus laid down and established by the decisions in the cases referred to, it is apparent that a case has not been made entitling the complainant to the relief demanded. As to Edward A. Reddy, the former owner of an undivided one-quarter interest in the lands relinquished to the United States, there is nothing to show that the transaction was not carried through in a manner entirely satisfactory to him. With respect to Emily M. Reddy, while it is alleged that a deed for the relinquished lands was executed by, and procured from, her in a manner different from that provided by the agreement, no claim is made that she sustained any loss or injury in consequence thereof, or that she was dissatisfied, or that she was not at all times willing to retain the purchase price paid her, and permit the transaction as consummated to stand, notwithstanding the departure from the agreement of August, 1900. Mollie Conklin is said to be desirous of having the patent canceled, and the Monache lands restored to her, and offers to return, upon return to her of her interest in said lands, the money which she has received in payment therefor. As has been observed, no one was injured. The government secured the land which it wanted, and the owners of the Monache lands relinquished to the government received the full consideration to which they were entitled under their contract of sale. The alleged fraud consisted in procuring the conveyance to be made in a manner and by a method not provided for by the agreement; but this was not done with any intent or for the purpose of defrauding either the government or the former owners of the Monache lands. Assuming, without deciding, that the allegations made in that paragraph of the bill which pleads the ignorance of Mollie Conklin and Emily M. Reddy and their reliance upon Mr. Campbell and the law firm of Campbell, Metson & Campbell, sufficiently set forth the falseness of the statements and representations therein alleged to have been made by the person who brought the deed to Mrs. Conklin and Mrs. Reddy for execution, still they do not cover the allegations made in another paragraph of the bill, which set forth the representations made by the person who brought the deeds, and which were to the effect that the deeds had been prepared by Messrs. Campbell, Metson & Campbell in pursuance to the agreement of August, 1900. There is nothing, therefore, to show that the instruments presented to Mrs.

Conklin and Mrs. Reddy for execution had not in fact been prepared or approved by their attorneys before they were sent, and it is not alleged that they were prepared by any one else. Be that, however, as it may, and whether the representations made were false or true, it is not alleged that they were made with any intent to defraud, but, as stated in the bill, they were made "in order to cause to be violated the terms in their agreement, and in order to procure from them, the said Mollie Conklin and Emily M. Reddy, their said lands, other than in accordance with their said agreement," and in order to have Mrs. Conklin and Mrs. Reddy sign and return the instruments without reading or examining the same. Clearly, no court would be justified in decreeing the annulment of a United States patent upon such grounds.

It is contended, however, on the part of the government, that its right to the relief sought in this suit is established by the decision of the Supreme Court in the case of *Hyde v. Shine*, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. Ed. 90. It requires no argument to show that the principle of that case is not applicable here. The question involved there was the sufficiency of an indictment charging the defendant with the offense of conspiring to defraud the government. It was insisted that, inasmuch as it did not appear from the facts stated in the indictment that the government had suffered any pecuniary loss or injury by reason of the acts charged, no offense was stated, and no prosecution could be maintained. In the consideration of the question so presented, the Supreme Court, speaking through Mr. Justice Brown, said:

"Whatever may be the rule in equity as to the necessity of proving an actual loss or damage to the plaintiff, we think a case is made out under this statute by proof of a conspiracy to defraud, and the commission of an overt act, notwithstanding the United States may have received a consideration for the lands, and suffered no pecuniary loss. *MacLaren v. Cochran*, 44 Minn. 255, 46 N. W. 408. The law punishes the false practices by which the lands were obtained, and the question whether the government stands in the position of a bona fide purchaser with respect to the school lands is not one which can be litigated in a criminal prosecution for a violation of law."

The court recognizes the rule which prevails in courts of equity, that injury or loss of a pecuniary nature should be shown to warrant the annulment or setting aside of muniments of title, but holds that such loss or injury need not be shown in a criminal prosecution for conspiracy to defraud the United States. And such is the rule in cases of that nature. *Curley v. U. S. (C. C. A.)*, 130 Fed. 1, 64 C. C. A. 369; *U. S. v. Stone (D. C.)* 130 Fed. 392; *U. S. v. Bradford (C. C.)* 148 Fed. 413.

It is true, the court also said that under the circumstances disclosed in the case of *Hyde v. Shine* there could be no doubt that the United States might maintain a bill to cancel the patents to the exchanged lands procured by the fraudulent means employed in their procurement, notwithstanding the government's title to the forest reserve lands might be good. But in that case a double fraud had been perpetrated; a fraud upon the state of California in depriving it of its school lands by making purchases thereof in the names of fictitious persons, and persons not qualified under the law to acquire the same, in

violation of the public policy of the state; a fraud upon the United States by securing from it lands by means of forged and fictitious deeds of relinquishment, purporting to convey to the government lands to which title had not been legally acquired. No such condition exists in the case at bar, although it is contended that, inasmuch as the certificate of acknowledgment is alleged to have been falsely made and forged, this case is brought within the rule laid down in *Hyde v. Shine*. But here the deed was not a forgery. A conveyance of the property was effected without an acknowledgment of the execution of the deed. It may be, as was said by the learned judge of the lower court, "that if the government had known that the deed was not acknowledged, it would not have issued the patent," but, as it does not appear that the government was in any manner injured, we are unable to see how it could be harmed by reason of the failure on the part of the grantors to acknowledge the execution of the deed.

We find no ground upon which this suit can be sustained, and conclude, therefore, that the decree of the circuit court should be affirmed. So ordered.

WESTERN UNION TELEGRAPH CO. v. IVY.

(Circuit Court of Appeals, Eighth Circuit. February 21, 1910.)

No. 3,075.

1. DAMAGES (§ 1*)—ELEMENTS—BREACH OF CONTRACT.

Damages can only be allowed for that which is the result of a breach of contract or wrong done, and, if resulting from a breach of contract, cannot be determined by speculation, argument, or dependency on one or more contingencies.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. TELEGRAPHS AND TELEPHONES (§ 73*)—MESSAGES—FAILURE TO DELIVER—DAMAGES—CONTINGENCIES.

Plaintiff's son having died suddenly in T., his body was taken to the undertaking rooms of one "Sinclair." Plaintiff having been informed of the death, but having forgotten the name of the undertaker, examined a list of undertakers in T., and telephoned one H., who offered to find out who had the body and take charge of it; but plaintiff instructed him to do nothing, and went to an undertaker and there decided that the name of the one having the body was "St. Clair," whereupon a message was sent addressed to "St. Clair" directing him to ship the body and notifying him of the deposit of \$30 for expenses. This message never reached T. After sending it, plaintiff was called on the long distance phone from T., but declined to answer the call, stating that it would incur additional expense. If "Sinclair" had received the message, he would not have shipped the body unless \$65 guaranty had been deposited, and, about a month after the body had been buried in the Potters' Field, "Sinclair" would have taken the body up and shipped it on a like guaranty of \$125, but not for less. *Held*, that plaintiff's right to recover depended on the finding of one contingency after another in his favor, to wit: That the T. operator would have known that "Sinclair" was the party intended, that "Sinclair" would have wired that \$65 was required, that plaintiff would have paid for that message and would have deposited that amount

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and so wired "Sinclair," and that defendant was therefore entitled to the direction of a verdict.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 73.*]

3. **TELEGRAPHS AND TELEPHONES (§ 66*)—MESSAGES—DUTY OF TELEGRAPH COMPANY—EVIDENCE.**

Where a message is received, and the charges paid, the telegraph company must, up to its capacity, transmit it with other messages tendered, and a failure to do so is prima facie evidence of negligence warranting a verdict, unless such failure is satisfactorily explained by the company, though it is not the insurer of the delivery of messages.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 63; Dec. Dig. § 66.*]

4. **TELEGRAPHS AND TELEPHONES (§ 66*)—MESSAGES—LOSS IN TRANSMISSION—NEGLIGENCE—STRIKES.**

Evidence that a telegram was lost in transmission between St. Louis and its destination, that the St. Louis operator duly sent the message and received back the signal that the message had been received at destination, but that a strike of defendant's employes was in progress at the time, and defendant's service interfered with all over the country by keys being opened and wires grounded by the strikers and unauthorized persons, was sufficient to rebut the prima facie case of negligence arising from a failure to transmit and deliver the message.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 66.*]

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Action by C. M. Ivy against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

See, also, 165 Fed. 371.

George H. Fearons, U. M. Rose, W. E. Hemingway, G. B. Rose, D. H. Cantrell, and J. F. Loughborough, for plaintiff in error.

Durand Whipple (William G. Whipple, on the brief), for defendant in error.

Before SANBORN and ADAMS, Circuit Judges, and SMITH McPHERSON, District Judge.

SMITH McPHERSON, District Judge. C. M. Ivy brought this action to recover damages for the failure to deliver a telegram received by the company for transmission. In August, 1907, his son, Leo Ivy, 15 years of age, suddenly died on the streets of Terre Haute, Ind., where the son was a stranger. The body was at once taken to the undertaking rooms of E. V. Sinclair of Terre Haute. By reason of a letter on the body, notice was given by the undertaker to a friend of the boy in Memphis, Tenn. This friend conveyed the information as to the death by telephone from Memphis to Hot Springs, Ark., where the plaintiff resided. Plaintiff had no telephone, and the conversation was with a lady neighbor, who undertook to convey the information to the plaintiff. In doing so she had forgotten the name of the Terre Haute undertaker. Upon a list of Terre Haute undertakers being presented to her, she thought the name of "Hickman" was the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

one who had the body in charge. Thereupon plaintiff telephoned him, and he offered to find out who had the body and to take charge of it. Plaintiff told Hickman to do nothing. Thereupon plaintiff went to an undertaker in Hot Springs, and, in looking over the names of the Terre Haute undertakers, it was decided that the name of the one having the body was E. V. St. Clair. Thereupon the plaintiff and the local undertaker, H. McCafferty, went to a substation of the company at Hot Springs, and requested the operator to write out the following message, which McCafferty signed:

"Hot Springs, Arkansas, August 30th, 1907.

"E. V. St. Clair, Terre Haute, Indiana. Ship body of Leo Ivy to Traskwood, Arkansas. Thirty dollars for expenses.

"[Signed] H. McCafferty, Undertaker."

There was no undertaker in Terre Haute by the name of E. V. St. Clair; the name being Sinclair. This telegram never reached Terre Haute. Traskwood was some miles distant from Hot Springs, to which point plaintiff desired the body sent by reason of the fact that the bodies of some members of his family had been buried there. Plaintiff and some of his family went to Traskwood, and remained for a day or two, and, the body not coming, they returned to their home, incurring expenses for telephone and telegrams, and traveling expenses, and loss of time, aggregating \$40. Before leaving Hot Springs for Traskwood, plaintiff was called up by the long distance telephone from Terre Haute; but he declined to answer the call, stating that it would incur an additional expense, and would serve no purpose. Sinclair retained the body a couple of days, and then buried it in the Potters' Field in the cemetery at Terre Haute. If Sinclair had received the message, he would not have shipped the body for less than \$65; the guaranty to be made good by deposit of the money with the local express office in Hot Springs. About a month afterwards, when all the facts were learned, Sinclair would have taken the body up and shipped it upon a like guaranty of \$125, and not for less.

Section 7947 of Kirby's Digest of the Statutes of Arkansas of March 7, 1873, is as follows:

"All telegraph companies doing business in this state shall be liable in damages for mental anguish or suffering, even in the absence of bodily injury or pecuniary loss, for negligence in receiving, transmitting or delivering messages; and in all actions under this section the jury may award such damages as they conclude resulted from the negligence of the said telegraph company."

Such damages are not allowed in Indiana. The case was tried to a jury, resulting in a verdict and judgment in favor of the plaintiff of \$1,478.62, and the telegraph company now seeks to reverse this judgment by writ of error.

On the foregoing statement it will be seen that more than \$1,400 of the judgment is on account of mental anguish.

Much of the time of the trial, much of the evidence, and a considerable part of the charge of the court were devoted to the various propositions as to what would have been the result had the message been received at the office of the telegraph company in Terre Haute.

The evidence shows that, while there was no undertaker there by the name of St. Clair, the city and telephone directories showed that E. V. Sinclair was an undertaker. The wording of the message showed that it was of and concerning a human body. It was contended by the plaintiff, in which he was sustained by the jury and the Circuit Court, that by the exercise of diligence by the Terre Haute office, the message would have been delivered to Sinclair. It was also successfully contended, both before the jury and the Circuit Court, that although there was only a guaranty of \$30, and no statement made as to how that guaranty would be enforced, if the message had been received by the Terre Haute telegraph office, negotiations by telegraph would have taken place, and the additional guaranty, amounting to \$65 in the aggregate, would have been made with the express company agreeably to the terms of Mr. Sinclair.

Whether the statute above quoted allowing damages for mental anguish could have any application to an interstate message, and whether such statute as to such interstate message would impinge upon the "commerce clause" of the national Constitution, and whether such statute is anything more than the exercise of the police power of the state of Arkansas, and, if the latter, whether the same could be enforced in an action for damages by reason of the failure to deliver an interstate message, are all questions that we pass to one side. We do not decide as to any of those questions.

But we are of the opinion that, if the message had been delivered to the Terre Haute office, there were so many uncertainties and things intervening that it cannot be judicially said that the body would have been transmitted to Traskwood, Ark. Nor can it be said that the telegraph company in receiving the message in Arkansas for transmission could have contemplated, as the result of a failure to thus transmit the message, that such conditions would arise and all be solved in favor of the plaintiff.

Would the Terre Haute operator have learned that Sinclair was the party intended, and not St. Clair? Would Sinclair have wired back that \$65 must be deposited with an express company at Hot Springs? Would plaintiff have paid for said message, and have made such deposit, and so wired Sinclair?

These questions must all be answered in the affirmative, and in addition thereto it must be said, before the alleged cause of action could be maintained, that such things and such answers were in the contemplation of the company when it failed to put the message over the wire to Terre Haute. It could not reasonably have been expected that further correspondence would take place, and that such correspondence, if taking place, would result in the end to the satisfaction of Sinclair.

Damages can only be allowed for that which is the result of the breach of the contract, or of the wrong done. And that which is the result of such breach or wrong cannot be determined by speculation, or argument, or the dependency of one contingency on another. *Globe Co. v. Landa Co.*, 190 U. S. 540, 544, 23 Sup. Ct. 754, 47 L. Ed. 1171; *Boston R. R. Co. v. O'Reilly*, 158 U. S. 334, 15 Sup. Ct. 830, 39 L.

Ed. 1006; *Primrose v. Western Union*, 154 U. S. 1, 29, 14 Sup. Ct. 1098, 38 L. Ed. 883; *Richmond R. R. Co. v. Elliott*, 149 U. S. 266, 13 Sup. Ct. 837, 37 L. Ed. 728.

In the case at bar, plaintiff in person, or through McCafferty as agent, could not direct or command Sinclair. It was a matter of contract to be preceded by negotiations with no certainty that negotiations would ripen into a contract. It was all conjecture.

Plaintiff had been advised that some one at Terre Haute had the body of his son. He telephoned the undertaker Hickman, and then told Hickman to do nothing. Then later the same day, after sending the telegram, he had a call by phone from Terre Haute, which he refused to answer because it would cost him \$4. He well knew, as any reasonable man would know, that it was concerning his son's body. Had he answered that call, with that trifling expense, he would have learned all the facts, and have made the contract for shipping the body, or would have failed in his negotiations. A party cannot allow matters to thus proceed, when by a slight effort or small expense all difficulties would be avoided. *Warren v. Stoddart*, 105 U. S. 224, 229, 26 L. Ed. 1117; *Baird v. U. S.*, 131 U. S. cix, 21 L. Ed. 519.

So that it clearly appears that the plaintiff was deprived of seeing the body of his son, and having it interred in his own burying ground, by reason of one contingency after another, all of which must have been solved in favor of the plaintiff before the body would have gone forward.

We conclude that this would be allowing a recovery by reason of one contingency after another, and one doubt after another, all of which must have been coupled together and worked out to the satisfaction of the plaintiff. He says he was a poor man and with great difficulty could raise the small amount of money for the payment of the first message to Hickman and the other small incidental expenses. It does not appear that he could have raised \$65, which would have been required. And, even if such fact did appear, the fact still remains that it was one contingency after another which might never have taken place, and the failure of any one would have left the body for burial at Terre Haute. But if he could have raised the money, then by the comparatively small expense of \$125 the body would have been taken up and shipped forward after one month's delay. We are of the opinion that the request of defendant for a directed verdict in its favor should have been granted.

As above stated, the message was never received at Terre Haute. There is a connection by wire over defendant's lines from Hot Springs to St. Louis. The message was delivered to the company at Hot Springs, at 12 o'clock noon, and within a few minutes it was in the St. Louis office, at which place it had to be relayed for Terre Haute. At that relay office within a very few minutes the message was put on the wire for Terre Haute. The wire on which the message was put was the usual wire for Terre Haute business, and the wire was in working order. Immediately after the message was thus put on the Terre Haute line by the St. Louis operator, a signal or check was

received by the St. Louis operator acknowledging receipt of the message as though it had been received in Terre Haute. To account for this a showing is made that at that time there existed a violent and vicious strike of defendant's operators all over the country. Its force of employés in the St. Louis office by reason of this strike had been reduced to about one-third in number. At the Terre Haute office the reduction in the working force was but slight. But the evidence is that all over the country telegraph keys were opened, the wires grounded, and messages interfered with by strikers and unauthorized persons. And all this was without fault of the company. No one can say just what became of this message, nor at what point between St. Louis and Terre Haute it left defendant's wire. But the uncontroverted evidence conclusively shows that at some point between the two cities the message left defendant's wire through no fault of it or its employés. When the St. Louis operator put the message on the wire, he had fully and completely performed his duty except in the one thing, namely, to receive back the signal or information that the message had been received at Terre Haute. This duty the St. Louis operator fully performed, as he believed, when receiving the signal that the message had been received at Terre Haute. And when he received that signal, his duty was at an end. No operator at Terre Haute was in any degree at fault, because the message never went to that office. In our opinion there can be but the one conclusion, that the message was taken from the wire at some point unknown, between St. Louis and Terre Haute, and was thus taken from the wire by an unauthorized person. And by such a showing the company is exonerated. A telegraph company is not an insurer. When the message is received and the charges paid, it must up to its capacity transmit that with other messages tendered, and the failure to transmit is a *prima facie* showing of negligence, and warrants a verdict, unless such failure is satisfactorily explained. A complete statement of defendant's obligation and the rules governing its business in a case like this is stated in *Cooley on Torts* (3d Ed., vol. 2, p. 1382), where it is said:

"In reason as well as on authority, they are responsible in sending, receiving, and delivering messages, on the grounds only that through their negligence errors or unnecessary delays have occurred, or that they have failed to transmit and deliver messages impartially. If a message is not sent and delivered within a reasonable time under the circumstances, or if errors occur in the transmission, which are attributable to their negligence, they are responsible for all consequent damages; but they are not insurers, and, if errors occur without their fault, they are not responsible."

So that from principle and authority it clearly appears that defendant is not an insurer and only chargeable with negligence, with the burden upon the company to excuse itself from the charge of negligence by a satisfactory showing of its inability to transmit and deliver the message. By such a showing it is not responsible in damages.

But the defendant not being an insurer and only chargeable with negligence, with the failure to deliver the message presumptively supplying the proof as to such charge, the company has made a showing which to our mind admits of no difference of opinion. To other-

wise hold would be to declare that such presumption of negligence is a conclusive one, and not subject to rebuttal. It will not do to hold that because the company could not name what key was opened, or where the wire was grounded, or what vicious or unauthorized person interfered with the message, or a failure to show who sent to the St. Louis operator the false information that the message had been received at Terre Haute, is not a sufficient excuse.

There should have been a directed verdict for the defendant on each of the foregoing propositions, failing to give which the Circuit Court was in error.

The judgment of the Circuit Court is reversed, and the cause is remanded, with directions to grant a new trial.

ADAMS, Circuit Judge (specially concurring). This was an action to recover for mental anguish and suffering alleged to have been occasioned by the failure of the telegraph company to transmit and deliver a message intrusted to it by the plaintiff. Apart from the statute (section 7947, Kirby's Dig.), no recovery could have been had for mere mental anguish and suffering. By the statute such recovery was authorized if it resulted from negligence "in receiving, transmitting or delivering" the message.

1. The evidence is uncontradicted that the telegraph company for a consideration paid to it received and undertook to transmit and deliver a message to E. V. St. Clair, Terre Haute, Ind., and that it failed to deliver the same. That failure constituted a breach of its contract and was presumptive evidence of want of due care in the performance of its obligation which constituted negligence within the meaning of the Arkansas statute in question. Whether that presumption was overcome by the fact that there was no person in Terre Haute who spelled his name E. V. St. Clair, while there was one engaged in the undertaker's business (with which alone the message was concerned) who spelled his name E. V. Sinclair, was an issue of fact determinable under the well-recognized rule requiring the telegraph company to exercise reasonable care to deliver a message as directed; whether the presumption was overcome by the existence of a strike depended upon the real but disputed terms of the contract made between the plaintiff and the telegraph company, as well as upon conflicting evidence on the issue whether the strike caused the failure to deliver the message or not; and whether the failure to deliver the message was excused for other reasons assigned by the telegraph company depended upon the facts of the case. In my opinion, therefore, the court cannot and ought not to hold as a matter of law that there was no proof of negligence on the part of the telegraph company. That issue was clearly for the jury.

2. Whether or not the plaintiff would have succeeded in seeing the body of his son and securing its burial in the family lot if the message had been delivered also depended upon the facts of the case and was for the jury to decide. Moreover, whether he would or would not have so succeeded is material only in the determination of the quantum of mental anguish and suffering which he endured.

To have had the possibility of doing so thwarted by the fault of the telegraph company might have occasioned mental anguish and suffering even if the effort had proven ineffectual. The recoverable damages provided for by the statute reside in the domain of sentiment, and I do not think they can be figured out in dollars and cents, or that they are subject to the rules condemnatory of conjecture, speculation, and contingency which govern the measure of damages for breaches of ordinary contracts which the majority think are applicable to this case. In my opinion the character of the action and the intangible nature of the damages which are recoverable preclude the application of these rules.

The case was peculiarly one for the jury, first, to ascertain and find under appropriate instruction from all the facts and circumstances in evidence whether the telegraph company was negligent in the discharge of its duty to the plaintiff, and, if so, to award him such damages for mental anguish and suffering as they might conclude in view of all the facts and circumstances of the case he was entitled to have. The effort of the majority to demonstrate that there was neither negligence nor damages and, therefore, that there could be as a matter of law no recovery, is, in my opinion, an unwarrantable invasion of the province of the jury.

Notwithstanding the fact that I am unable to approve of the reasons assigned by the majority for reversing the judgment, I concur in that reversal, but do so solely on the ground that the trial court refused to give certain instructions requested by defendant's counsel definitely defining the degree of care required of the telegraph company in the matter of transmitting and delivering the message in question.

As abstract propositions of law, the requested instructions were concededly sound. Their refusal, however, was justified on the ground that the general charge stated the true rule. This, I think, is a mistake. The court told the jury that the presumption of negligence arising from the nondelivery of the message imposed the burden upon the telegraph company "to show to the satisfaction of the jury that it did everything that it possibly could for the purpose of transmitting and delivering the message." I think there is no warrant for imposing that high degree of care upon the telegraph company. The true rule is that of ordinary care only; and, while the court in some part of its charge so stated, it undoubtedly left the jury, by portions of its charge like that just quoted, in a state of doubt as to the true rule on the subject. The charge as a whole, therefore, did not excuse the court from giving the correct exposition of the law as requested by defendant.

WESTERN UNION TELEGRAPH CO. v. CATLETT.

(Circuit Court of Appeals, Fourth Circuit. February 25, 1910.)

No. 915.

1. DEATH (§ 14*)—WRONGFUL DEATH—WANTONNESS.

It is immaterial for the purpose of establishing a cause of action for wrongful death, authorized by Revisal N. C. 1905, § 59, whether the act causing the death was wanton or cruel; it being sufficient that it was merely negligent.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 16; Dec. Dig. § 14.*]

2. NEGLIGENCE (§ 13*)—DEGREES OF NEGLIGENCE.

While the law imposes different degrees of care based on relations existing between the parties, an injury resulting from a failure to observe such degree of care constitutes actionable negligence, regardless of the degree of such negligence; degrees of negligence being important only as fixing the character or quantum of damages to be awarded.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 15; Dec. Dig. § 13.*]

3. NEGLIGENCE (§ 112*)—WILLFUL INJURY.

An allegation that the act causing intestate's death was recklessly, carelessly, wantonly, and cruelly done did not charge a willful injury, but amounted only to an allegation of simple negligence; the word "wanton" not being the equivalent of "willful."

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 185; Dec. Dig. § 112.*]

4. MASTER AND SERVANT (§ 306*)—INJURIES TO SERVANT—WILLFUL MISCONDUCT.

A master is liable for the willful misconduct of his servant within the scope of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1230-1232; Dec. Dig. § 306.*]

5. DEATH (§ 93*)—WRONGFUL DEATH—DAMAGES.

Under Revisal N. C. 1905, § 60, authorizing a recovery for wrongful death of a fair and just compensation for the pecuniary injury resulting therefrom, no punitive or exemplary damages can be recovered.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 98; Dec. Dig. § 93.*]

Punitive damages in actions for wrongful death, see note to McGhee v. McCarley, 44 C. C. A. 259.]

6. NEGLIGENCE (§ 136*)—TRIAL—QUESTION FOR COURT OR JURY.

When a given state of facts are such that reasonable men may fairly differ on the question whether there was negligence or not, the matter is for the determination of the jury, but, when the facts are such that all reasonable men must draw the same conclusion, the question may be determined by a court as one of law.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

7. NEGLIGENCE (§ 1*)—DEFINITION.

"Negligence" is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person under the existing circumstances would not have done.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

8. MASTER AND SERVANT (§ 304*)—INJURIES TO THIRD PERSON—NEGLIGENCE.

Decedent, a railroad track foreman, while standing with his crew some distance from the track during the passage of a train, was struck and killed by a telegraph cross-arm weighing 25 pounds thrown from the train by defendant's servant without looking or without being able to see that decedent or some other person might be struck thereby. Decedent was in charge of a section of the road six miles long, and was daily at some point thereon with his crew in the discharge of his duty. *Held*, that defendant's servant was negligent as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 304.*]

9. NEGLIGENCE (§ 1*)—ANTICIPATION OF DANGER.

Anticipation of danger is an element of actionable negligence only when the character of the act is doubtful, it being of no moment whether the negligent actor could have reasonably anticipated the presence of the person injured at the time and place if the conditions are such as to impose a duty in respect to the public which was not complied with.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.*]

In Error to the Circuit Court of the United States for the Western District of North Carolina, at Greensboro.

Action by Lillie M. Catlett, administratrix of T. W. S. Catlett, deceased, against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Defendant in error, hereinafter called the plaintiff, sued plaintiff in error, hereinafter called defendant, in the superior court of Forsyth county to recover damages incurred by the death of her intestate alleged to have been caused by the negligence of defendant's servant. The cause upon defendant's petition was removed into the Circuit Court of the United States for the Western District of North Carolina. Plaintiff alleged that on the 12th day of October, 1906, her intestate was in the employment of the Southern Railway Company as a section master, and while in the performance of his duties near Reidsville, N. C., on the main line of said railway, working on the track of said road, when a train approached running north; that said intestate and his hands were standing near the track in a group in full view, and as the train passed the defendant Samuel Burton, who was at the time in the employment of the Western Union Telegraph Company and whose duty it was to throw off at certain points along the track cross-arms to be used by said telegraph company; that as the said train turned the point where plaintiff's intestate was standing as aforesaid, and in full view of said agent and servant of said telegraph company, said Burton threw from the car on which he was riding a large wooden cross-arm, weighing 25 pounds or more, upon plaintiff's intestate, killing him instantly; that the said Burton by the exercise of reasonable care and caution would have avoided the killing of plaintiff's intestate; that just before throwing the cross-arm he looked at the group of men, and knew where they were, but recklessly, carelessly, wantonly, and cruelly hurled the pieces of heavy timber upon plaintiff's intestate, killing him instantly.

Defendant, answering, admitted allegation first and allegation second, "save that it is denied that plaintiff's intestate and his hands were in view of the defendant's servant Burton as the train approached and passed." With the same exception, allegation 3 was admitted. Allegations 4 and 5 were denied. Upon the call of the case for trial, plaintiff's counsel tendered the following issues: "(1) Was the plaintiff's intestate's death caused by the negligence of the defendant? (2) What damage, if any, is the plaintiff entitled to recover?" In apt time the defendant's counsel objected to the first issue proposed by plaintiff, on the ground that it does not follow the allegation of the complaint, in that the words "wantonly, carelessly and recklessly" are omitted from the issue. The court overruled the objection of defendant's counsel to the issue, on the ground that the words "wantonly, carelessly, and recklessly" are unnecessary in the complaint, the complaint sufficiently charging the death as a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

result of the defendant's negligence, whereupon defendant's counsel excepted.

Plaintiff introduced Weyman Spencer, who testified that he was employed by the Southern Railway Company as a section hand, and that plaintiff's intestate was his section master; that witness was with him when he was killed. He said: "We were working down the railroad track, and Capt. Catlett stopped when he saw the train coming, and told one of the men to step back down the hill and get a lining bar. He stepped off five feet from the track. I was right behind him. I was a little closer to the train than he was, and I reckon he was looking at the engine, or something. He was not looking down the track the way I was, and I saw the timber come poking out of the car about three feet, and, before I could speak, the fellow had thrown the timber out and it struck him right across his breast and broke his neck. He died right off. Train going north about 8 o'clock in the morning. We were surfacing the track. We worked there about 10 hours every day for nearly a week—had six hands—didn't have anything on the track—ground about level with the track. The baggage car door was open. There was nothing to prevent man from seeing us—open space. The piece of timber was about eight feet long—two pieces nailed together—used for cross-arms on telegraph posts. The section upon which we worked was six miles long. The hands are likely to be at any point on the track. They go over it constantly. Several witnesses testified to the same facts—one of them saying that it was the duty of Burton to repair the poles, and, "when there were rotten cross-arms, to put new ones up."

John Totten testified that he was with Catlett when he was killed; that it was a fair morning—there was nothing to prevent Burton from seeing the men—that Catlett was 8 feet from the track, open space, straight track, thinks that Burton could have seen him for 300 yards. Witness had worked on the section three or four years, regular work, every day.

Defendant introduced the engineer in charge of the engine on the day of the accident, who swore that the place at which it occurred was at the end of a curve and cut; that the cut would break the view of a man standing back the distance described by the plaintiff's witnesses; that he saw the section hands as he passed them; they were regular workers on the track, always waved hand at them. There was other evidence tending to show that Burton could not see the deceased from the car door. The evidence showed that the train was running from 35 to 50 miles an hour. At the conclusion of the testimony, defendant requested his honor to direct a verdict because, "taking the testimony on the part of the plaintiff to be true, with all legal and reasonable inferences to be drawn therefrom, it does not warrant a verdict for plaintiff." To the refusal to so instruct the jury defendant duly excepted. Defendant requested his honor to direct a verdict for that "there was a material variance between the allegations and proof and duly excepted to his refusal to do so." His honor explained to the jury the issues involved, defining negligence, and, in regard to the law of the case, said: "The court charges you, therefore, gentlemen, in connection with this first issue, that if the evidence satisfies the jury that Burton, as a lineman of the defendant, was required, as one of the duties of his employment, to travel on a railroad train and throw material off for use in repairing or maintaining the telegraph line, and that he was engaged in his work at the time intestate of plaintiff was killed, and that in the discharge of his employment he threw from the door of a baggage car attached to a train moving at a rate of speed of from 35 to 50 miles an hour a heavy piece of timber composed of two telegraph arms nailed together, being two pieces of scantling about 8 feet long, which struck and killed intestate, and that the said Burton threw the said piece of scantling where persons were, or where they had the right to be, that such is negligence per se, and constitutes negligence for which the company is liable; and in this connection the court instructs the jury further that the intestate, being section foreman upon this particular section of the railway, had a right to be where he was when the scantling struck him; that he had performed the duty which devolved upon him by law; that, when he heard the train approaching, had removed himself, and caused his employes to remove themselves far enough from the railway track to permit the train to pass in safety to all concerned. Now, gentlemen, if you find the facts to be—that is, by the preponderance of the testimony—that Burton was the agent of the company and its lineman, and was traveling in this

car, carrying this piece of timber, in the discharge of the duties of his employment, and that he threw this piece of timber out of that car door, when the car was running at from 35 to 50 miles an hour, and the intestate being there near the railroad, where he had a right to be, that as to him that act on the part of Burton was negligence for which the telegraph company is liable in damages."

There was a verdict for plaintiff, assessing her damages at \$5,000. Defendant duly excepted to the instructions given by his honor, assigned error as set out in the record, and appealed.

W. M. Hendren (Manly & Hendren and George H. Fearons, on the brief), for plaintiff in error.

C. B. Watson (Watson, Buxton & Watson, on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and BRAWLEY and CONNOR, District Judges.

CONNOR, District Judge (after stating the facts as above). Defendant's first exception is directed to the refusal of his honor to insert in the issue the words "wantonly, carelessly, and cruelly," used in the fourth paragraph of the complaint. The contention is based upon the proposition that plaintiff has "alleged one cause of action and proven another." The vice in this proposition lies in the failure to note the distinction between the allegations upon which the cause of action is founded and those allegations which are material only as affecting the character and quantum of damages. The actionable facts alleged are that defendant's servant, by a negligent act, or an act done in a negligent manner, caused the death of plaintiff's intestate. It is entirely immaterial, for the purpose of establishing a cause of action under the provisions of Lord Campbell's act (Revisal N. C. § 59), whether the act was wanton or cruel. "Facts showing a legal duty and the neglect thereof on the part of defendant, with a resulting injury to the plaintiff, are sufficient to constitute a cause of action." 29 Cyc. 565. While the law imposes different degrees of care, based upon the relations existing between the parties, it adjudges that any injury resulting from a failure to observe such degree of care constitutes actionable negligence. The degree of negligence, if it be possible to define it, is of no import in fixing the liability. It may be of importance in fixing the character and quantum of damages to be awarded. A very accurate author, writing on the law of negligence, says:

"There is no matter within the range of jurisprudence that has been the subject of more troublesome controversies than the determination of the existence of the degrees of negligence." 1 Bevin, Neg. 19; *The New World v. King*, 57 U. S. 469, 14 L. Ed. 1019.

Baron Rolfe, in *Wilson v. Brett*, 11 M. & W. 113, well says:

"That he can see no difference between negligence and gross negligence; that it is the same thing, with the addition of a vituperative epithet."

Defendant calls our attention to authorities which hold that, when the plaintiff alleges that the act complained of has been willful, evidence showing such act to have been merely negligent constitutes a fatal variance. 29 Cyc. 588. The learned counsel insists that the

language of the complaint, in effect, charges that Burton's conduct was willful. We do not so interpret it. "Willful" imports a much more positive affirmative mental condition prompting the act than wanton. Many judges hold, and with much reason, that "willful negligence" is a contradiction, an anomaly. "It has been generally held that willful injury is not charged by an allegation that the act was committed recklessly, wantonly, or purposely, wrongfully or unlawfully." 29 Cyc. 574. Nor is a charge of gross negligence equivalent to an allegation of a willful act. *McAdoo v. Railroad*, 105 N. C. 140, 11 S. E. 316. When it is sought to hold a master liable for the act of the servant, it is sometimes material to inquire whether the act complained of emanated from the willful or malicious state of mind of the servant. In recent times, however, the master has been held liable for the willful misconduct of his servant if in the scope of his employment (*Pollock on Torts* [7th Ed.] 91), abandoning the doctrine of *McManus v. Crickett*, 1 East, 105, and the long line of decisions based upon that case (*Jaggard on Torts*, 39; *Sawyer v. Railroad*, 141 N. C. 873, 56 S. E. 1039; *Stewart v. Lumber Co.*, 146 N. C. 47, 59 S. E. 545). In this case the degree of negligence attributable to Burton is, in no possible point of view, material, because by the statute giving a right of action, the damages to be recovered are confined to "a fair and just compensation for the pecuniary injury resulting from the death of intestate." Revisal, § 60. No punitive or exemplary damages can be recovered. The exceptions based upon his honor's ruling as to the form of the issue and the supposed variance cannot be sustained. Did his honor correctly instruct the jury that, if they found the condition summarized by him, defendant's servant was guilty of negligence as matter of law?

It is uniformly held, and may be treated as the settled practice, in both state and federal courts, that:

"When a given state of facts are such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only when the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is considered as one of law for the court." *Grand Trunk Ry. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Texas & Pac. Ry. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186.

"Questions of negligence do not become questions of law for the court, except where the facts are such that all reasonable men must draw the same conclusion from them." *Kreigh v. Westinghouse Co.*, 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984; *Haltom v. Railroad*, 127 N. C. 255, 37 S. E. 262.

His honor, by grouping certain phases of the testimony in regard to which there was no contradiction, and eliminating all such as were controverted, said to the jury that, if they found such facts, the law imputed negligence to Burton in throwing the cross-arm from the car. He assumed, because admitted in the pleadings: That plaintiff's intestate was at the time he was killed in the discharge of his duty and where he had a right to be. He was not a trespasser, nor a mere licensee, but an employé of the road. He exercised due care, upon the approach of the train, by stepping from five to eight feet from the track, leaving not only room for the train to pass in safety, but for Burton to drop the cross-arm on the side of the track at a safe distance

from the cars. That the train was moving at the rate of 35 to 50 miles an hour. That Burton was the lineman of defendant, and that it was his duty to throw off at certain points along the track cross-arms to be used by defendant company. It was in evidence, without contradiction, that intestate and his hands for some considerable time were employed each day at the point where the injury was inflicted. The engineer, defendant's witness, said that he saw them daily. It does not appear how long Burton had been employed as lineman on the section of the road upon which intestate worked. In view of his honor's instruction, we must eliminate the testimony tending to show that Burton either saw or could by a proper lookout have seen intestate at the time of, or immediately prior to, throwing the cross-arm; these questions being controverted and the evidence being either contradictory or capable of more than one reasonable inference. We are thus confronted with the question whether, in view of the conditions admitted by the pleadings, and found by the jury, under the instructions, it was per se negligent on the part of Burton to throw the cross-bar from the open door of the baggage car at the point and under the conditions shown to exist. The instruction is not open to the criticism made by the learned counsel for defendant. His honor did not hold that:

"It is negligence as a matter of law for a person to throw from a moving train, in the open country, any object likely to do harm, without regard to where the train is, or whether persons are actually near the railroad, or likely to be near."

No such question was involved in the record, nor presented by the evidence. Courts deal with concrete cases, and not with academic discussions. His honor said that if certain averments, sustained by testimony, were found to be true, they established negligence as a matter of law. It cannot be doubted that Burton owed the duty to exercise reasonable care, or that degree of care which a reasonably prudent man under the same or similar circumstances would exercise to avoid injuring any person rightfully on, or near to, the track. The standard of duty is thus laid down by the Supreme Court:

"Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion." *Railroad Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506.

Since the decision of *Russell v. Railroad*, 118 N. C. 1098, 24 S. E. 512, this standard of duty has obtained in the courts of North Carolina—sometimes called the rule of the "ideal prudent man." "Legal negligence is the absence of that degree of care which the law requires a man to exercise under the peculiar circumstances in which he may be placed for the time being, or the party charged with the injury must act like a man of ordinary prudence would under similar circumstances." *Brinkley v. Railroad*, 126 N. C. 88, 35 S. E. 238.

We concur with his honor that, applying this standard to Burton's conduct, he was guilty of negligence. To throw from a rapidly moving train without looking, or without being able, to see whether a per-

son whose duty it was to be somewhere along a section of six miles of the track and who was daily at some such point, two pieces of timber 8 feet long and weighing 25 pounds, nailed across each other with sufficient force to project it from 5 to 8 feet beyond the track and crush the body, break the neck of a human being, is, to put it mildly, negligent, without due care, and in disregard to a plain duty. It is inconceivable that the "ideal prudent man" under like circumstances could act with such disregard of consequences. Conceding that it was lawful and proper for him to drop the cross-arm at or near to the side of the track, certainly it was not necessary to accomplish that end to throw it with such force as to make it a deadly missile. It is not unreasonable to infer that Burton was familiar with the track, that he had passed over it before in the discharge of his duty. He certainly knew that at the point at which he threw the cross-arm there was a necessity for it; that the one then in use was to be replaced. It is a reasonable inference that he had recently been there. However this may be, it was his duty to exercise a reasonable degree of care to avoid injuring persons whose duty called them to be near to the track. Assuming that, either by reason of the curve, the cut, the "lay of the land," or the rapidity of the train, he could not see that intestate was near the track, these conditions should have made him more careful to avoid giving the cross-bar such momentum as to endanger human life. A man may not discharge a deadly weapon into a dark space, where people have a right to be, and avoid the consequences of his act by saying that, by reason of the darkness, he could not see the victim of his negligent conduct. The conditions by which he was surrounded imposed a higher degree of care to avoid injuring another by his conduct. If he saw the injured person and shot, he would be guilty of murder. If he could have seen him by the exercise of reasonable care and failed to do so, and shot, he would be guilty of manslaughter. If he could not see, but knew that persons were probably there, had duties which called them to be there, he would be guilty at the least of negligence.

Mr. Justice Moody in *Atchison, etc., R. R. v. Calhoun*, 213 U. S. 1, 29 Sup. Ct. 321, 53 L. Ed. 671, quotes with approval the language of Sir Frederick Pollock:

"The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely probable. He will order his precaution by the measure of what appears likely in the known course of things." Pollock on Torts (8th Ed.) 41.

In applying this language to the facts in that case, the learned justice says:

"In judging of the defendant's conduct, attention must be paid to the place where the truck was left. If it had been where the passengers were at all likely to get on or off the train and a passenger stumbled over it to his hurt, there could be no doubt of the liability of the railroad."

So, in the case before us, if the point at which the cross-arm was thrown was one at which no employé was "at all likely" to be, the duty of prevision would not as a matter of law be imposed. It would be

at least a question for the jury, but it is established beyond question, and we know as of common knowledge that on our great trunk lines of railroads common prudence, if not positive law, requires the section hands to be constantly passing over and frequently working upon each section of the track. It would be trifling with the court to say that a lineman of defendant company, whose duty it was to pass over the road frequently, did not know this condition. It would be to impute to defendant negligence in the selection of its servant to suggest that it employed a lineman, who was not reasonably familiar with this condition. Viewed from any possible point of view, Burton was negligent in the manner in which he threw the cross-arm from the moving car.

Defendant strongly urges upon us the argument that he could not reasonably have anticipated that intestate would be at the place at which he threw the cross-arm. This is not the test of liability for the result of a negligent act. If the character of the act is doubtful, the question of reasonable apprehension enters into the problem of liability for a neglect of the duty of prevision; but, if the conditions are such as to impose the duty in respect to the public, it is of no moment whether the negligent actor could have reasonably anticipated the presence of the person injured at the time and place. This element of actionable negligence has sometimes been obscured by failing to keep this distinction in view. In *Smith v. London L. W. Ry. Co.*, L. R., 6 C. P. 21, Blackburn, J., said:

"What the defendants might reasonably anticipate is only material with reference to the question whether the defendants were negligent or not and cannot alter their liability if they were guilty of negligence. If the negligence were once established, it would be no answer that it did much more damage than was expected. If a man fires a gun across the road, where he may reasonably anticipate that persons will be passing, he is guilty of negligence and liable for the injury he has caused; but, if he fires in his own wood, where he cannot reasonably anticipate that any one will be, he is not liable to any one whom he shoots, which shows that what a person may reasonably anticipate is important in considering whether he has been negligent."

Mr. Bevin, after a careful review of the authorities, says:

"When negligence is once shown to exist, it carries a liability for the consequences arising from it, whether they be greater or less, until the intervention of some diverting force, or until the force put in motion by the negligence has itself become exhausted." 1 Neg. 88.

"A tortfeasor is liable for all injuries resulting directly from his wrongful act, whether they could or could not have been seen by him. * * * The real question in these cases is: Did the wrongful conduct produce the injury complained of, and not whether the party committing the act could have anticipated the result." *Hale on Damages*, 36-8; *Ramsbottom v. Railroad*, 138 N. C. 38, 50 S. E. 448; *Johnson v. Railroad*, 140 N. C. 574, 53 S. E. 362.

The presence of the deceased at the point where the cross-arm was thrown did not affect the legal quality or character of the act. The other conditions made the act wrongful. The impact between the cross-arm and the body of the deceased gave to him a cause of action, and his death, from such impact, by virtue of the statute, gave to plaintiff a cause of action, with the right to recover such damages as ensued from his death. We have examined *Fletcher v. B. & O. R. R.*,

168 U. S. 135, 18 Sup. Ct. 35, 42 L. Ed. 411. Nothing said in that case conflicts with the ruling of his honor or our conclusion. There the court below passed judgment of nonsuit, and the sole question was whether there was any evidence sufficient to carry the case to the jury. No other question was raised by the exception. There were a number of controverted questions of fact upon the finding of which the liability of defendant depended. Here the sole question was one of law upon practically conceded facts.

Upon a careful examination of the entire record we find no reversible error.

The judgment must be affirmed.

HARRIS v. FALL.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1910.)

No. 1,589.

1. PHYSICIANS AND SURGEONS (§ 14*)—DEGREE OF SKILL AND CARE REQUIRED.

In undertaking the performance of a surgical operation and to give subsequent care to the case, the surgeon incurs the obligation to exercise throughout the performance of his engagement both the ordinary care and skill of his profession in the light of modern advancement and learning on the subject, and his own best ability, skill, and care.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 21-30; Dec. Dig. § 14.*]

2. PHYSICIANS AND SURGEONS (§ 18*)—ACTION FOR MALPRACTICE—QUESTIONS FOR JURY.

In an action against a surgeon for malpractice in failing to properly treat and care for a wound made by a surgical operation, where there is no direct evidence to show whether defendant or other physicians or surgeons who assisted in caring for the patient after the operation was chargeable with the negligence proved, such question is one of fact for the jury, if there is circumstantial evidence from which an inference as to the one in fault may be fairly drawn.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 44; Dec. Dig. § 18.*]

3. PHYSICIANS AND SURGEONS (§ 18*)—ACTION FOR MALPRACTICE—EVIDENCE—LOCAL CUSTOM.

A custom of the locality or a particular hospital with respect to the care of patients after a surgical operation, the dressing of the wound, etc., cannot be shown to affect the right of a patient to recover for malpractice, where he was a stranger to the locality, and is not shown to have had knowledge or notice of the custom.

[Ed. Note.—For other cases, see Physicians and Surgeons, Dec. Dig. § 18.*]

4. PHYSICIANS AND SURGEONS (§ 16*)—LIABILITY OF GENERAL PRACTITIONER FOR NEGLIGENCE OF HOSPITAL ATTENDANTS.

Plaintiff, who was a resident of Ohio, employed defendant as a surgeon to treat him in Chicago in a hospital incorporated for general hospital purposes, and under the management of a board of trustees. Plaintiff came to Chicago, contracted with the hospital authorities for his room and accommodations, and received and paid for care and treatment from its regularly employed nurses and house physicians after the performance of a surgical operation by defendant, who was an independent practition-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

er, in addition to the after-care and treatment given by defendant. *Held*, that the general custom of such hospitals to furnish like service, and of reliance thereon by an independent operating surgeon and by patients therein for the usual care and after-treatment incidental to an operation, were matters within common knowledge and of which plaintiff was charged with notice, and that the mere undertaking of defendant to operate did not imply his further undertaking to be personally responsible for fault or negligence on the part of such hospital attendants, neither known to nor discoverable by him in the exercise of care and skill in the performance of his engagement.

[Ed. Note.—For other cases, see Physicians and Surgeons, Dec. Dig. § 16.*]

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

The plaintiff in error, Dr. Malcolm L. Harris, a surgeon of Chicago, was defendant below, in an action brought by Frederick E. Fall, the defendant in error, for alleged malpractice, which resulted in a verdict and judgment for \$4,000 damages against Dr. Harris. This writ of error is sued out for review thereof, with an extended assignment of errors. All questions raised, however, which are deemed essential, are mentioned in the opinion, together with the pertinent facts. Reversed.

O. W. Dynes and James M. Sheean, for plaintiff in error.

C. Arch Williams and F. S. Loomis, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge. In this action the defendant below, Dr. Harris, is charged with malpractice in a surgical operation and subsequent treatment, all performed at Chicago Polyclinic Hospital. The direct evidence of facts in the case appears in testimony which is free from conflict in most particulars, and the verdict in favor of the plaintiff rests on deductions from such facts. Numerous errors are assigned for review—mainly in rulings upon evidence received or offered and instructions to the jury given or refused—but on examination we believe no reversible error appears, unless it arises out of one of the instructions upon the law of the case. Extended discussion of the several rulings complained of, aside from the instruction referred to, is deemed unnecessary, either for purposes of a new trial or otherwise; and remarks upon leading exceptions will serve for disposition of the others, without specific mention.

The plaintiff, Fall, resided at Toledo, Ohio, was suffering with an ailment, and had been under treatment of Dr. Haskins, of that place, for several months. Believing the trouble to be caused by stone in the right ureter, Dr. Haskins advised an operation by the defendant, Dr. Harris (whom he knew both personally and by reputation as a surgeon of skill), and was authorized by the patient to correspond with Dr. Harris to that end. An arrangement was made accordingly for Dr. Harris to attend to the case, at Chicago, in the Polyclinic Hospital. Dr. Haskins and Fall proceeded to Chicago, obtained place in the hospital November 16, 1904, and Dr. Harris operated on November

17th. Finding no ureteral stone, further exploration was postponed, as Dr. Harris states, "to study the case further before attempting any more radical means"—Fall remaining at the hospital under care of Dr. Harris, and Dr. Haskins returning to Toledo.

In the course of several weeks, the developments were deemed sufficient by Dr. Harris to require another operation. He sent word accordingly to Dr. Haskins, who then returned to Chicago to be present, and the second operation was performed by Dr. Harris at the hospital January 12, 1905. On this occasion two incisions were made—one in front, reopening the first wound, and ascertaining that the ureter had parted, and the other in the back for removal of the right kidney, which was accomplished.

The present controversy arises out of the last-mentioned operation for removal of the kidney and ensuing treatment of the wound, as the evidence establishes that at some stage of treatment a band of gauze used therein was deposited and left in the kidney cavity, causing serious disturbance, until removed long afterwards, through another operation; and the prior transactions referred to are pertinent only by way of proving the continuous relation which existed between Dr. Harris and the patient, put in issue by the defendant. While several other surgeons and attendants were present during the operation, removal of the kidney, and immediate treating and dressing of the wound, it is undisputed that Dr. Harris personally attended to all of these proceedings, with the usual incidental service of the attendants. In reference to the treatment, Dr. Harris testifies that he "used fabrics to clean out the wound," but left "nothing in the wound" when finished; that he then "packed with drainage," by inserting successively strips of gauze, by means of an instrument, with the first strips reaching "the bottom of the cavity," the next "two inches further up" and so graduating their locations; that he thus "put in five or six" strips—making no count or record of the exact number—each strip for such use being seven or eight inches wide and a yard long; that the outer end of each strip was held in a clamp during the process and each end remained outside the wound, for removal at the next dressing; and that he then sewed up the wound, leaving an opening for packing "two to two and one half inches in length," and then "put on the outside dressing." Other witnesses place the length of the opening thus left at one inch and give different recollections of the number of strips inserted in the wound. Thereafter Fall remained at the Policlinic Hospital until March 2, 1905, under the charge of Dr. Harris, who made frequent examinations of wound and dressings, and on occasions attended to the dressing; but generally Dr. Hamill or Dr. Lane, internes of the hospital, attended to the packing and dressing under instructions given them by Dr. Harris. The testimony is conflicting whether Dr. Harris personally attended to the first packing and dressing, after the day of the operation, and how many strips were then found and removed from the wound. Throughout Fall's stay at the hospital the wound remained open and unhealed, discharged pus, and gave much uneasiness, but he was assured by Dr. Harris that all was going well;

and on March 2d, under approval of Dr. Harris, Fall was removed to a Toledo Hospital.

At Toledo Dr. Haskins attended to the drainage and dressing; and after about two months, on consultation with Dr. Randolph, a Toledo surgeon of skill, it was concluded that the conditions required another operation. On June 3d a letter was sent to Dr. Harris, informing him of their opinion and asking advice, but his absence delayed a reply, so that Dr. Randolph operated on June 15th. This operation disclosed in the kidney cavity "a large piece of gauze" (as described by Dr. Randolph) and "the granulated tissue had filled up pretty well," so that he had to "curette it" for removal of the bunch of gauze, which was found to be of the size and description used for drainage packing. After such removal discharges of pus ceased and the wound healed, so that Fall's recovery had progressed favorably.

The foregoing summary necessarily omits mention of many circumstances in evidence and expert opinions, which may bear upon the issue of personal responsibility for thus leaving the gauze in the kidney cavity; but all such testimony makes for the weight of evidence one way or the other, a matter not reviewable here, and therefore not open to consideration.

The desirability or need of the operation and removal of the kidney is not within the issue; nor is it questionable that Dr. Harris was of excellent repute for skill in surgery, and that the removal was skillfully performed. Neither the fact of his undertaking to operate, and as well to attend personally to the immediate treatment and give subsequent care at the hospital, nor the matter of compensation therefor, are open to dispute under the testimony. If any issue arises upon the actual undertaking for care of the case, it is in reference to service on the part of the hospital internes. The Chicago Policlinic Hospital was incorporated for general hospital purposes, neither owned nor controlled by Dr. Harris, although he was a member of the faculty and of the board of directors. His patients were frequently sent and received there for operations by him and for subsequent treatment, making their own arrangement for hospital accommodations. Neither of the internes at the hospital was an independent employé or servant of Dr. Harris, nor of his selection or under his charge, otherwise than through their presence in the hospital service. Dr. Harris informed Fall, through a letter to Dr. Haskins answering the inquiry, that "the expense at the hospital varies from eight to twenty dollars a week, according to the room," and Fall entered the hospital at a \$12 rate, which was paid during his stay, but was not informed what was included therein.

In undertaking this professional work, the obligation was incurred by Dr. Harris to exercise throughout the performance of his engagement both "the ordinary care and skill of his profession, in the light of modern advancement and learning on the subject" and his own best ability, skill, and care. *Gillette v. Tucker*, 67 Ohio St. 106, 134, 65 N. E. 865, 93 Am. St. Rep. 639, 643, and notes; *Ballou v. Prescott*, 64 Me. 305; *Williams v. Gillman*, 71 Me. 21; *Lawson v. Conaway*, 37 W. Va. 159, 168, 16 S. E. 564, 18 L. R. A. 627, 38 Am. St. Rep. 17, 24; *Akridge v. Noble*, 114 Ga. 949, 41 S. E. 78. That the facts stated,

therefore, establish a case of malpractice and serious injury, well within the rule, if Dr. Harris was responsible for leaving the gauze in the kidney cavity, is unquestionable; and, while it is not disputed that he would be answerable for any personal negligence proven, the main propositions for denial of liability are that no such personal negligence in operation or treatment is established by proof; that Dr. Harris is neither charged in the declaration for negligence of other participants in the treatment, nor liable in any event therefor; and that the verdict is predicated on liability for such negligence of other "independent contractors."

The first error assigned is for denial of motions to direct a verdict. It is urged under the first above-mentioned proposition substantially as follows: That the fault of leaving the gauze in the wound is attributable, either equally or with more probability, to one or another of the hospital surgeons (internes) or to Dr. Haskins; and that it thus calls for a "sheer guess" by the jury to name the guilty party, and authorizes no finding against Dr. Harris. We believe this proposition to be untenable, both in premise and conclusion. It assumed to invade the province of the jury, to fix the weight to be given the facts directly proven, and thereupon to set aside the elementary doctrine of circumstantial proof, with deductions therefrom of the ultimate fact. While it is true that no admission of fault appears from the lips of either party referred to, and that there is no direct testimony that either one committed the fault in person, nevertheless the truth may be ascertainable from facts and versions which are in evidence; and (without comment on the circumstances) we are content to overrule the claim that the facts here in evidence are insufficient to that end. The inquiry is one purely of fact (for the jury), both to find the circumstances which appear from credible testimony and the reasonable deductions of fact; and the motions were rightly denied.

Error is assigned on a number of rulings by the trial court in the admission and exclusion of testimony, but we believe none of these rulings to be erroneous. The only one which seems to require mention is the exclusion of testimony proffered by the defendant to show "that at the time and place of the treatment by defendant of plaintiff it was the custom of reasonably careful" surgeons in treating similar cases to leave the "subsequent care of patients in the matter of dressing, packing, and unpacking of such wounds to the house doctor." In each form of tender the proof of custom was thus limited either to Chicago or to the hospital in question—not a general custom. The rule is elementary that such local custom cannot enter into the contract made with a stranger to locality and custom without evidence tending to show notice; and, no offer appearing to prove that either the plaintiff or Dr. Haskins, who represented him in the arrangement, was familiar with the alleged local custom, the exclusion was not erroneous. The further tender, which was ultimately incorporated in the written proffer (as filed nunc pro tunc), to prove that the house physicians "were of ordinary skill," etc., requires no discussion in the foregoing view.

The only other assignments requiring mention relate to instructions to the jury, given and refused. No exception appears to those which were given aside from one paragraph, nor do we believe they are other-

wise erroneous or wanting in fair presentation of the issues. We believe the paragraph referred to states an erroneous rule of liability, but have hesitated over the inquiry whether it must be treated as prejudicial error under the undisputed circumstances in evidence. Our conclusions are that prejudice must be presumed and reversal directed accordingly. The paragraph reads:

"The defendant has claimed that even though plaintiff did carry the gauze from Chicago in his body when he left here in March that the defendant is not to be held responsible for that, unless it appears that the defendant was responsible for allowing the plaintiff to go away from here with the gauze in his body as distinguished from the house surgeon, who the testimony shows participated in the treatment of and care of the plaintiff during his entire stay at the Policlinic Hospital. But on that question I charge you as a matter of law that the defendant in this case cannot defend himself by saying that what was negligently done to this plaintiff, if negligence there was, is attributable to some one or more of the house surgeons at the Policlinic Hospital. It was his case, and he must discharge his obligation to the plaintiff under the facts in this case as if he had no house physician associated with, or participating with, him in the care and treatment of this plaintiff."

This instruction cannot be upheld on the theory that Dr. Harris may be liable for failure to trace the pus discharges and other ill conditions of the wound to the presence of the foreign substance, so that exercise of due care required its removal before the patient left his charge. If submission in that view were admissible under either count of the declaration, then the question whether failure to discover and remove the cause was due to want of reasonable care on the part of Dr. Harris, was one of fact for the jury to determine from all the testimony under instruction to that effect; and no such distinct submission appears, either in the paragraph quoted or elsewhere in the charge. Moreover, we do not understand the declaration to charge such malpractice, although we believe the objection to be untenable, as raised in the brief of counsel, that the declaration is insufficient to include any negligent conduct therein of the hospital physicians (as assumed), which may be chargeable directly to Dr. Harris.

Support for the instruction, therefore, rests on this proposition: That the engagement of Dr. Harris, under the circumstances in evidence, conclusively implies his obligation, not only to perform and complete the operation—which, as defined in *Akridge v. Noble*, 114 Ga. 949, 41 S. E. 78, "begins when the opening is made into the body and ends when this opening has been closed in a proper way after all appliances necessary to the successful operation have been removed from the body"—but to attend, either personally to all care, dressings and treatment required, or employ professional assistants therefor, until recovery or discharge from such care. We believe no such undertaking on the part of Dr. Harris can reasonably be presumed under the evidence, and that it is without sanction under any authority called to attention. The proposition ignores these potent facts: The patient entered the Policlinic Hospital, contracted there for his room and accommodations, and received care and treatment from its nurses and house physicians throughout his stay, for which he made weekly payments; and the hospital was incorporated for general hospital purposes, under management of a board of trustees, was neither owned

nor controlled by Dr. Harris, nor were the house physicians selected or engaged by him, nor within his control, except as their services were tendered as part of the hospital service. We believe, moreover, that proof of local custom in respect of such hospital service was not needful; that the general custom of incorporated general hospitals in like localities, to furnish like service, and of reliance thereon by an independent operating surgeon and by patients therein for the usual care and after-treatment incidental to an operation, are matters within common knowledge and entitled to notice accordingly. In *Baker v. Wentworth*, 155 Mass. 338, 29 N. E. 589, this custom in respect of nurses is recognized, and the operating surgeon held exempt from liability for negligence of the nurses, although the patient supposed (in the absence of representations) that the hospital was owned by the surgeon; and in *Perionowski v. Freeman*, 4 Foster & F. 977, 980, Cockburn, C. J., remarked upon the practice (there proven) of surgeons to leave care of their patients in various details to the hospital nurses that such practice was "indispensable," and the operating surgeon was not liable for their negligence. So, these hospital attendants, known as "internes" (usually young physicians), are furnished at the general hospitals to attend to the ordinary work of dressing and treating the wound (left by an operation) on the way to recovery; and the mere undertaking of the surgeon to operate, under call or engagement therefor, cannot, as we believe, imply his further personal undertaking for the ordinary details of after-treatment, to make the doctrine of respondeat superior applicable, to charge him for fault or negligence on the part of such hospital attendants, neither known nor discoverable by the surgeon in the exercise of care and skill throughout his engagement. No doubt is entertainable, however, that the professional undertaking in the case at bar extended as well to the subsequent visits, observations, and personal treatment in evidence with the attendant obligation for the exercise of skill and care therein.

We are of opinion, therefore, that the above-quoted instruction was erroneous; and the judgment is reversed, and the cause remanded accordingly for a new trial.

VAN DYKE et al. v. MIDNIGHT SUN MINING & DITCH CO.

(Circuit Court of Appeals, Ninth Circuit. March 9, 1910.)

No. 1,698.

1. EMINENT DOMAIN (§ 253*)—APPEALABLE ORDERS—ALASKA CODE—CONDEMNATION PROCEEDINGS.

Civ. Code Alaska, c. 22, § 207, concerning eminent domain, provides for the making of findings of certain facts before the condemnation of land, and that "The plaintiff or the defendant, or any party interested in the proceedings, can appeal to the United States Circuit Court of Appeals for the Ninth Circuit from any finding or judgment made or rendered under this chapter as in other cases. Such appeal does not stay any further proceedings under this chapter." *Held*, that a party may appeal from such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

findings and an order of condemnation based thereon without waiting for the assessment of damages.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 660-664; Dec. Dig. § 253.*]

2. WATERS AND WATER COURSES (§ 15*)—WATER RIGHTS IN ALASKA—LAW GOVERNING.

The common-law doctrine of riparian rights does not apply to the Seward Peninsula in Alaska; but the waters of nonnavigable streams on public lands are subject to appropriation for mining, agricultural, and other useful purposes, and the locator of a mining claim on such a stream acquires no riparian rights by reason of such location as against a prior appropriator. He is, however, entitled to the continued use of so much water as he has been diverting and applying to a beneficial use as against a subsequent appropriator; there being no law of the territory requiring posting or recording of the notices of such appropriation to give him a vested right thereto.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 7; Dec. Dig. § 15.*]

Hunt, District Judge, dissenting.

In Error to the District Court of the United States for the Second Division of the District of Alaska.

Proceeding by the Midnight Sun Mining & Ditch Company against S. P. Van Dyke and D. W. McKay under the eminent domain act of Alaska. From the findings and an order of condemnation, defendants bring error. Affirmed.

Elwood Bruner and J. Allison Bruner, for plaintiffs in error.

S. T. Jeffreys and James E. Fenton, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge

ROSS, Circuit Judge. The plaintiffs in error are, and have been for a considerable period, the owners of certain placer mining claims on Big Hurrah creek, Alaska, so located as to cross that stream. They allege, and they gave evidence tending to show, that all the water of the creek is necessary for the proper working and developing of their claims. In 1902, after the location of these claims by the plaintiffs in error, the defendant in error posted notices near the creek and filed a claim in the recorder's office of the district setting forth that it had appropriated all the water of Big Hurrah creek. In pursuance of that notice, the defendant in error in the year 1904 constructed a ditch, tapping the creek above the plaintiffs in error's claims, and running for a distance of six or eight miles, by means of which ditch the defendant in error has been and is diverting all the water of the creek, thus depriving the plaintiffs in error of any of it. This ditch was constructed across the said mining claims of the plaintiffs in error. The evidence is conflicting as to whether, at the time of its construction, the plaintiffs in error objected thereto; but it does show, without conflict, that they subsequently denied the right of the defendant in error to run the ditch over their land, and demanded its removal. Whereupon the defendant in error brought the present suit to condemn a right of way for its ditch over the claims of the plaintiffs in error,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

relying on chapter 22 of title 3 of an act entitled "An act making further provisions for the civil government of Alaska and for other purposes," approved June 6, 1900 (Act June 6, 1900, c. 786, 31 Stat. 522). In their answer the plaintiffs in error deny the right of the company to condemn such right of way and pray for a decree ordering the removal of the ditch and the payment of damages for the trespass committed by the company in running it on their lands. The court found that the company had a right to all of the water of Big Hurrah creek by virtue of its appropriation; that the use to which it was putting the water was a public use; and that a right of way across the plaintiffs in error's claims was necessary to the proper exercise of the public use. Accordingly, the court made an order of condemnation, and, a motion made by the plaintiffs in error for a new trial being overruled, they sued out the present writ of error to this court, which writ the defendant in error moved to dismiss, contending that the order or judgment complained of was interlocutory and not final, and that therefore the Court of Appeals is without jurisdiction.

The proceeding was under section 207 of chapter 22 of the Civil Code of Alaska, concerning eminent domain, which makes it necessary for the court to find certain facts before condemnation—among them: (1) That the use to which the property is to be applied is a use authorized by law. (2) That the taking is necessary to such use. (3) If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.

It is upon findings so made that there is established a basis for further proceedings. The findings constitute the decision of the court upon the vital question of whether or not the property sought to be taken can be condemned at all. Congress evidently deemed them of great importance, for in the same clause of the Code making findings necessary it provided that:

"The plaintiff or the defendant, or any party interested in the proceedings, can appeal to the United States Circuit Court of Appeals for the Ninth Circuit from any finding or judgment made or rendered under this chapter as in other cases. Such appeal does not stay any further proceedings under this chapter."

While there may be an appeal from an assessment made by commissioners after damages are assessed, nevertheless this right to have the findings and order of condemnation reviewed by this court is given in plain language. The requirement that the appeal shall be "as in other cases" refers to the practice in the mode of taking the appeal, rather than to cases wherein an appeal may lie. We find, too, that the whole of section 207 of the Code of Alaska, as we have cited it, was taken from the Code of Civil Procedure of Montana, where it can be found in section 7334, title 7, "Eminent Domain," Rev. Codes Mont. 1907, or section 2214, Codes Mont. adopted in 1895. The Supreme Court of Montana directly construed the statute in *State ex rel. Davis v. District Court*, 29 Mont. 153, 74 Pac. 200, and held that a defendant had a right of appeal from an order of condemnation made upon findings under the statute referred to, and before damages were assessed; and in *Helena Power Transmission Co. v. Spratt et al.*, 35

Mont. 108, 88 Pac. 773, 8 L. R. A. (N. S.) 567, appeal was also taken from a judgment or order appointing commissioners after findings had been made.

As these interpretations of the statute conform to our own views, we overrule the motion to dismiss the writ of error and pass to the merits of the case.

The counsel for the plaintiffs in error are mistaken in saying, as they do, that the evidence introduced in the cause conclusively shows that the diversion of the waters of Big Hurrah creek by the plaintiff was not for any public use, but solely for its own purposes. If so, as a matter of course, the plaintiff had no right of condemnation. But we think the evidence was sufficient to justify the finding of the court to the effect that the plaintiff's appropriation of waters of Hurrah creek was made not only for its own benefit, but also in behalf of a public use. In pursuance of that appropriation, the plaintiff did supply the public with such waters, as the proof shows, and can be compelled to do so to the extent of its supply. That the plaintiff was incorporated for that purpose, among others, is also found by the trial court, and it hardly needs be said, in view of the provisions of section 204, c. 22, of the Alaska Code, which provides that the law of eminent domain may be exercised in behalf of "canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying mines and farming neighborhoods with water, and sites for reservoirs necessary for collecting and storing water; roads, tunnels, ditches, flumes, pipes and dumping places for working mines," that the plaintiff's appropriation in question was in behalf of a public use.

It is, however, a conceded fact in the case that, prior to the appropriation under which the plaintiff claims, the placer mining claims held by the plaintiffs in error were located across Hurrah creek below the point of the defendant in error's subsequent diversion, and if it be true, as is contended on behalf of the plaintiffs in error, that the common-law doctrine of riparian rights applies to the case, it would follow that the defendant in error had no right to divert any of the water from the creek above their claims. Apart from the fact that the court will take judicial notice of the climatic and physical conditions of the Seward Peninsula, on and in which the properties in question are situate, the evidence presented to the court below shows without conflict that that Peninsula is valuable chiefly, if not entirely, for its gold and other mineral deposits, much of it being in benches remote from the streams, and that water is essential to the washing out and procuring of the gold. Indeed, in few, if any, sections of the various mining states and territories, is water more essential for that purpose than in Alaska. To states and territories so circumstanced, it has long been settled that the common-law doctrine of riparian rights is inapplicable. It is true that a provision of the statutes of Alaska, to wit, section 367, puts in force therein a portion of the common law, but only "so much of the common law as is applicable, and not inconsistent with the Constitution of the United States, or with any law passed or to be passed by Congress."

In the case of *Atchison v. Peterson*, 20 Wall. 511, 22 L. Ed. 414, the Supreme Court of the United States held that, as respects the use of

water for mining purposes throughout the Pacific states and territories, the doctrines of the common law declaratory of the rights of riparian owners were, at an early day after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent, to the necessities of miners, and inadequate to their protection. "By the common law," said the court, "the riparian owner on a stream not navigable takes the land to the center of the stream, and such owner has the right to the use of the water flowing over the land as an incident to his estate. And as all such owners on the same stream have an equality of right to the use of the water as it naturally flows, in quality, and without diminution in quantity, except so far as such diminution may be created by a reasonable use of the water for certain domestic, agricultural, or manufacturing purposes, there could not be, according to that law, any such diversion or use of the water by one owner as would work material detriment to any other owner below him. Nor could the water by one owner be so retarded in its flow as to be thrown back to the injury of another owner above him."

In the subsequent case of *Basey v. Gallagher*, 20 Wall. 682, 22 L. Ed. 452, the court held that the views expressed and rulings made in the case of *Atchison v. Peterson* "are equally applicable to the use of water on the public lands for purposes of irrigation."

Again, in *Broder v. Water Company*, 101 U. S. 276, 25 L. Ed. 760, the court said:

"It is the established doctrine of this court that rights of miners who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation in the region where such artificial use of the water was an absolute necessity, are rights which the government had by its conduct recognized and encouraged, and was bound to protect, before the act of 1866"

—referring to the act of Congress of July 26, 1866 (14 Stat. 253, c. 262 [U. S. Comp. St. 1901, p. 1437]), the ninth section of which contains this declaration:

"That wherever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed."

And the court added:

"We are of opinion that the section of the act which we have quoted (the ninth) was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one."

The court, accordingly, in the *Broder Case*, without regard to the act of 1866, protected the right of the defendant to divert the water there in question from its natural channel, upon the ground that the government had, by its conduct, recognized and encouraged, and was bound to protect, such diversions. It was this principle of appropriation, and nothing else, that secured the defendant in the case of *Broder*

v. Water Company in the continued enjoyment of the water it had appropriated as against a grant from the government antedating the act of 1866, for the court there in terms declares:

"We do not think that the defendant is under the necessity of relying on that statute."

The defendant had acquired the right to divert the water from its natural channel and appropriate it to a useful purpose, because the government by its conduct through a long series of years, in view of the necessities of the country, which were widely different from those of the country from which the common law was taken, had recognized and encouraged such diversions and use of the waters upon the public lands. The government permitted the principle of appropriation of such waters to grow up and become a part of the law in relation to the public lands, and therefore, in construing the grant from the government, the court considered it with reference to the principle of appropriation, and protected the rights of the defendant which arose under and by virtue of that principle.

The decisions of the Supreme Court of the United States to which reference has been made are in line with and confirmation of numerous state decisions. In *People v. Canal Appraisers*, 33 N. Y. 482, the Court of Appeals of New York quoted with approval this language of Judge Bronson:

"I think no doctrine better settled than that such portions of the law of England as are not adapted to our condition form no part of the law of this state. This exception includes not only such laws as are inconsistent with the spirit of our own institutions, but such as were framed with special reference to the physical condition of a country differing widely from our own. It is contrary to the spirit of the common law itself to apply a rule founded upon a particular reason to a law when that reason utterly fails. '*Cessante ratione legis, cessat ipsa lex.*'"

In *McClintock v. Bryden*, 5 Cal. 100, 63 Am. Dec. 87, the Supreme Court of California said:

"The wants and interests of a country have always had their due weight upon courts in applying principles of law which should shape its conditions; and rules must be relaxed, the enforcement of which would be entirely unsuited to the interests of the people they are to govern."

From the beginning, in the arid regions of the western states and territories, it has been the custom of the people to divert from their natural channels the waters of the streams upon the public lands, and appropriate the same to the purposes of mining, agriculture, and other useful and beneficial uses. In *Irwin v. Phillips*, 5 Cal. 140, 63 Am. Dec. 113, after stating that a system of rules had been permitted to grow up with respect to mining on the public lands by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region had been tacitly assented to by the federal government, and heartily encouraged by the expressed legislative policy of the state, the court said:

"So fully recognized have become these rights, and without any specific legislation conferring or confirming them, they are alluded to and spoken of in various acts of the Legislature in the same manner as if they were rights

which had been vested by the most distinct expression of the will of the law-makers."

The common-law doctrine of riparian rights being wholly inconsistent with and antagonistic to that of appropriation, it necessarily follows that when the federal and state governments assented to, recognized, and confirmed, with respect to the waters upon the public lands, the doctrine of appropriation, they in effect declared that that of riparian rights did not apply. The doctrine of appropriation thus established was not a temporary thing, but was one born of the necessities of the country and its people, was the growth of years, permanent in its character, and fixed the status of water rights with respect to public lands.

So, in the very recent case of *Boquillas Land & Cattle Co. v. Curtis et al.*, 213 U. S. 338, 345, 29 Sup. Ct. 493, 494, 53 L. Ed. 822, the Supreme Court, in considering a similar question that arose in Arizona, said, among other things:

"But, perhaps, the main contention of the plaintiff is based on the legislation of the territory, and especially on Howell Code 1864, c. 61, § 7, as follows: 'The common law of England, so far as it is not repugnant to, or inconsistent with the Constitution and laws of the United States, or the bill of rights or laws of this territory, is hereby adopted, and shall be the rule of decision in all courts of this territory.' We assume that this section, however it may affect the case at bar, was within the power of the Legislature to enact. (Citing cases.) But we agree with the territorial court that, construed with the rest of the Code, it is far from meaning that patentees of a ranch on the San Pedro are to have the same rights as owners of an estate on the Thames."

And that Congress itself has by legislation, in effect, declared that the common-law doctrine does not apply to the waters of the non-navigable streams upon the public lands in the arid portions of the western states and territories, but that such waters in those regions may be appropriated and diverted for mining, agricultural, and other useful purposes, is further shown by the cases of *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690, 704, 705, 706, 19 Sup. Ct. 770, 43 L. Ed. 1136, and *Gutierrez v. Albuquerque Land Co.*, 188 U. S. 545, 23 Sup. Ct. 338, 47 L. Ed. 588, both of which cases arose in New Mexico, and *Bear Lake Irrigation Co. v. Garland*, 164 U. S. 1, 18, 17 Sup. Ct. 7, 41 L. Ed. 327.

We are of the opinion that the plaintiffs in error in the present case acquired, by virtue of the placer mining locations held by them, no riparian rights in or to the waters of Hurrah creek. They undoubtedly had the right to appropriate such of the unappropriated waters of that stream as were needed in and for the working of their mining claims; and the record here shows that it appeared in evidence before the court below:

"That S. P. Van Dyke and D. W. McKay were the owners of placer claims Nos. 9 and 10, that Ingobar Johnson and others were the owners of placer claims numbered 7 and 8, that Assyria Hall and others were the owners of placer claim No. 6, all on Big Hurrah creek, and that they and their grantors were such owners at the time the water ditch mentioned in the complaint was constructed, and were the owners at the time and prior to the alleged location of the waters of Big Hurrah creek by the plaintiffs herein, and its grantor, and that each and all of them were using the waters of said creek more or less for mining purposes."

There is nothing, however, in the evidence, nor, indeed, in the pleading of the plaintiffs in error, tending to show the amount of the water of the creek they had diverted for beneficial purposes prior to the appropriation under which the defendant in error claims. Inasmuch as the statutes of Alaska make no provision respecting the necessity of either the posting or recording of notices of appropriation of waters upon the public land, we think no such notice essential to the validity of a bona fide diversion of such waters for a beneficial use in Alaska, and therefore, in the final judgment to be entered in this cause, care should be taken to provide that it be without prejudice to any rights the plaintiffs in error may be able to establish to any of the waters of Hurrah creek by virtue of any appropriation made by them, or those under whom they claim, for beneficial uses, prior to the appropriation under which the defendant in error holds.

The order is affirmed, with directions so to provide in any final decree hereafter to be entered in the cause.

HUNT, District Judge (dissenting). I agree that the motion to dismiss the writ of error should be overruled. I agree, too, with the views of the majority in so far as they hold that the doctrine of riparian rights, as known to the common law, is inapplicable to the conditions existing in the semiarid states and territories. I might even go so far as to say that that doctrine may perhaps be inapplicable to conditions existing in parts of Alaska, but for reasons hereinafter stated I believe that it was the intent and spirit of the act of Congress relating to Alaska that rights in and to property there situated should, generally speaking, and so far as applicable, be governed by the rule of decision laid down by the Supreme Court of Oregon.

It is evident, from the record, that the lower court proceeded upon the theory that the plaintiffs in error had no riparian rights in the Big Hurrah creek by virtue of the location of their placer mining claims, and that the defendant in error, by its declaration of a water right and construction of a ditch and diversion of water, even though all these acts were had and done subsequent to the location of the placer mining claims of plaintiffs in error, was a bona fide lawful appropriator, and as such could condemn a right of way for its ditch.

The Code of Alaska has no specific provisions with respect to the location of water rights. In the Political Code (section 15; p. 137, Carter's Ann. Alaska Cases) there are provisions defining what instruments are subject to record, which include notices and declarations of water rights. But a statute making it the duty of a recording officer to record a notice or declaration of a water right is of little or no aid in determining whether the placer mine owners in the present case can claim riparian rights as against the defendant in error. We find assistance, however, in section 367, Civ. Code Alaska, which provides that:

"So much of the common law as is applicable and not inconsistent with the Constitution of the United States or with any law passed or to be passed by the Congress is adopted and declared to be law within the District of Alaska."

Here was a declaration to the effect that riparian rights, as known at common law, do exist in Alaska to the extent to which the law of such rights is applicable and not inconsistent with other acts of Congress.

The question is, then: To what extent and in what nature, if at all, is the common-law doctrine of riparian rights applicable? The act of Congress, "An act providing a civil government for Alaska" (chapter 53, 23 Stat. U. S. p. 24), makes the general laws of Oregon obtain in Alaska so far as the same may be applicable and not in conflict with the provisions of the laws of the United States. No statute of Oregon is directly pertinent; but we find that the rights of riparian owners in that state have been well established by judicial interpretation which, I think, may well be adopted as applicable to Alaska, where well-known climatic conditions are not unlike those of Oregon and Washington. In *Brown v. Baker*, 39 Or. 66, 65 Pac. 799, the rule recognized in that state is thus declared:

"The water of a nonnavigable stream is an incident to the soil through which it flows, and, as the United States is the primary proprietor of public lands, its grant of the waters thereof, in the Pacific Coast states, to the person having the priority of its possession (14 Stat. 253, c. 262), in the absence of a constitutional provision or statute declaring water to be public property, necessarily cuts off the right of a subsequent settler to divert the water under a claim of prior appropriation. Title by relation gives to the first settler upon the public land the priority of possession of the water flowing through the same (*Faull v. Cooke*, 19 Or. 455, 26 Pac. 662, 20 Am. St. Rep. 836; *Larsen v. Navigation Co.*, 19 Or. 240, 23 Pac. 974; *Johnson v. Lumbering Co.*, 24 Or. 182, 33 Pac. 528; *Cole v. Logan*, 24 Or. 304, 33 Pac. 568), though he may never appropriate the water to a beneficial use. If a lower riparian proprietor had acquired a right to the waters of Willow creek prior to the plaintiff's diversion, such right would necessarily defeat their appropriation of the water, because the stream at the time of the diversion was not flowing through public lands. The right of prior appropriation is limited to the use of water by the pioneer settler before any adverse claims of riparian proprietors attach to the stream from which the water is taken, and not to the points of diversion, which may be either within or beyond the boundaries of the tract selected by such settler. * * * The first settler upon public land through which a stream of water flows may either divert the water and use it for a beneficial purpose, or exercise the common-law right prevailing in the Pacific Coast states, where the modified rule of riparian ownership is still in force, and insist that the stream shall flow in its natural channel undiminished in quantity, except when applied to the natural use of the upper riparian proprietors, and for irrigation if the stream affords a sufficient quantity of water for the latter purpose. *Low v. Schaffer*, 24 Or. 239, 33 Pac. 678; *Milling Co. v. Coughanour*, 34 Or. 9, 54 Pac. 223."

The plaintiffs there contended that there was no proof of a diversion in accordance with any local custom or law, as contemplated by the act of Congress of July 26, 1866 (*supra*), and the court said:

"The act of Congress to which reference is made provides that whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same. The water rights thus granted were limited by Congress to territory in which the local customs, laws, and decisions of the courts recognized and enforced the principle that a superior right to the use of water flowing through public land was secured by priority of possession."

So, in the case under consideration, there is no proof of diversion under any local custom or law.

In *North Powder Milling Co. v. Coughanour*, 34 Or. 9, 54 Pac., page 223, the court said:

"The right of prior appropriation is incompatible with the doctrine of riparian proprietorship (Pom. Rip. Rights, § 132; Kin. Irr. § 272), and as Tartar, plaintiff's predecessor in interest, was the first settler upon the banks of that part of North Powder river, he had the privilege of making a prior and superior appropriation of its waters, or he could insist upon having the stream flow uninterruptedly in its channel through his land, subject, however, to the natural use of the water by upper riparian proprietors, and also to a reasonable use thereof by them in irrigating their lands, if the volume of the water was sufficient to supply the natural wants of the different proprietors; but, having elected to divert the water, he could not thereafter stand upon his strict common-law rights as a riparian proprietor. *Low v. Schaffer*, 24 Or. 239, 33 Pac. 678."

In *Low v. Schaffer*, 24 Or. 239, 33 Pac. 678, the Supreme Court also recognized the right of a riparian proprietor to the ordinary use of the water flowing past his land for the purpose of supplying his natural wants, and to the use of a reasonable quantity for irrigating his land, if there be sufficient to supply the natural wants of the different proprietors.

I would say, however, that in my judgment the enjoyment of the right of the riparian proprietor goes no farther than for a reasonable use, always keeping in mind the rights of others, so that as many as possible may participate in the benefits of the use of the water. In applying the common-law rules to Alaska, I think it is no strain of principle to hold that a use there for mining is as reasonable as is a use for irrigation in Oregon. The principles of the common law are not prohibitive of a reasonable use for either purpose, and the courts should not attempt to make classifications of uses without cautious regard for the circumstances and physical condition of that section of the country to be affected. *Weil on Water Rights*, p. 370; *Farnham on Waters*, § 650; *Union Mill & Mining Co. v. Dangberg*, 81 Fed. 73.

If I am right in taking the rule of the common law, as modified in interpretation by the Supreme Court of Oregon, to be the proper one to sustain as applicable to Alaska, it should follow, I think, that, the plaintiffs in error being locators of placer mining claims bordering upon a stream within the public domain before defendant in error made any appropriation of the water of the stream, defendant's subsequent appropriation should be held to be subject to the prior rights of plaintiffs in error and to the riparian rights belonging to plaintiffs in error as locators.

I think it should also follow that inasmuch as the theory upon which the lower court proceeded was wrong in ignoring the fundamental rights of the plaintiffs in error, which, under the evidence, called for the use of all the water in the creek, the order of condemnation should be set aside, and a new trial ordered, with the right accorded to the defendant in error to amend its allegations and proof with a view to establishing rights under the laws of eminent domain.

JONES et al. v. WILD GOOSE MINING & TRADING CO. et al.

(Circuit Court of Appeals, Ninth Circuit. March 11, 1910.)

No. 1,754.

MINES AND MINERALS (§ 18*)—MINING CLAIMS—EXCESSIVE LOCATION—RIGHT OF OWNER TO REJECT EXCESS.

A placer mining claim located in good faith is not wholly void because it exceeds 20 acres, but is void only as to the excess, which may be rejected from any portion the owner may select, and until he has been advised of the excess, and has had a reasonable time to make his selection, his possession extends to the entire claim, and another who goes upon it and makes a location of any part is a trespasser, and his location a nullity and void for any purpose.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 35; Dec. Dig. § 18.*]

Gilbert, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Second Division of the District of Alaska.

Action by the Wild Goose Mining & Trading Company and Frank J. Kolash against Daniel A. Jones and Charles D. Jones. Judgment for plaintiffs, and defendants bring error. Affirmed.

Grigsby & Hill, N. H. Castle, Curtis H. Lindley, and E. M. Rice, for plaintiffs in error.

Albert Fink, Thomas H. Breeze, and Gordon Hall, for defendants in error.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

HUNT, District Judge. This is an action in ejectment brought by defendants in error, plaintiffs below, to recover possession of a certain piece of placer mining property in Alaska, and for damages.

There is no substantial conflict in the evidence as to the material facts: On the 1st day of January, 1901, Harry M. Ball located the Navajoe placer claim, which, by the notice of location, and the recorder's certificate, contained a tract of land 1,320 feet long and 660 feet wide, i. e., an area of just 20 acres; but, as actually marked upon the ground by the boundary stakes, there was by inadvertence and honest mistake embraced within the claim an excess amounting to slightly over $2\frac{1}{2}$ acres, so that the claim really covered 22.531 acres, instead of the 20 acres allowed by law.

The Wild Goose Mining & Trading Company and Frank J. Kolash, defendants in error, succeeded to the title of the locator Ball prior to the commencement of this action.

In July or August, 1908, one Van Orsdale had been negotiating with defendants in error for a lease on a portion of the Navajoe claim, and had spoken to plaintiffs in error with a view to having them take over said lease and work the ground. Thereafter Van Orsdale departed from the locality, but before going notified defendant in error Kolash that the plaintiffs in error were associated with him in the lease, and that they would consummate the same. To this Kolash

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

consented. Thereafter, after the departure of Van Orsdale from Nome, plaintiff in error Charles D. Jones called upon Kolash to secure the said Van Orsdale lease. A dispute arose with regard to the amount of land to be covered by the lease, and Kolash, being unwilling to let plaintiffs in error have the amount of land asserted by them to have been negotiated for by Van Orsdale, offered them a definite parcel of the claim, and the next day (August 9th or 10th) the plaintiffs in error visited the Navajoe claim to view the same and to ascertain the boundaries of the portion thereof which Kolash was willing to lease them.

Upon measuring the boundary lines of the Navajoe, plaintiff in error Daniel A. Jones, who is a civil engineer and surveyor, found that they were too long, and that consequently the claim was excessive in area, containing more than the legal 20 acres. He, therefore, directly proceeded to make an accurate survey, and having thereby determined that the Navajoe, as located on the ground, included 22.531 acres, he did on August 12th, without having given the defendants in error any notice of his discovery of the fact that the Navajoe was excessive in area, go to the Navajoe claim and select, locate, and stake a portion thereof as the "Papoose fraction," a triangular tract embracing 2.531 acres of the northeasterly portion of the Navajoe claim, which amount he had ascertained was the excess area included within the original Navajoe boundaries, and which particular piece of ground he preferred to any other in the Navajoe claim. Immediately upon locating the Papoose fraction, plaintiffs in error assumed possession thereof and went to work sinking a shaft, and prosecuted work thereon until during the latter part of September, 1908, when they made a discovery of a few colors of placer gold, and followed this up with a discovery of gold in paying quantities about October 1st.

There is a conflict of testimony among the witnesses as to the exact date when the Navajoe owners became apprised of the fact that their claim was excessive in area, and that the plaintiff in error had located and staked the Papoose fraction. It is admitted, however, that they had no knowledge, and that no notice thereof was given to the owners of the Navajoe by the plaintiffs in error, until after location and staking of the Papoose fraction.

On August 21 or 22, 1908, T. M. Gibson, a representative of the Wild Goose Mining & Trading Company, in a conversation with said Jones, asked the latter to pull up the stakes marking the Papoose fraction, for the reason that "the owners of the Navajoe did not want to cast off the excess, if any there was, just the way he had staked it, but if he would take up his stakes, they would cast off the excess where they thought it best to do so, and that then he could take it if he wanted to." Jones refused to comply with such request. Thereafter on November 7, 1908, defendants in error caused the Navajoe claim to be surveyed, and thereupon cast off 2.54 acres from the southeasterly portion of the claim, and made an amended location of the claim, of the remaining 20 acres. On November 12, 1908, one W. H. Lonagan, acting in behalf of the Wild Goose Mining & Trading Company, located and staked the excess so cast off as the "pump fraction."

At the close of the testimony, plaintiffs moved the court to direct the jury to bring in a verdict for plaintiffs. This request was granted, and the jury, pursuant to the court's instructions, found for the plaintiffs. Judgment was entered in accordance therewith, and defendants sued out this writ, assigning for errors the action of the court in sustaining plaintiffs' motion, and instructing the jury to return a verdict in favor of the plaintiffs, and in entering judgment upon the verdict of the jury, and in overruling defendants' motion for a new trial.

The law under which mining locations may be made is to be found in chapter 6 of title 32, Rev. St. (U. S. Comp. St. 1901, pp. 1422-1442). By section 2322 it is provided that:

"The location of all mining locations * * * on any mineral vein, lode or ledge, situated on the public domain, * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations. * * *"

And by section 2329 it is provided that:

"Claims usually called 'placers' including all forms of deposits, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims."

In a late case, *Clipper Mining Co. v. Eli Mining & Land Co.*, 194 U. S. 220, 24 Sup. Ct. 632, 48 L. Ed. 944, the Supreme Court, commenting on these sections, says:

"It will be seen that section 2322 gives to the owner of a valid lode location the exclusive right of possession and enjoyment of all the surface included within the lines of the location. That exclusive right of possession forbids any trespass. No one without his consent, or at least his acquiescence, can rightfully enter upon the premises or disturb its surface by sinking shafts or otherwise. * * * That exclusive right of possession is as much the property of the locator as the vein or lode by him discovered and located. * * * In *Belk v. Meagher*, 104 U. S. 283 [26 L. Ed. 735], it was said by Chief Justice Waite that 'a mining claim perfected under the law is property in the highest sense of that term,' and in a later case (*Gwillim v. Donnellan*, 115 U. S. 45, 49 [5 Sup. Ct. 1110, 1112, 29 L. Ed. 348]), he adds: 'A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a location, there is another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as a bar to the second.' In *St. Louis Mining Co. v. Montana Mining Co.*, 171 U. S. 650, 655 [19 Sup. Ct. 61, 63 (43 L. Ed. 320)], the present Chief Justice declared that: 'Where there is a valid location of a mining claim, the area becomes segregated from the public domain and the property of the locator. * * * And this exclusive right of possession and enjoyment continues during the entire life of the location.'"

Again, in *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735, the Supreme Court has said:

"Mining claims are not open to location until the rights of a former locator have come to an end. A relocater seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim, and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a re-

location on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done."

These principles of law, long settled and unambiguous, are the ones that must be invoked for guidance in the determination of the single question presented for decision by the record in this case, and that is: The right, as between the parties to this action, to the possession of the ground embraced within the so-called "Papoose fraction" location. It is evident, from the decisions of the Supreme Court above cited, that, if the location by Jones of the Papoose fraction was void and invalid, then no possessory rights were initiated and he acquired none.

In *Waskey v. Hammer*, 170 Fed. 31, 34, 95 C. C. A. 305, 308, this court said:

"A location made in good faith and otherwise conformable to law is not rendered wholly void by reason of such excess; but that the excessive area only is void is well settled. And that such locator is at liberty to select the portion of the claim that he will reject as such excess is also established law."

And in *Walton v. Wild Goose Mining & Trading Co.*, 123 Fed. 218, 60 C. C. A. 144, this court, through Judge Hawley, regarded an excess of 20 acres in the location of a placer claim as not invalidating the location, but merely rendering it voidable as to the excess. The same doctrines are announced in *Zimmerman et al. v. Funchion et al.*, 161 Fed. 859, 89 C. C. A. 53, and *McIntosh v. Price*, 121 Fed. 716, 58 C. C. A. 136.

Applying the above principles of law to the facts in the case at bar, it is apparent that Jones, at the time he staked the Papoose fraction, was a wrongdoer, and an intruder and trespasser upon the possessory rights of the defendants in error in and to the Navajoe claim; and that his attempted location of the Papoose fraction, at the time and in the manner he did, was a nullity and void for any purpose, and initiated no rights whatsoever in him, for the reason that the ground covered by such attempted location was, at the time that location was made, in the eye of the law, in the exclusive possession of the defendants in error, under a valid and subsisting location, and they were unaware of, and had not been notified of, the excess, by the plaintiffs in error, nor were they given any opportunity to exercise their right to select and cast off. Until they had received such notice, and were given an opportunity to exercise such right, the whole claim, including any excess due to honest mistake and free from fraud, was so far segregated from the public domain as to exempt it or any part thereof from relocation. In *Kendall v. San Juan Mining Co.*, 144 U. S. 663, 12 Sup. Ct. 779, 36 L. Ed. 583, a case involving the validity of a location of a mining claim upon an Indian reservation which had been set apart for "the absolute and undisturbed use and occupation of the Indians," the Supreme Court used the following pertinent language:

"The effect of the treaty was to exclude all intrusion for mining or other private pursuits upon the territory thus reserved for the Indians. It prohibited any entry of the kind upon the premises, and no interest could be claimed or enforced in disregard of this provision. Not until the withdrawal of the land from this reservation of the treaty by a new convention with the

Indians, and one which would throw the lands open, could a mining location thereon be initiated by the plaintiffs. The location of the Bear lode, having been made whilst the treaty was in force, was inoperative to confer any rights upon the plaintiffs. * * * Had the plaintiffs immediately after the withdrawal of the reservation relocated their Bear lode, their position would have been that of original locators, and they would then have been within the rule in *Noonan v. Caledonia Mining Co.*, 121 U. S. 393 [7 Sup. Ct. 911, 30 L. Ed. 1061]."

So in the case at bar, had the plaintiff in error Jones, after giving the owners of the Navajoe notice of the excess, waited a reasonable time for them to exercise the right to select and cast off, and then relocated the Papoose fraction, a very different question would be presented, and, by a subsequent discovery, he might then perhaps have brought himself within the rule announced in *Mining Company v. Tunnel Company*, 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501. This, however, he did not do, but relied upon his location of August 12, 1908, and this we hold was a nullity, initiating no rights; for, again to follow the doctrine of the Supreme Court, the right to the possession of mining property comes only from a valid location; if there is no location, there can be no possession under it. "A location to be effectual must be good at the time it is made." *Belk v. Meagher*, 104 U. S. 284, 26 L. Ed. 735. Consequently, a location void at the time it is made, because made on a claim valid and subsisting, continues and remains void, and is not cured or made effectual by subsequent discovery.

The conduct of plaintiffs in error in the location of the Papoose fraction, as appears from the record, was, in our opinion, unjustifiable, and is not to be sanctioned. Moreover, as Chief Justice Waite said:

"To hold that, before the former location has expired, an entry may be made and the several acts done necessary to perfect a relocation, will be to encourage unseemly contests about the possession of the public mineral bearing lands which would almost necessarily be followed by breaches of the peace." *Belk v. Meagher*, 104 U. S. 285, 26 L. Ed. 735.

The decision which we have thus reached renders it unnecessary to consider and determine the other questions presented in counsel's briefs.

The action of the District Court for Alaska in sustaining plaintiffs' motion to direct a verdict, and in entering judgment on the verdict, was right, and it is affirmed.

GILBERT, Circuit Judge (dissenting). Conceding that the plaintiffs in error could not lawfully make their location at the time when they attempted to make it, the question still remains whether or not the defendants in error had at the time of the commencement of the action such title that they could maintain ejectment against the plaintiffs in error who were in possession of the disputed premises. The plaintiff in ejectment must recover, if at all, on the strength of his own title and not on the weakness or defect of his adversary's title. In the absence of fraud or bad faith, a mining claim which includes more ground than the law allows is not entirely void, but is void only as to the excess. Such is the language of numerous decisions and of the text-writers. The question arises: What portion of the excessive

claim shall be deemed to be the excess? In the case of a lode claim located under regulations or a statute limiting the side lines to a certain width on each side of the vein or the discovery shaft, if the claim as marked is of greater than the permitted width, it is easy to ascertain where and what is the excess, and it would seem that the excess is open to immediate location by another. *Taylor v. Parenteau*, 23 Colo. 368, 48 Pac. 505; *Lakin v. Dolly* (C. C.) 53 Fed. 333; *Bonner v. Meikle* (D. C.) 82 Fed. 697-705. In *Hausworth v. Butcher*, 4 Mont. 299, 1 Pac. 714, the court said:

"The boundaries must be so definite and certain as that they can be readily traced, and they must be within the limits authorized by law; otherwise their purpose and object would be defeated. The area bounded by a location must be within the limits of the grant. No one would be required to look outside of such limits for the boundaries of a location. Boundaries beyond the maximum extent of a location would not impart notice and would be equivalent to no boundaries at all."

But in the case of a placer claim, where the only limitation is that it shall not exceed 20 acres, the precise part that shall be deemed the excess is not ascertained until the locator in the exercise of his right, on discovering that his claim is excessive, has readjusted his lines so as to exclude the excess. It is the logical deduction from the decisions that, if the original location was fraudulently made excessive, it is void in toto. If this be true, it would seem that if, after discovering that his claim is excessive, the locator willfully continues to maintain his lines as marked upon the ground, and fails within a reasonable time to cast off the excess, he places himself in the attitude of fraudulently asserting claim to a location greater in area than the law permits, the resulting invalidity of which would be the same that it would be if he had made the claim fraudulently excessive in the first instance. The defendants in error in this case failed, for a period of nearly three months after notice that their claim was excessive, to alter their lines so as to conform to the legal requirements. This failure to act, in my opinion, amounted to an active and intentional assertion of an excessive claim, and I submit it should be held that thereby the location became void.

But whether this conclusion is correct or not, in any proper view of the facts and the law applicable thereto the defendants in error are still fraudulently asserting an excessive claim. The only portion of their claim which they have cast off is that portion on which was their posted notice of location, their discovery shaft, and all their extensive workings, and from which practically all the gold extracted from the claim since its location had been taken, and upon which they had, at the time of relocating their lines, ceased their mining operations. To cast off this portion of the claim as excess is but another way of maintaining a claim to the whole location as it was originally made. To hold that a locator of an excessive location may exhaust the mineral from a portion thereof, cast off that portion as the excess, and hold the remainder, would be to open the door to fraudulent location, and would be tantamount to deciding that such a locator, if he can succeed in working out a portion of the claim before notice is brought to him that his claim is excessive, may successfully locate,

hold, mine, and exhaust a placer claim of greater area than the law allows. To hold so would be to render nugatory the express object of the mining laws which limit the size of placer locations, and would permit the miner to profit by his own wrong.

In view of these considerations, I submit that the defendants in error had no title or right of possession on which they could recover in ejectment, and that the trial court erred in directing a verdict for the defendants in error.

UNITED STATES v. DOLLA.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1910.)

No. 2,007.

COURTS (§ 405*)—JURISDICTION OF CIRCUIT COURT OF APPEALS—PROCEEDING FOR NATURALIZATION—REVIEW—"CASE."

A proceeding for naturalization under Act June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1909, p. 477), is not a "case" within the meaning of Act March 3, 1891, c. 517, § 6, 26 Stat. 828 (U. S. Comp. St. 1901, p. 549), which provides that Circuit Courts of Appeals "shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law," and there being no provision for direct review in the naturalization act a Circuit Court of Appeals is without jurisdiction to review the decision of a District or Circuit Court in such a proceeding. Moreover, the admission of an alien to citizenship is a political, and not a judicial, act, and, having been vested by Congress in the courts to be exercised on proof "to the satisfaction of the court," its exercise is discretionary, and not reviewable.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 405.*

For other definitions, see Words and Phrases, vol. 1, pp. 985-994; vol. 8, p. 7597.]

In Error to the District Court of the United States for the Southern District of Georgia.

Petition for naturalization by Abba Dolla. From an order admitting petitioner to citizenship, the United States brings error. Writ of error dismissed.

Alexander Akerman, for the United States.

Robt. M. Hitch and Remer L. Denmark, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

PARDEE, Circuit Judge. The record shows that Abba Dolla presented his petition in due form for naturalization under the act of Congress providing for a uniform rule for the naturalization of aliens, approved June 29, 1906 (Act June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1909, p. 477]), that upon the hearing of this petition and in opposition thereto the United States appeared through Alexander Ackerman, Esq., Assistant United States Attorney, and urged an objection upon the ground that the said Abba Dolla was a native of India, and was not of those classes of aliens who are per-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mitted to be naturalized under the laws of the United States. The court heard the petitioner and the evidence produced by him, and "being of opinion that the said applicant was a white person, within the meaning of the said naturalization laws, and was entitled to become naturalized as a citizen of the United States," made an order formally admitting said Abba Dolla as a citizen of the United States, to which ruling of the court the United States Attorney in behalf of the United States excepted and thereafter sued out this writ of error.

The bill of exception shows:

"Upon the said hearing, by the sworn testimony of the said Abba Dolla, and his said two witnesses, it was shown to the satisfaction of the court that the said Abba Dolla was in all respects qualified to become naturalized as a citizen of the United States, the only question at issue being as to whether or not he was a white person within the meaning of naturalization laws. It appeared that the said Abba Dolla was born and reared in Calcutta, India. His father and mother were natives of Afghanistan. Prior to the applicant's birth they removed to Calcutta from Kabul, the capital of Afghanistan. The applicant's complexion is dark, eyes dark, features regular and rather delicate, hair very black, wavy and very fine and soft. On being called on to pull up the sleeves of his coat and shirt, the skin of his arm where it had been protected from the sun and weather by his clothing was found to be several shades lighter than that of his face and hands, and was sufficiently transparent for the blue color of the veins to show very clearly. He was about medium or a little below medium in physical size, and his bones and limbs appeared to be rather small and delicate. Before determining that the applicant was entitled to naturalization the presiding judge closely scrutinized his appearance and himself propounded the questions relating to the various requirements of the naturalization statutes, giving the applicant a rigid and detailed examination. The applicant testified that he came to New York from Calcutta about June 15, 1894, on the steamship Gonconda, and that on the same boat a fellow countryman of his, named Abdul Hamid, came to this country, and that Abdul Hamid was granted naturalization papers in the United States District Court at New Orleans on March 20, 1908, the naturalization certificate of Abdul Hamid being produced and submitted to the presiding judge in confirmation of this statement. The applicant has been living in Savannah, Ga., about 12 years. He is a regular importer of silks, linens, and other goods from India, through the Savannah custom house, and acts as a kind of jobber or wholesaler in this line of business, other countrymen of his taking the goods and selling them at retail from house to house in the surrounding country as well as in the city of Savannah. The applicant seemed to be generally and very favorably known by quite a number of reputable people in Savannah, several of whom he offered to produce in court to testify as to his character, integrity, habits, etc., though the court did not require their testimony. Among those whom he offered to produce for this purpose was the deputy collector of the port at Savannah, certain merchants of the city, one of the attachés of the United States court and one of the leading white physicians of the city, Dr. E. R. Corson, who had attended him at the various times in the past several years and who had at one time performed an operation on him for appendicitis. Dr. Corson was present in the court at the hearing, and was ready to swear that in his judgment the applicant was of pure Caucasian blood. The applicant seemed to have no particular affiliations of social nature with any except those of his own nationality—he and several of his countrymen living together in Savannah. His trade was among whites and blacks indifferently. The two witnesses to his application were colored men. He was shown, however, to be the owner of a cemetery lot in the "white cemetery" at Savannah, which is owned and controlled by the city of Savannah, and which cemetery lots are sold by the city of Savannah to white persons only, and in which white persons only are buried, other cemeteries being provided for colored people."

The errors assigned are, (1) The court erred in admitting the said Abba Dolla as a citizen of the United States over the objection of the said United States. (2) The court erred in holding that under the evidence the said Abba Dolla was a white person within the meaning of the naturalization laws of the United States. (3) The court erred in overruling the objection of the United States to the said petition. (4) The court erred in not making an order, under the evidence in the case, refusing to admit the said Abba Dolla to citizenship.

The defendant in error denies our jurisdiction. The naturalization laws, while they provide "the United States shall have the right to appear before any court exercising jurisdiction in naturalization proceedings for the purpose of cross-examining the petitioner and shall have the right to call witnesses to produce evidence and be heard in opposition to the granting of any petition in naturalization proceedings," do not provide for, or apparently contemplate, any appeal, by writ of error or otherwise, to any revisory court, and therefore if this court has any jurisdiction on this writ of error, it must be found in the fifth and sixth sections of the Circuit Courts of Appeals Act, passed in 1891 (Act March 3, 1891, c. 517, 26 Stat. 827, 828 [U. S. Comp. St. 1901, p. 549]), the fifth section of which provides for appeals or writs of error from the District and existing Circuit Courts to the Supreme Court in certain enumerated cases; and in section 6 provides that the Circuit Courts of Appeals established by this act shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts and existing Circuit Courts in all cases other than those provided for in the fifth section unless otherwise provided by law.

The question before us, then, is whether an application for naturalization under the laws of the United States which may be presented to any District or Circuit Court or to any court of record in any state or territory having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity in which the amount in controversy is unlimited, is a case within the meaning of the sixth section of our jurisdictional act.

Bouvier defines a case to be "a contested question before a court of justice; a suit or action; a cause."

Burrell defines a case to be "a suit or action, a cause; the Latin *casus* had formerly the same meaning." He also says: "A case, in the sense of the Constitution of the United States (article 3, § 2), is a suit in law or equity instituted according to the regular course of judicial proceedings."

"A 'case' is a contested question before a court of justice; a suit or action; a cause; a state of facts involving a question for discussion or decision, especially a cause or suit in court. The term 'case' has been frequently held synonymous with the terms 'cause,' 'action' and 'suit,' but distinctions have been drawn between 'cause' and 'case.'" Ency. L. & P. vol. 5, p. 748 et seq.

"The word 'cases,' three times used in this section (section 2, art. 3, Const. U. S.), must be understood in its legal and technical sense as meaning contested questions before courts of the United States, suits,

or actions." *Home Ins. Co. v. Northwest Packet Co.*, 32 Iowa, 236, 7 Am. Rep. 183.

"A 'case' is a state of facts which furnishes occasion for the exercise of the jurisdiction of a court of the United States; to the existence of such a case parties are necessary, also pleadings and proceedings, trials, orders, judgments, etc., should follow." *Calderwood v. Peyser*, 42 Cal. 115.

"'Case' is defined to be a question contested before a court of justice, an action or suit in law or equity (*Martin v. Hunter's Lessee*, 1 Wheat. 352 [4 L. Ed. 97]; *Osborn v. U. S. Bank*, 9 Wheat. 819 [6 L. Ed. 204]). A suit is defined to be a prosecution of some demand in a court of justice (*Cohens v. Virginia*, 6 Wheat. 407, 5 L. Ed. 257; *Wayman v. Southard*, 10 Wheat. 30 [6 L. Ed. 253])." *Ex parte Towles*, 48 Tex. 433.

"The words 'case' and 'cause' are constantly used as synonymous in statutes and judicial decisions, each meaning a proceeding in court, a suit or action. Surely no court can have jurisdiction of either a case or a cause until it is presented in the form of an action." *Blyew v. United States*, 13 Wall. 591, 595, 20 L. Ed. 638.

Under the naturalization law of June 29, 1906, the jurisdiction is conferred upon the courts, the petition for naturalization is to be filed addressed to the court, notice is to be given by posting, witnesses may be summoned, the United States are given the right to appear and oppose and call witnesses, every final hearing shall be had in open court before a judge or judges, and final orders are to be under the hand of the court and entered of record. Under the first naturalization act (Act March 26, 1790, c. 3, 1 Stat. 103), jurisdiction was conferred upon state courts only, but since 1802 it has been extended to District and Circuit Courts of the United States. Naturalization has always been an act or judgment of a court, but never until the act of 1906 has it been suggested that the special proceedings authorized constituted a case, action, or cause that could be reviewed on writ of error under any judiciary act, state or federal. If, by the additional provisions and restrictions with which naturalization is guarded by the act of 1906, an application for naturalization is made a case within the meaning of section 6 of the Courts of Appeals Act of 1891, then it must follow that all applications for naturalization in all courts, state and federal, are reviewable by appeal or writ of error, as the several judiciary acts may read, at the suit of the rejected applicant or the United States.

We may say, further, if naturalization proceedings under the act of 1906 constitute a "case" it is a case at law, not in equity nor in admiralty; and if such a case is reviewable under present laws it can only be on writ of error, and only errors of law appearing of record can be reviewed. It is unnecessary to point out that such review would be fruitless in all cases where the forms provided by the law are followed. Any review of naturalization proceedings in an appellate court, to be worth while, must be a review of the facts as well as law, and this can only be on appeal, and an appeal must be provided by statute. As the act of 1906 is silent with regard to any appeal or writ of error,

while sedulous in placing guards and restrictions around the proceedings and fully protecting the United States by authorizing a suit to annul any certificate fraudulently obtained or improperly granted, it is not to be supposed that it was the intention of the said act to make a reviewable case of every application for naturalization. The mischief to be remedied was not in that line, but was the hasty and improvident way in which many of the courts under the prior laws naturalized aliens without examination and proper proof. Naturalization of aliens is an act of grace, not right, and it is not necessarily a business of the courts. It is lodged in the courts for convenience, and, at the pleasure of Congress, can be taken entirely away and lodged in the Bureau of Commerce and Labor, which is now charged with supervision of the operations under the act, or with any executive officer, as is now lodged the right and power to determine whether certain aliens shall be permitted to come into the country at all. See *Lee Lung v. Patterson*, 186 U. S. 168, 22 Sup. Ct. 795, 46 L. Ed. 1108. If naturalization is a judicial act it is because done by judges.

We therefore conclude that the action and proceedings of the District Court on Abba Dolla's petition for naturalization did not constitute a "case" within the meaning of the sixth section of the judiciary act of 1891, and this court is without jurisdiction to review the same.

The same conclusion may be reached on another line. The admission of an alien to citizenship is not only a political act of grace, but the power vested in the court to grant or order the same is on proof to the satisfaction of the court, with the petitioner and witness as necessary exhibits—that is to say, the question of admission is committed to the discretion of the courts—and discretionary rulings of courts are not reviewable on error or appeal, except, perhaps, when the discretion is shown to have been abused, and abuse of discretion in naturalization cases is provided for in section 15 of the act of 1906, not by error or appeal, but by a direct suit to annul and cancel.

A writ of error to revise discretionary rulings should be dismissed. See *McTague v. P. & N. E. R. R. Co.*, 44 N. J. Law, 61, 62.

The writ of error is dismissed.

GREAT NORTHERN RY. CO. v. McDERMID.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1910.)

No. 1,761.

1. MASTER AND SERVANT (§§ 288, 289*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—DEFECTIVE MACHINERY—QUESTIONS FOR JURY.

Where a servant having knowledge of a defect in a machine or appliance which makes it unsafe to use it reports the fact to the employer, and is promised that the defect shall be repaired within a reasonable time, whether his continuing to use it is within the assumption of risk or constitutes contributory negligence if he is injured are questions for the jury, unless the facts are such that upon any view of them no recovery can be had thereon as matter of law.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1084, 1097; Dec. Dig. §§ 288, 289.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MASTER AND SERVANT (§ 145*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—CONSTRUCTION OF RULES OF RAILROAD COMPANY.

If a rule of a railroad company is ambiguous and uncertain, it should be construed most strongly against the company, and in favor of the employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 288; Dec. Dig. § 145.*]

3. MASTER AND SERVANT (§ 243*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—DEFECTIVE MACHINERY—CONTRIBUTORY NEGLIGENCE—VIOLATION OF RULES—RELIANCE ON PROMISE TO REPAIR.

Where the rules of a railroad company required the roundhouse foreman to make all needed repairs on engines or cause them to be made, a rule requiring engineers before starting on a trip to examine their engines to know that they are in a safe condition to operate does not make it the duty of an engineer to make repairs before starting, but in such respect the roundhouse foreman is his superior, and the promise by such foreman to repair a defect reported to him by an engineer, or to send an appliance required, may justify the engineer in proceeding with the engine in reliance on such promise when he is ordered to do so.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 682, 762; Dec. Dig. § 243.*]

In Error to the Circuit Court of the United States for the Eastern Division of the Eastern District of Washington.

Action by Anson McDermid against the Great Northern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

F. V. Brown, A. J. Laughon, J. J. Lavin, and Robert C. Saunders, for plaintiff in error.

W. H. Plummer, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

HUNT, District Judge. This action was brought in the United States Circuit Court by Anson McDermid, a locomotive engineer, hereafter to be called the plaintiff, against the Great Northern Railway Company, hereafter to be called the defendant, to recover damages for an injury to plaintiff's right eye, caused by the alleged negligence of the defendant in not furnishing a guard for a lubricator glass in the locomotive. The glass exploded and partially destroyed the eye of the plaintiff. Verdict in favor of the plaintiff for \$4,000, and, from a judgment thereon, the defendant sued out this writ of error.

The only specification of error relates to the refusal of the court to instruct the jury to return a verdict in favor of the defendant. The evidence of the plaintiff is substantially as follows: The plaintiff was in the employ of the defendant company as an engineer. In May, 1908, he was ordered to take an engine from Hillyard, Wash., to Troy, Mont. Upon examining the engine, preparatory to starting, plaintiff noticed the lack of a screen or guard over the lubricator glass in the cab. He immediately reported the defect to the roundhouse foreman, and requested that it be remedied. The foreman said, in answer to his report and request:

"Well, the night crew has gone. It is after 6 o'clock, and the day crew hasn't come to work yet. Everything is locked up and I can't get anything for you. You will have to go and we will send the things to you."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Thereupon, the plaintiff, relying upon the above promise of the foreman to make the repairs, ran the engine to Troy, as ordered. Upon his arrival at Troy, he reported to the defendant's foreman, that the lubricator had no screen glass, whereupon the foreman promised that he would send away for one and repair the defect in two or three days. Thereupon, the plaintiff continued, according to orders, to run the engine in its unsafe condition, relying on this promise of the foreman and on subsequent promises given every two or three days. On the eighth day after the discovery and first report of the defect, while the plaintiff was running his engine, relying on the promise of the foreman soon to remedy the defect, the unguarded lubricator glass exploded and drove a piece of glass into the plaintiff's eye, thereby injuring him severely.

It is well established that if a servant who has knowledge of the defects in a machine gives notice to his master, or his proper representative, and is promised that they shall be remedied, his subsequent use of it, in the well-grounded belief that they will be remedied within a reasonable time, is not, necessarily, either contributory negligence or within the assumption of risk. The questions involved are for submission to the jury, unless the conclusion follows, as matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish. *Kreigh v. Westinghouse & Co.*, 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984; *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *Northern Pac. R. R. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958. We think this case was properly submitted under these principles. The jury found that the plaintiff was not guilty of contributory negligence; nor did he assume the risk.

But the defendant would have us decide that, as a matter of law, the plaintiff cannot recover because the undisputed facts of the case show conclusively that he was guilty of contributory negligence in this: That the plaintiff was bound by the rules of the company to do the very thing for the lack of doing which he was injured, namely, seeing to it that the guard was provided before he took the engine out on the trip. The rule upon which the defendant bases its contention is as follows:

"Rule 468. 'Before starting on a trip, they must examine their engines so as to know that they are in safe condition to operate; that all steps, handrails and handholds are in perfect condition; that water and lubricator glasses and guards for same are in perfect condition, and must provide themselves with enough extra water and lubricator glasses and guards for same to replace any that may be broken.'

"a. Under no circumstances must they permit water and lubricator glass guards to be removed while engines are under their charge.'

"b. It is the right and duty of engineers to take sufficient time to make such examination of their engines, before using same, as will avoid exposing them to unusual and unnecessary dangers by reason of any defective condition of same.'"

Defendant's contention is based upon a construction of this rule, to the effect that it is the engineer's duty to repair his engine, or see to it that the repairs are made. But it is apparent to us that neither the letter nor the spirit of the above rule supports this construction.

Undoubtedly, the rule prescribes that the engineer shall examine his engine for defects, but there is nothing in it to lead us to believe that the engineer must also repair defects when found, or be responsible for the repairing. As confirmatory of our view, we observe that "Roundhouse foremen, Rule 452," provides that the roundhouse foreman shall make repairs, or see to it that they are made. Thus, there is a positive duty to repair imposed upon the roundhouse foreman. The defendant argues that, under any construction, responsibility for repairs is put upon the foreman and the engineer jointly. There being, however, nothing tending to show that such responsibility is in the engineer, it is more consistent with reason and the generally known exigencies of railroading to believe that this is the duty of the foreman alone. The necessity for the delegation of labor among railway employes is a matter of common knowledge. An engineer, whose duty it was to repair the defects which might arise from time to time in his engine, would have little time for anything else. It is also insisted that rule 468, quoted, forbids an engineer to take out an engine which is defective in any particular, and that, therefore, the plaintiff in this case disobeyed a plain rule of the company and cannot recover.

Railway rules are presumed to have been drawn up with care and study, and the meaning of the company ought to be expressed in clear and concise language. But if the intent and meaning are not so expressed, and the meaning of any particular rule is ambiguous or uncertain, it should be construed in its stronger sense against the company and in favor of the employé. In the case at bar, does the rule plainly and unambiguously prohibit the taking out of a defective engine? It seems to us clearly not.

We have seen that the duty of making repairs devolved solely upon the foreman. He was fully capable of binding the company by a promise to the engineer concerning the duty which the company owed the engineer, the performance of which had been delegated to the foreman. *Cincinnati Ry. Co. v. Robertson*, 139 Fed. 519, 71 C. C. A. 335; *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612.

The defendant attempts to distinguish the cases above cited from the one before us. There are some slight differences, it is true, but the principle on which the decisions cited rest is the same as that on which this case is based. Defendant insists that in the *Hough Case*, *supra*, the engineer was under the direct control of the foreman, while here, the engineer was not thus under his control, and that this lack of authority of the foreman over the engineer is fatal to the imputation to the company of promises made by the foreman to the engineer. The defendant again takes an erroneous view of the relative positions and duties of the foreman and of the engineer. The foreman was the superior of the engineer, at least, in regard to repairing the engine. He was the representative of the defendant company in matters within the domain of repairing and mending engines. Moreover, it appears from the evidence that when orders came from headquarters, it was the duty and right of the foreman to select the engine and crew to execute such orders. This power to designate what engine and engineer should perform the work makes the foreman the superior of all those who may come within the purview of his selection. He commands

them to execute the orders which come through the train dispatcher. If the engineer thus selected by the foreman to perform service is told to do it with a defective engine, and if he complains of the defect to the foreman, and is promised that it will be soon remedied, and is told by the foreman that in the meanwhile, he must use the engine in its defective condition, it is but reasonable to say that the engineer is using that particular engine at the command of the company, and that he has a right to rely on the foreman's promise that the defect will soon be remedied, as the promise of the company. There is nothing in the nature of the defect in the present action, and the means of remedying it, which make this case essentially different from *Railway v. Robertson*, *supra*.

Objection is also made that the promise was insufficient in fact, in that it was never performed, and had not been performed within a reasonable time between the promise and the injury. Of course, if the promise had been performed, this cause would not now be before this court. What constituted a reasonable time between the promises and the injury was clearly a question for the jury, and its conclusion will not be questioned.

After examination of all the points urged for review, we are of opinion that there is no substantial ground for a reversal.

Judgment affirmed.

KJELSBURG v. CHILBERG.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1910.)

No. 1,716.

1. MINES AND MINERALS (§ 57*)—CONTRACT TO LEASE—EVIDENCE.

In an action for breach of a contract to lease plaintiff the right to operate a mining claim on a royalty, evidence that defendant stated to plaintiff that he would make out a lease of the claim in question, that the terms of the royalty would be 40 per cent., and that the lease was to commence on September 1, 1905, and run to the middle of June, 1906, was sufficient evidence as to the terms of the contract.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 57.*]

2. TRIAL (§ 296*)—INSTRUCTIONS—PEREMPTORY INSTRUCTIONS—CONSTRUCTION.

In an action for breach of a contract to lease a mine, the court charged that if the jury found from the evidence that the agreement was made and that defendant leased the premises to another, and if plaintiff had been given a lease would have mined the ground at a profit, then the jury should find for plaintiff for some amount, was not error; the court having presented the issue whether defendant agreed to make the lease, and having elsewhere instructed that, if the jury found there was a breach of such agreement, plaintiff was at least entitled to nominal damages.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 705-716; Dec. Dig. § 296.*]

3. EVIDENCE (§ 142*)—SIMILAR FACTS AND TRANSACTIONS—DAMAGES.

In an action for breach of a contract to lease a mine, evidence of the profits made under a like lease of the same property to others during the same period, in connection with evidence that plaintiff would have worked the premises practically in the same manner, had the lease been executed to him, was competent on the issue of damages.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 142.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the District Court of the United States for the Second Division of the District of Alaska.

Action by B. A. Chilberg against Magnus Kjelsberg. Judgment for plaintiff, and defendant brings error. Affirmed.

Ira D. Orton, Campbell, Metson, Drew, Oatman & MacKenzie, and E. H. Ryan, for plaintiff in error.

Albert H. Elliot and Wm. H. Packwood, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

GILBERT, Circuit Judge. The defendant in error brought an action against the plaintiff in error to recover damages for breach of an agreement to lease to the defendant in error a certain placer mining claim belonging to the plaintiff in error. The complaint alleged that the parties to the contract had been copartners in business at Nome, Alaska; that they dissolved their partnership, and in part consideration of the surrender by the defendant in error of his interest in the copartnership business the plaintiff in error agreed to execute to him a lease of the mining claim for one year upon a royalty of 40 per cent.; that the plaintiff in error failed and refused to execute the lease, and instead thereof executed a lease of the claim to another, so that the defendant in error was prevented from working the said claim; that the defendant in error could and would have extracted from the ground, over and above the royalty to be paid to the plaintiff in error and the necessary expenses of working the mine, gold dust of the value of \$50,000. For that sum he demanded judgment. On the trial before a jury, verdict was returned for the defendant in error in the sum of \$2,000, for which judgment was rendered.

The plaintiff in error contends that there was no contract proven by the record which would entitle the defendant in error to damages for its breach. There was no motion for an instructed verdict. There was no testimony to contradict in any way the testimony of the defendant in error as to the terms of the contract. He testified that the plaintiff in error said, "I will make you out a lease of the Metson Bench;" that the terms were that the royalty was to be 40 per cent., and that the lease was to commence on the 1st of September, 1905, and run to the middle of June, 1906. This was sufficient evidence of the terms of the lease. Under the instructions of the court, the jury found that the contract to give the lease had been made as alleged.

It is assigned as error that the court gave the following instruction:

"You are instructed in this case to find for the plaintiff for some amount, that amount to be filled in in the form of verdict which I send out with you to your jury room."

It is contended that, since the answer of the plaintiff in error put in issue the allegation that a contract was made for a lease, it was error to give such an instruction, notwithstanding that the plaintiff in error had made no denial of the testimony of the defendant in error. Without passing on the question whether it would have been error to give such an instruction, we are of the opinion that the court did not

intend to, and did not, so instruct. The language above quoted follows a clause in the instructions in which the court told the jury that if they found from the evidence that the agreement was made, and that the plaintiff in error leased the premises to another, and that the defendant in error, if he had been given the lease, would have mined the grounds at a profit, "you are instructed in this case [that is to say, in this event] to find for the plaintiff for some amount," etc. The court distinctly presented to the jury the issue whether the defendant agreed with the plaintiff to make and execute to him a lease, and elsewhere instructed the jury that if they found from the preponderance of the evidence that the plaintiff in error agreed with the defendant in error to make and execute to him a lease, and then failed to make the lease, and made a lease of the same ground to another, that it was a breach of the agreement, and the defendant in error "would be entitled to at least nominal damages, as indemnity for the breach or violation of such oral contract."

Error is assigned to the instructions to the jury in which they were told in substance that the rule of law is that where the lessor has title, and for any reason refuses to lease the premises agreed upon, he shall respond in damages and make good to the lessee whatever he may have lost by reason of his bargain, and that the lessee would be entitled to such profits as would have been derived from the premises, for the full period of the term for which the lease was to be made, and that proof of the profits may be made by showing what profits were made under a like lease of the same property to other parties, if the proof further shows that the party who was to have the lease would have worked the premises practically in the same manner as the persons did who worked the same. We find no error in the instructions so given. In the case of a wrongful breach of a contract to lease houses or land, the measure of damage to the plaintiff is easy of ascertainment. It is the reasonable value of his contract, and not the profits which he would have made if the agreement had been carried out. It is well settled that where one contracts to grant a lease, well knowing that he has no title, or where he puts it out of his power to grant the lease by giving a lease to a third person, the other party to the contract may recover as damages the value of his bargain. *Robinson v. Harman*, 1 Exch. 850; *Ford v. Tiley*, 6 B. & C. 325. And other damages, which are the direct and natural consequences of the breach, may be recovered in addition to the value of the bargain. *Driggs v. Dwight*, 17 Wend. (N. Y.) 71, 31 Am. Dec. 283; *Wolf v. Studebaker*, 65 Pa. 459; *Hall v. Horton*, 79 Iowa, 352, 44 N. W. 569; *Hanslip v. Padwick*, 5 Exch. 615.

More analogous to the case at bar, however, are cases of croppers' leases, where land is let or agreed to be let to be farmed on shares. In such cases the profits which the lessee might have made are often taken into consideration in determining the measure of his damages for a breach of the contract. *Depew v. Ketchum*, 75 Hun, 227, 27 N. Y. Supp. 8; *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415; *Bowers v. Graves & Vinton Co.*, 8 S. D. 385, 66 N. W. 931; *Rice v. Whitmore*, 74 Cal. 619, 16 Pac. 501, 5 Am. St. Rep. 479. In *Depew v. Ketchum* it was held that the measure of the lessee's damages was the

value of his term surrendered, based upon the capacity of the farm to yield a profit to one working under the contract. In *Taylor v. Bradley* the court said:

"To my mind the only rule which can be prescribed, and the only rule which will do justice to the parties, is that the plaintiff is entitled to the value of his contract. He was entitled to its performance. It is broken. He is deprived of his adventure. What was this opportunity, which the contract had apparently secured to him, worth? To reap the benefit of it, he must incur expense, submit to labor and appropriation of his stock. His damages are what he lost by being deprived of his chance of profit."

See, also, *Dickinson v. Hart*, 142 N. Y. 183, 36 N. E. 801.

But a contract to lease an undeveloped mining claim stands upon still different ground. A lease of a mine is a grant of the corpus of the property. It confers the right to take out a part or all of the value of the property, and a lease upon a fixed royalty is in some respects a joint venture for the benefit of both the lessor and the lessee. It may be said that a lease of an undeveloped placer mine in the Nome district ordinarily has no market value, because it cannot be known with any degree of certainty what will be found in the ground. The lessee takes his chances. He may operate it at a loss, or he may operate it at a great profit, to himself and to his lessor. If one method of estimating damages is shown to be more definite and certain than others, it should be adopted. The only way of proving the value of such a lease with any degree of certainty is by proving what was actually taken out of the mine, and if the proof is, as it was in this case, that the plaintiff would have operated the mine in substantially the same way as it was operated under the lease which was given to another, no reason is perceived why proof of the profits made by that other may not be received as tending to show the amount of the damages that accrued to the plaintiff in the action. The value of the gold in the mine is a fixed quantity. The elements of uncertainty in extracting it are the expense of the mining operation and the location of the pay streak.

The defendant in error was shown to be an experienced miner. He testified that it was his intention to sink a shaft at the point where the subsequent lessee sunk his shaft and found pay dirt. It was shown that the gold taken from the mine during the mining season for which the lease was to have been given to the defendant in error was from \$15,000 to \$20,000 in value, and that the cost of mining was from 40 to 45 per cent. of the gross proceeds. From these estimates it will be seen that the amount awarded the defendant in error by the jury was well within the sum of the net profits he would probably have realized, had he been allowed to work the mine.

The contract in the case at bar is clearly distinguishable from the contracts involved in the cases of *Smith v. Eubanks*, 72 Ga. 280, and *Rhodes v. Baird*, 16 Ohio St. 573, cited by the plaintiff in error. In the first of those cases the action was for a breach of a lease of real estate to be used for a grocery store, blacksmith shop, and wagon yard, and the court held that the damages for the breach could not be shown by proof of the profits which were afterwards made by other parties who occupied the premises. The court said:

"The successors of plaintiff may have been more popular, and thus have made better customers; may have managed better and made more money. They may have been men of better habits, more prudent and successful business men."

In *Rhodes v. Baird* the action was brought on a contract in which the defendant agreed to make a lease of land to the plaintiff on which to plant and cultivate a peach orchard for a term of 10 years. The court held that it was not permissible to show as evidence of damages what would be the probable profits to be realized from the orchard, judging from the number of crops and the prices of peaches in the county for the prior 10 or 15 years; that such a proof of damages was clearly too speculative and uncertain to form the basis of recovery.

In *Ruffatti v. Lexington Min. Co.*, 10 Utah, 386, 37 Pac. 591, the lessee of mining property sued the lessor for damages for wrongful ouster, and the court admitted, as evidence of damages, proof that he had exposed, ready for mining, 300 tons of ore, on which his profit under the terms of the lease would have been approximately \$10,000, and permitted him to recover his share of the profits he would have made if he had been permitted to work during the remainder of his term.

In *Isabella Gold Min. Co. v. Glenn*, 37 Colo. 165, 86 Pac. 349, the Supreme Court of Colorado sustained the right of lessees of a mine, who had been evicted therefrom, to recover the value of the ores that, but for the eviction, they might have taken therefrom. In that case, for the purpose of proving what they could and would have mined during the term, and with the intent of showing the amount of their damages, the plaintiffs produced evidence of the mining and marketing of ores from the premises so demised to them largely in excess of the amount of the verdict.

In *Paul v. Cragnaz*, 25 Nev. 293, 59 Pac. 857, 60 Pac. 933, 47 L. R. A. 540, a case in which the owner of an undivided two-thirds interest in a mine refused to permit the plaintiff, who was the lessee of the other interest, to work the mine, the court said:

"We think the evidence would have justified the jury in finding that the plaintiff, as a practical miner of long experience in mining, whose business was that of mining, could and would probably have extracted such quantities of ore from said ore bodies during his said term, if the defendant had not excluded him therefrom, and sold the same at such market price then existing as would have yielded him a net profit even greater than the sum allowed him for damages. The only value a mine has to a lessee thereof is the profits arising from his working the same, and, when he is wrongfully excluded and prevented from such working, his loss consists in the loss of profits that he would have made, but for such exclusion."

The judgment is affirmed.

ATCHISON, T. & S. F. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1910.)

No. 1,610.

1. MASTER AND SERVANT (§ 13*)—SERVICE ACT—CONSTRUCTION—"PERIOD."

Act Cong. March 4, 1907, c. 2939, § 2, 34 Stat. 1415 (U. S. Comp. St. Supp. 1909, p. 1170), prohibits a carrier to require or permit any employé subject to the act to remain on duty for a longer period than 16 consecutive hours, and requires that after an employé has been continuously on duty for 16 hours he shall be relieved, and not permitted to go on duty again until he has had at least 10 consecutive hours off duty, and that no such employé who has been on duty 16 hours in the aggregate in any 24-hour period shall be permitted to continue or again go on duty without having had at least 8 consecutive hours off duty, provided that no operator, train dispatcher, or other employé dispatching train orders shall be permitted to remain on duty for a longer period than 9 hours in any 24-hour period at stations continuously operated night and day, or for more than 13 hours in stations operated only in the daytime. *Held*, that the word "period," as used in such section, did not mean a continuous cycle of time without intermission, and hence the fact that a telegraph operator employed by a carrier went on duty at 6:30 a. m. and worked until 12 m. was then given an intermission until 3 p. m., and then worked until 6:30 p. m., making in all 9 hours' actual service, but 12 hours from the beginning to the end, did not constitute a violation of the act.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 13.*

For other definitions, see Words and Phrases, vol. 6, p. 5302.]

2. MASTER AND SERVANT (§ 13*)—HOURS OF SERVICE—TRAIN DISPATCHERS—"EMPLOYÉS."

Train dispatchers, being "employés," are within the protection of the main part of the section giving to all employés "at least eight consecutive hours off duty in each day, counting from some point in the next day, so that it would be impossible for carriers to require of them short service periods spread over the entire 24 hours, giving no opportunity for real recuperation.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 13.*

For other definitions, see Words and Phrases, vol. 3, pp. 2369-2377; vol. 8, p. 7649.]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by the United States against the Atchison, Topeka & Santa Fé Railway Company. Judgment for the United States, and defendant brings error. Reversed and remanded.

The writ of error is to reverse a judgment in favor of defendant in error, against the plaintiff in error, for the sum of One Hundred Dollars, together with costs, entered upon a verdict, upon instruction of the Court, in favor of Appellee on the first, third, fifth and seventh counts of the declaration.

The suit was brought under the Hours of Service Act, approved March 4th, 1907, United States Statutes at Large, Vol. 34, Part 1, p. 1415, c. 2939 (U. S. Comp. St. Supp. 1909, p. 1170).

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The following is the opinion of Landis, District Judge, on denying defendant's motion for an order directing the jury to return a verdict of not guilty:

In this proceeding the defendant is charged with a violation of the statute which was enacted to limit the hours of labor of railway employes having to do with the movement of trains. The evidence having all been heard, the defendant moves for an order directing a verdict of not guilty. The controversy relates to that provision of the law respecting telegraph operators employed at offices operated continuously day and night. The statute is as follows:

Section 1 enacts that the provisions of the law shall apply to railway common carriers, interstate, and provides that "the term 'employes' * * * shall be held to mean persons actually engaged in or connected with the movement of any train."

"Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employe subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employe of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employe who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: Provided, that no operator, train dispatcher, or other employe who by the use of the telegraph or telephone, dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employes named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week: Provided, further, the Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case."

The remaining sections provide for the enforcement of the law, the imposition of penalties, and specify exceptions to its operation (which are not material here).

For the United States the claim is that this law forbids the operator's employment for more than 9 hours in any 24-hour period, and requires the employment to be continuous. For the defendant it is contended that the law authorizes the employment of operators 9 hours in the aggregate in any 24-hour period; that the office here is not one "operated continuously night and day;" and, further, that the employes involved "are not persons actually engaged in or connected with the movement of any train" within the meaning of the law.

The facts are as follows: The defendant is a railway common carrier from Chicago to points in states west of the Mississippi river, and has a railroad yard called Corwith, located some distance from the main line in the western part of Chicago. At this yard is a telegraph office where two operators are employed. The day man works from 6:30 o'clock in the morning until 6:30 o'clock in the evening, with 3 hours off duty, from 12 o'clock noon until 3 o'clock in the afternoon. The night man works from 6:30 o'clock at night until 6:30 the next morning, with 3 hours off duty, from 12 o'clock midnight until 3 o'clock a. m. The bulk of the work done by these two men pertains to general railroad business other than the movement of trains. However, during each day and night, one or two freight trains, destined interstate, pull out of Corwith and move west over the rails of the main line. This train movement is in compliance with clearance orders telegraphed in each instance by de-

fendant's division dispatcher to Corwith, and by the operators there taken from the wire and delivered to the train crews.

The court is of the opinion that this office is clearly one "continuously operated night and day" within the meaning of the statute. The manifest purpose was to apply the provisions of the law to all employes having to do with train movement, and knowing that some railway telegraph offices were open only during the daytime, while others were open night and day, Congress inserted as a regulation for the latter class the provision respecting those "continuously operated night and day." It can hardly be that Congress had it in mind by the use of the word "continuously" to place it in the power of a railway company to except a night and day office from the operation of the law by the simple process of closing the office and sending the operator away for a few minutes, or, as in this case, for three hours. Nor does the mere fact that employes are concerned but a trifle with the movement of trains, or are concerned with the movement of but a few trains, except them from the operation of the statute. The language of the law is: "The term 'employes' * * * shall be held to mean persons actually engaged in or connected with the movement of any train."

The remaining question is not so free from difficulty. While the purpose of Congress "to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon" clearly appears from the title of the act, it must be admitted the provision relating to persons engaged in the telegraph service might have been more happily phrased to accomplish that purpose. However, as will be observed from an examination of the whole of sections 1 and 2, it was the object of Congress to place a limit on the time of service of all railway employes having to do with the movement of trains interstate. It also clearly appears from section 2 that it was definitely and distinctly in the legislative mind that there were two classes of such employes, namely, those whose work was continuous and those whose work was intermittent. Accordingly, for the former class, it was provided that the limit should be "sixteen consecutive hours," to be succeeded by 10 consecutive hours off duty, and for the latter class the limit is placed on the aggregate of service, the language being: "No such employe who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty." Then follows the special proviso for persons engaged in the telegraph service: "That no operator, train dispatcher, or other employe who by the use of the telegraph * * * transmits or delivers orders pertaining to or affecting train movements, shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all * * * stations continuously operated night and day, nor for a longer period than thirteen hours * * * in all stations operated only during the daytime, except in cases of emergency, when the employes named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week."

The defendant urges that this language should be read as if it were as follows: "That no operator * * * shall be required or permitted to be or remain on duty for more than nine hours in the aggregate in any twenty-four hour period." But the use of the word "period" in the 9-hour provision of the act excludes this construction. "Period" is the antithesis of "aggregate." It implies continuity, unbrokenness, uninterruptedness, as distinguished from "aggregate," which signifies the sum or total or gross amount of separate and distinct particles. Thus reference is made to the "Revolutionary period," the "Reconstruction period," the "twenty-four hour period" (as used in the act itself), each of which expressions has a definite and well-understood meaning, which is diametrically opposed to and which excludes the idea that is the basis of the defendant's claim.

Moreover, immediately preceding the provision under consideration is the language used by Congress in dealing with the same subject as related to railway employes in general, which, as before observed, distinctly provides a limitation on the hours of service in the aggregate, as distinguished from continuous or unbroken service. And in the subsequent provision relating to day

offices, where the service is prohibited for a longer period than 13 hours except in cases of emergency, when 4 additional hours' service in a 24-hour period is allowed, and in the concluding proviso authorizing the Interstate Commerce Commission, for good cause, to extend the period in which the carrier shall comply with the act, the word is used in a sense contrary to the meaning which the defendant argues should be given to it in the 9-hour clause. Can it be that Congress intended the court to give the word as used here a meaning opposed not only to its true import, but opposed as well to the sense in which the word is used elsewhere in the same section?

Being of the opinion that a 24-hour period is 24 consecutive hours, and that a 9-hour period is 9 consecutive hours, my conclusion is that the 9-hour period during which the law authorized the day man to be at work expired at 3:30 p. m., and that, inasmuch as he was required or permitted to be "on duty" three hours thereafter, the law has been violated. And so with respect to the night man.

The defendant's motion for an order requiring the United States to elect one count and proceed thereon is without merit. The language of the statute is plain, and provides that the carrier shall be liable "for each and every violation." This, I take it, means each and every 24-hour period in which the prohibition of the law is ignored.

Let there be an order overruling both motions of the defendant.

Robert Dunlap, Lee F. English, and James L. Coleman, for plaintiff in error.

Edwin W. Sims, U. S. Atty., and James H. Wilkerson, for the United States.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, delivered the opinion:

Section 2 of the Hours of Service Act, applicable to plaintiff in error, a common carrier within the meaning of that Act, provides:

"Section 2. It shall be unlawful for any common carrier, its officers, etc., to require or permit any employé subject to this act to be, or remain, on duty for a longer period than sixteen consecutive hours, and whenever any such employé, of such common carrier, shall have been continuously on duty for sixteen hours, he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employé who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty.

Provided that no operator, train despatcher or other employé who by the use of the telegraph or telephone despatches, reports, transmits, receives or delivers orders pertaining to, or affecting, train movements, shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places and stations operated only during the daytime, except in case of emergency," etc.

The charge alleged was that plaintiff in error required and permitted Fred Hillhouse, one of its telegraph operators despatching, reporting, transmitting, receiving and delivering orders pertaining to and affecting train movements in interstate commerce, at Corwith, in the State of Illinois, to be on duty in such office, continuously operated day and night, for a longer period than nine hours—the proof showing that he went on duty at 6:30 o'clock A. M., was given an intermission of three hours at 12:00 o'clock Noon, resumed duty at 3:00 o'clock P. M., and went off duty at 6:30 P. M., making in all

nine hours of actual service, but twelve hours from the beginning thereof to the end thereof.

A like charge was made respecting requirements upon one W. E. Sargent and one F. M. Elliott, covering the same hours of service but on different days.

Do these facts prove a violation of the act? The question is raised by appropriate exceptions to the instructions of the Court, and by the refusal of the Court to give instructions offered by the plaintiff in error.

The contention of the Government is, that while in neither of the cases above mentioned was the operator required or permitted to remain on duty for more than nine hours in any twenty-four in the aggregate, such service, within the contemplation of the statute either is to be divided into "two periods," separated by the intermission (for which the statute makes no provision), or is to be considered as "one period," including the intermission, which would make it a period of twelve hours. But manifestly, Congress did not intend that an intermission of three hours, in the middle of the day, should be computed as a part of the employee's service; for the statute was enacted in view of the customs of the land, and the customs of the land do not include such intermissions as a part of the working hours of employees. The position of the Government is therefore reduced to its contention respecting the word "period,"—that "period" is "a term," "a cycle," something "continuous" between a definite beginning and a definite end—whereby, invoking the canon of strict construction in criminal statutes, the period was a period of twelve hours, notwithstanding the intermission.

We cannot concur in this view. The statute was passed with custom as a background. According to custom, nine hours' work unquestionably means nine hours' actual employment, whether broken by an intermission for lunch or on account of some other occasion. According to custom, too, especially in railroading in the new western States, the actual service of employees is divided, necessarily divided, throughout the day, to correspond with the arrival and departure of trains. Certainly, Congress did not intend to override these existing customs; making it necessary either that the railroad company should not give intermissions, or that the employee should be paid notwithstanding the intermissions; and making it necessary at many stations (presumably well known to Congress) that the railroad should either employ a different telegraph operator for every train that came and went (trains on western roads being often more than nine hours apart), irrespective of the fact that the actual service for each train was a very short period of time. The contention of the Government gives to this word "period," all things considered, a highly strained meaning. Disregarding a meaning so strained, and reading the word in connection with the context, and in the light of ordinary custom, we are clear that the acts proven do not constitute an offense within the meaning of the law. And, if it be objected that under this construction of the law, it would be possible for the railroad company to require its operators to give their service for short periods at short

intervals, say every alternate hour, or an hour in every two hours and a half, thus so spreading his actual service over the twenty-four hours that no opportunity would be given for real recuperation, the answer is that no instance of such practice has been brought to our attention, and no such instance is likely, which accounts for the fact that no provision in the Act is made for such instances. When such practice actually occurs, Congress will doubtless provide a cure. A further answer is that despatchers, being "employees," come under the protection of the main part of the section which gives to all employees "at least eight consecutive hours off duty" in each day, counting from some point in the next day.

The judgment of the District Court is reversed and the cause remanded, with instructions to grant a new trial.

SCHULER v. HASSINGER et al. (four cases).

KNIGHT v. SAME (two cases).

(Circuit Court of Appeals, Fifth Circuit. February 22, 1910.)

Nos. 1,924, 1,925, 1,939, 1,992, 2,001, 2,029.

1. BANKRUPTCY (§ 455*)—APPEAL—APPEALABLE ORDERS.

Orders of a bankruptcy court relating to the sale of a bankrupt's property are regular steps in the proceedings, and not appealable under Bankruptcy Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 455.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

2. BANKRUPTCY (§ 269*)—SALE OF PROPERTY—GROUNDS FOR SETTING ASIDE—INADEQUACY OF PRICE.

In the absence of reliable evidence impeaching it, the appraisal governs as to the value of a bankrupt's property, and a sale for more than the appraised value, confirmed by the court, will not be set aside by the appellate court on the ground of inadequacy of price.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 269.*]

3. BANKRUPTCY (§ 263*)—SALE OF PROPERTY—VALIDITY.

A sale in bankruptcy of the property of a large manufacturing corporation is not subject to objection because the property was purchased by a reorganization committee, nor is it invalid as collusive or unfair because such purchase was favored by the trustees and on their recommendation they were permitted to receive, as part of the purchase price, securities which were a lien on the property.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 263.*]

4. BANKRUPTCY (§ 260*)—SALE OF PROPERTY—VALIDITY.

An order for the sale of a bankrupt's property is not invalid as matter of law because it does not fix an upset price for the property, which is to be sold subject to confirmation.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 260.*]

5. BANKRUPTCY (§ 446*)—PROCEEDINGS TO REVISE—MATTERS REVIEWABLE.

A general objection that a sale of a bankrupt's property was unfair, illegal, and void cannot be considered by the Circuit Court of Appeals on a petition to revise in matter of law, in the absence of an agreed state-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ment of facts or findings by the court or referee; nor can orders which were within the discretion of the court be reviewed unless an abuse of discretion is shown.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 446.*]

Petitions to Revise Proceedings of the District Court of the United States for the Northern District of Alabama, in Bankruptcy.

Appeals from the District Court of the United States for the Northern District of Alabama.

In the matter of the Southern Steel Company, bankrupt. Appeals and petitions for revision by George H. Schuler and Samuel I. Knight against William H. Hassinger and others, trustees, to review certain orders. Appeals dismissed, and petitions for revision denied.

John W. Tomlinson, for petitioner.

E. K. Campbell, Augustus Benners, Wm. B. Hornblower, and J. Norris Miller, for respondents.

J. W. Tomlinson, for appellant.

E. K. Campbell, Augustus Benners, Wm. B. Hornblower, and J. Norris Miller, for appellees.

• Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. In October, 1907, sundry creditors of the Southern Steel Company, a manufacturing corporation under the laws of Alabama, filed, in the District Court for the Northern District of Alabama, several petitions, charging acts of bankruptcy, and praying that said steel company should be adjudicated a bankrupt. Thereupon receivers were appointed, and on January 21, 1908, the bankruptcy proceedings under the several petitions were consolidated, and the whole case transferred to the Southern Division of the Northern District, and thereupon in said division said steel company was adjudicated a bankrupt. As we gather from the record, there was no objection or opposition to such adjudication; certainly, no appeal was prosecuted therefrom.

At this time the Southern Steel Company was capitalized in the sum of \$25,000,000; \$10,000,000 preferred stock, and \$15,000,000 common stock. And it was the owner of wire and rod mills, steel plants, furnaces, coke ovens, plant sites, coal lands and coal rights, red ore lands and rights, all in the state of Alabama, and was the owner of the capital stock of subsidiary incorporated steel companies in Georgia and Tennessee, all subsequently appraised by sworn appraisers appointed in the bankruptcy court in the sum of \$7,674,380.91.

At the date of adjudication the company's properties were mortgaged and pledged in the sum of \$6,674,000. Following the adjudication, three trustees were chosen by the creditors, and their appointment and election confirmed by the court. At the same time, the court appointed three disinterested persons as appraisers. The said trustees entered upon the discharge of their duties, and on February 26, 1909, they filed with the referee a petition praying for authority to sell all the property of the company free and clear of all mortgages, liens,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and incumbrances for the payment of debts; offerings first to be in parcels in such a way as to protect the several lien creditors, and afterwards in bulk if a higher price could be obtained thereby. The necessity and urgency of the recommended sale was fully shown by the facts recited in the petition, which facts are in no wise disputed in the court below or in this court.

In the said petition the referee was advised that there was in existence a reorganization committee under and in pursuance of a certain plan and agreement of reorganization of the Southern Steel Company dated May 15, 1908, a copy of which plan and agreement was annexed and made part of the petition. The trustees averred that said reorganization committee claims to hold all the certain issue of \$3,000,000 secured by a mortgage on all the properties to the Farmers' Loan & Trust Company, and further claims that the bonds and accrued interest constitute a valid and binding obligation and a prior and subsisting lien on the properties mentioned in the mortgage; but no special relief was asked for or against said reorganization committee.

The petitioners suggest that in order to facilitate and aid in the sale and purchase of said properties, and that the highest possible price be attained, it may be desirable that provision be made in the decree or order of sale to the effect that the purchaser or purchasers may use and turn in, on account of such purchase price, bonds or trust notes or lien claims or proved claims against the bankrupt's estate as the trustee may determine to be a minimum amount to which said purchasers, as the holders of said bond or trust notes, claims, or liens, will be entitled to receive on the distribution of the proceeds of sale.

Upon the filing of said petition, the referee set the hearing thereon for March 4, 1909, and notice thereof was duly given, and the referee convoked a creditors' meeting to consider the same. On March 4th the meeting of creditors was held, and thereat the sale proposed by the trustees was recommended. The meeting also recommended the recognition of the mortgage creditors' claims to priority, and that the appraisers should file their appraisal.

On March 4th, on leave of the referee, George H. Schuler, representing himself to be a large stockholder of the Southern Steel Company, intervened to oppose the proposed sale on the ground that no appraisement according to section 70b of the bankrupt law (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) had been made, and that a minimum sum of 75 per cent. of the value of the property should be fixed, and opposing the allowance of securities and claims to be received as a part of the purchase price.

The petition of the trustees for an order of sale coming on to be heard before the referee, an order was entered adjudicating and recognizing the nature, amount, and character of the liens claimed by the Farmers' Loan & Trust Company, Central Mortgage & Trust Company, and the Trust Company of America, and ordering the properties to be sold on April 12, 1909, free and clear of any and all liens and mortgages; said liens and mortgages to be shifted to the proceeds of the sale of the properties so mortgaged, and giving any purchaser at the sale the right to use and apply securities and claims on payment of

purchase price. It was also ordered that the property should be sold in parcels in order that the proper funds to which liens were to be shifted might be readily ascertained.

No exception was taken to this decree within five days, and thereupon, under the rules of court, it was confirmed by the District Court on March 10, 1909.

On March 15th, five days later, George H. Schuler filed a petition with the referee to review the said order, which petition was certified to the court, and there, on motion of trustees, it was dismissed on March 27, 1909.

On March 29, 1909, Samuel I. Knight, alleging himself to be a holder of one of the collateral trust notes and a stockholder in the bankrupt corporation, filed an intervention attacking the order of sale made by the referee on the ground that it adjudicated the validity of the mortgage bonds and trust notes, etc., and that no upset price was fixed, and that securities and claims were to be received on account of the purchase price; substantially the same objections as theretofore made by Schuler. This intervention of Knight finally came on to be heard on April 5th before the District Court, and there the petitioner, Knight, was denied the right of intervention, for the reason, among others, that as a creditor he failed to show that he was a creditor at the time the court confirmed the decree of sale or to show that he would be injured by the court failing to permit him to intervene.

On March 23, 1909, the appraisers appointed by the court made a report of value of the property of the Southern Steel Company in the hands of the trustees. This report seems to have been filed with the trustees' report of sale, and it is elaborate and minute as to details. The gross valuation as summed up was \$7,674,380.91. As this amount included the value of property of the subsidiary companies in Tennessee and Georgia, of which the Southern Steel Company owned only the stock, and which property was under mortgage indebtedness in the amount of \$3,017,819.26, the valuation of the appraisers should be reduced by said sum, which leaves a net appraised value of the properties of \$4,656,561.65.

After due advertisement, and on the day named in the order of sale, the trustees sold the property in accordance with the order of sale, and the same was adjudicated in bulk to William W. Miller, Esq., attorney for the reorganization committee, for the gross sum of \$5,111,000.

Promptly, George H. Schuler and Samuel I. Knight filed exceptions to the trustees' report of sale claiming that said sale was illegal and void, was collusive, the property brought an inadequate price, competition was stifled, terms of sale were unfair to bidders, and unfair to creditors, and charging collusion—all of which objections and exceptions were on the 19th day of April, 1909, overruled, and at the same time the referee in a formal decree ratified and confirmed the sale.

On April 20, 1909, the said Schuler and Knight, reiterating their previous objections, applied for a petition to review the order confirming the sale, which review came on to be heard before the District Court on the 1st day of May, 1909, when the District Court, considering that the assignments of error in the petition for review were not

well taken, dismissed the said petition, and further ordered and adjudged that the action of the referee in confirming the sale aforesaid should be in all things ratified and confirmed.

The matter of the sale and confirmation thereof of the property of the Southern Steel Company has been brought before this court:

(1) On the petition of George H. Schuler (No. 1,924), an alleged holder of common and preferred stock in said steel company, to superintend and revise the order of sale rendered by the referee and confirmed by the District Court on the 27th day of March, 1909.

(2) On the petition of Samuel I. Knight (No. 1,925), an alleged creditor and stockholder, to superintend and revise the whole order of sale.

(3) The joint petition of George H. Schuler and Samuel I. Knight (No. 1,939) to superintend and revise the order of the referee confirming the sale of the Southern Steel Company's properties and the order of the District Court confirming the said sale.

(4) An appeal prosecuted by Samuel I. Knight (No. 2,001) from an order of the District Court rendered on the 8th day of April, 1909, denying him, the said Knight, the right to intervene in the bankruptcy proceedings for the purpose of opposing the sale of the bankrupt's properties.

(5) An appeal by George H. Schuler (No. 1,992) from an order denying him, the said Schuler, a review of the order of sale made by the referee on the ground that his petition for review had not been filed within the time required by the rule of court.

(6) The joint appeal of George H. Schuler and Samuel I. Knight (No. 2,029) from the order of the District Court confirming the sale theretofore made of the bankrupt property.

By consent of the parties and order of court these six cases were consolidated and were heard together.

A motion has been made to dismiss the appeals because they are taken to review orders and decrees not within the scope of section 25a of the bankruptcy act of 1898, nor are they appeals from orders and decrees in independent suits or controversies arising out of the settlement of the estate of bankrupts, and therefore no appeal lies.

The proceedings in the District Court in the bankruptcy of the Southern Steel Company, which are attacked in the several appeals, to wit, the sale and disposition of the bankrupt's effects, are regular steps or proceedings in bankruptcy, and no appeal lies from orders or decrees in such proceedings. See *Remington on Bankruptcy*, 1678, § 2864, for a full discussion, and *First National Bank v. Chicago Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051; *In re Whitener*, 105 Fed. 185, 44 C. C. A. 434; *In re Friend*, 134 Fed. 778, 67 C. C. A. 500; *Dickas v. Barnes et al.*, 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654; *Davidson & Co. v. Friedman*, 140 Fed. 853, 72 C. C. A. 553.

It is true that in the order of sale the referee recognizes and adjudicates the validity and amount due on the several mortgages upon the property of the Southern Steel Company as incidental to the necessary sale of the property free and clear of all incumbrances; but it is doubtful if such recognition was such an allowance of a claim as would en-

title any party not adversely affected to appeal therefrom; but, even if an appeal from such order could have been taken by a proper party, neither the appeal of Samuel I. Knight (No. 2,001) nor of George H. Schuler (No. 1,992), although relating to the order of sale, was an appeal from that order, but were appeals, one from an order denying Knight the right to intervene because he was not a creditor, and the other from an order denying Schuler the right to review, because not applied for in time. And it may be said, further, that, if any one of the appeals now before us could be maintained on the ground that it was taken from an order allowing a claim, then only the validity of the claim allowed could be considered, and there is no evidence in the record attacking the validity of the claims adjudicated by the referee, but all tends to establish them.

It follows that the appeals in this case must be dismissed.

Objection is made to the petitions to superintend and revise on the ground that they do not seek to revise in matters of law, and that in so far as they attempt the same they are frivolous. It is also objected that said petitions fail to present to this court any findings of fact or conclusions of law of the referee or the District Court so that the court may see the precise questions of law upon which rulings are made; and, further, that said petitioners fail to show that they have been aggrieved by the orders and decrees sought to be revised.

The three petitions to revise assign errors in great number covering nearly every phase of the proceedings in the bankruptcy of the Southern Steel Company, from the filing of the petition of the trustees for an order of sale to the final order of confirmation in the District Court.

The specifications of error are boiled down for argument by the learned counsel for the petitioners in their brief to the following:

"(1) To the objection that the property was sold for a grossly inadequate sum.

"(2) To the objection that said sale was collusive.

"(3) To the objection that said sale was made without an upset price having been fixed in the order of sale.

"(4) To the objection that the terms of sale were unequal and unfair, and that competition thereby was stifled.

"(5) To the objection that said sale was insufficiently advertised.

"(6) To the objection that said sale was made without sufficient time being allowed to elapse between the date of the order and the time fixed for the sale to allow efforts to be made to get capital commensurate with the value of the property interested in the purchase thereof.

"(7) To the objection that there was no proof made of the correctness of the claims allowed by the order of sale to be deposited on account of the purchase price and no opportunity afforded parties in interest to contest the same.

"(8) To the objection that sufficient time was not given to allow proof to be adduced in support of the objections and exceptions filed against the confirmation of said sale.

"(9) To the objection that said sale was absolutely unfair, illegal, and void.

"(10) To the denial of the petition of Samuel I. Knight to intervene."

We deal with these objections as follows:

(1) "That the property was sold for a grossly inadequate price." We find no evidence in the transcript as to the original cost of the property of the Southern Steel Company. The company had a capital stock of \$25,000,000; but we are in the dark as to how much of that

stock was paid in cash; but, from what does appear in the record, it is evident that most of the said stock was not fully paid, if not wholly water or air. The company operated the property at a loss resulting in bankruptcy. The receivers undertook to operate the property and were obliged to abandon it as unprofitable. The sworn appraisers of the court valued it at \$4,656,561.65, and the property was sold for \$5,111,000. The great value claimed by petitioners herein is based upon affidavits giving estimates and upon an estimate in the reorganization plan amounting to this that, if the property can be restored to a running, operating condition by the reorganization of its debts and assets under the plan proposed and involving the advancement and investing of several millions of dollars, a net revenue of \$1,200,000 per annum is a just estimate of the earning capacity of the property. And all seems to be based on the opinion of the trustees, as per letter referred to and found in the record.

The sworn value of the property fixed by the appraisers appointed by the court controls; but, as it sold for more, we are remitted to the sale for value, and we cannot as a matter of law hold that the property was worth more than \$5,111,000, which it actually brought at the sale.

(2) The second proposition, that the sale was collusive, is based upon the fact that prior to the sale there was a reorganization committee for the purpose of purchasing the property in bulk; that the trustees favored such reorganization; and that the order of sale permitted the trustees to receive, as part of the purchase price, admitted securities constituting liens upon the property.

That there should be a reorganization agreement for the purpose of buying in the property of the bankrupt corporation cannot be objected to. In fact, it furnishes the only way that a large diversified property and plant like that of the Southern Steel Company can be sold and purchased without disastrous results to creditors and stockholders, and the creditors have every right to organize themselves for the purpose of protecting their interests. These are propositions that need neither argument nor authority to support.

That the trustees should in good faith encourage and approve a plan which looked to the successful settlement and winding up of the bankruptcy estate, and which met the approval of creditors and had the consent of all classes interested, was perfectly proper. See *Cook on Corp.* vol. 3, p. 3189; *Platt v. Philadelphia R. R.* (C. C.) 65 Fed. 872.

The reorganization agreement set forth in the record as approved by the trustees provided for the mortgage and lien holders and the unsecured creditors and all stockholders, both common and preferred; and it was assented to by all of the first mortgage bondholders, 99 $\frac{3}{4}$ per cent. of the collateral trust note holders, 86 per cent. of the proved claims, 87 per cent. of the preferred stockholders, and 90 per cent. of the common stockholders.

Such a reorganization agreement seems so fair on its face that the court itself could well have approved it if brought before it in proper way; in fact, it seems to have all the elements of a composition which is favorably provided for in the bankruptcy law.

(3) The third proposition, asserting that the said sale was made

without an upset price having been fixed in the order of sale, is not sound. We are not shown any law which requires that an upset price should be fixed in orders of sale in bankruptcy. The law does provide that real and personal property, when practicable, shall be sold subject to the approval of the court, and shall not be sold otherwise than subject to the approval of the court for less than 75 per centum of the appraised value. That sometimes in equitable proceedings, generally with, although sometimes without, the consent of parties, an upset price is fixed, furnishes no reason for us to hold as a matter of law that an upset price other than the one fixed in the statute should have been fixed in this case; and, in this connection, we may say that, in adjudged cases wherein an upset price has been fixed, it was not a matter of law at all, but a matter of equity within the sound discretion of the court.

(4) The fourth proposition, that the terms of sale were unequal and unfair, and competition was thereby stifled, is based upon the fact that the purchaser was permitted by the terms of the order of sale to turn in, in payment of the price, admitted securities; the argument being that the holders of securities could buy without paying cash, while an outsider would be compelled to pay cash.

The contention in this case seems to disregard the general rule which prevails in all foreclosure and execution sales wherein it is not deemed proper and necessary to require purchasers to put up cash with one hand to take it down with the other. See Cook on Stock & Stockholders, vol. 2, § 887.

(7) The seventh proposition, urging the objection that there was no proof made of the correctness of the claims allowed by the order of sale to be deposited on account of the purchase price and no opportunity offered parties in interest to contest the same, does not seem to merit much consideration. As the referee formally allowed the claims in question, we may well presume that he had sufficient evidence before him; but it is not necessary to rest on such presumption, because the record shows that the trustees admitted the claims, and no one contested them, and all through the record their validity stands out as one of the undisputed facts in the case. And the record nowhere shows that time was asked.

(9) "That the said sale was absolutely unfair, illegal, and void." To determine as an ultimate proposition that the sale was unfair, illegal, and void would require, in the absence of an agreed statement of facts or finding of facts by the referee or court, a consideration of all the evidence in the record entirely beyond the inquiries this court can make on a petition for revision in matters of law.

This disposes of all the counsel's propositions, with the exception of the fifth, sixth, eighth, and tenth, which entirely relate to matters that were within the sound discretion of the bankruptcy court, and we have nothing before us to show that the discretion of the court was abused to the injury of any creditor or stockholder.

As to the denial of the petition of Samuel I. Knight to intervene, it may also be said that practically he was allowed to intervene, and his contentions have been presented to and disposed of by this court.

For the reasons herein given, the petitions to revise in Nos. 1,924, 1,925, and 1,939 are denied, and the appeals in Nos. 1,992, 2,001, and 2,029 are dismissed, all with costs.

MARITIME INS. CO., Limited, v. M. S. DOLLAR S. S. CO.†

(Circuit Court of Appeals, Ninth Circuit. February 28, 1910.)

No. 1,753.

1. APPEAL AND ERROR (§ 1068*)—REVIEW—HARMLESS ERROR—SUBMISSION OF QUESTION TO JURY.

The erroneous submission to a jury of the question of the law of a foreign country on a given subject, instead of instructing them what the law is, was without prejudice, and not ground for reversal where the jury decided the question correctly.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228; Dec. Dig. § 1068.*]

2. INSURANCE (§ 272*)—MARINE INSURANCE—WAR RISKS—IMPLIED CONDITIONS OF POLICY.

Under a marine policy insuring a vessel for a heavy premium against war risks only on a voyage from San Francisco to Vladivostok during the war between Russia and Japan, which expressly gave the assured "liberty to run blockade," the consent of the insurer to the carrying by the vessel of false clearance papers, showing her destination to be a Japanese port, is necessarily implied as a subterfuge which by general usage is resorted to by blockade runners in the interest of both the insured and insurer, and the fact that the vessel was seized and condemned by the Japanese authorities on the ground of carrying such false papers is not a defense to liability on the policy under either the English or American law.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 577; Dec. Dig. § 272.*]

In Error to the Circuit Court of the United States for the Northern District of California.

Action by the M. S. Dollar Steamship Company against the Maritime Insurance Company, Limited. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 149 Fed. 616.

William Denman, for plaintiff in error.

Nathan H. Frank and Walter D. Mansfield, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

ROSS, Circuit Judge. At the time of the making of the contract of insurance upon which this action was brought, a state of war existed between Russia and Japan. In December, 1904, the defendant in error, being desirous of sending the steamship M. S. Dollar on a voyage from San Francisco to Vladivostok, caused the ship to be insured for the aggregate amount of £37,000 by various English insurers; the plaintiff in error being one of the insuring companies in the sum of £3,000, for the recovery of which sum the present suit was brought. The policy described the risk as "those risks excluded

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Rehearing denied May 2, 1910.

by the warranted free from capture, seizure, and detention clause in marine policy or policies," and covered the voyage from the port of San Francisco to Vladivostok, while there, and thence back to a safe neutral port. Vladivostok was at that time the principal naval station and base of supplies of Russia in its contest with Japan, and was being closely invested by the Japanese. The premium fixed in the policy was 25 per cent., with a provision to the effect that 5 per cent. thereof should be returned should the ship sail before a certain date (subsequent to her actual departure), and 5 per cent. further if there were no claim made under the policy. The policy also contained an express provision giving the assured the "liberty to run blockade." The insurance in question was effected through the agency of Bowring & Co., an English firm of brokers doing business in London and also in San Francisco; one Comyn being their Pacific Coast manager. Comyn testified, over the objections and exceptions of the defendant company, that between him and the assured it was agreed as a condition precedent to the delivery of the policy in question, as well as the other policies taken out by the ship, that the premium should be prepaid at San Francisco simultaneously with such delivery, and arrangements were accordingly made by the assured with the Bank of California at San Francisco for the payment by it of the premiums to the Pacific Coast agent of Bowring & Co. upon receipt of the policies. In pursuance of that agreement, Mr. Comyn forwarded the application for the policies to Bowring & Co. at London, who, in turn, having procured the policies in London, forwarded them to their Pacific Coast agent, by whom they were delivered to the Bank of California at San Francisco on the payment of the premiums, the premiums being then forwarded by Comyn to the London firm; and this was the procedure in the case of the policy in suit. The M. S. Dollar, being so insured, sailed from San Francisco December 31, 1904, on her voyage. Before her departure, the master of the vessel was directed by its managing owner to proceed to Vladivostok via La Perouse Straits if they were not blocked with ice, and, in the event of their being frozen, then to go through the Straits of Tsugar, and through the Sea of Japan. The evidence shows that the master left San Francisco with the intention of going through La Perouse Straits, which lie between the northernmost island of the Japanese group and the Kuril Islands. Tsugar Straits are further south, and lie between the Island of Yeddo and the main island of the Japanese group. The case shows that, for the purpose of evading capture by the Japanese, a false clearance of the ship was taken at San Francisco for Moji, Japan. The master, having found La Perouse Straits blocked by ice, passed to and through the Straits of Tsugar, and was then discovered in the Sea of Japan by a Japanese man of war, and, on the discovery of the falsity of her papers, the ship was taken in custody and conducted to Yokosuka. After the seizure, and on the 1st day of February, 1905, the assured abandoned the ship to the insurance company, and she was in due course condemned by the Japanese Prize Court, and sold as a prize of war; the decree placing her condemnation on the ground that she was using the false papers as a means to evade capture.

The plaintiff in error insists that the contract of insurance, was made in England, and must, in consequence, be controlled by the then prevailing law of England, and that it was error in the court below to leave to the jury, as it did, the determination as a fact of what the English law then was. The testimony of the witness Comyn tended to show that the contract in question was executed in San Francisco, in which event it would, of course, be controlled by the American rule upon the subject. Whether or not it becomes necessary to pass upon the defendant company's objections to the testimony of Comyn will depend upon the conclusion we reach upon the main question in the case.

We assume that the trial court was in error in refusing to determine and declare to the jury what the law of England was upon the subject in hand, and in leaving to it the determination of that matter as a question of fact. Nevertheless, if the case shows that the jury decided that question of law correctly, its submission to it by the court in the form it was submitted was without harm to the defendant. *Minneapolis & St. L. R. Co. v. Col. Rolling M. Co.*, 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376; *Pence v. Langdon*, 99 U. S. 578, 25 L. Ed. 420. The policy in suit, as has been said, expressly gave to the assured the "liberty to run blockade." It was, as a matter of course, only in view of the risks of the then prevailing war that the premium of 25 per cent. could be justified, and was paid. Insurance companies, like everybody else, must be held to know that blockade runners in war times resort, and necessarily must resort, to many kinds of subterfuge—among others to the carrying of false papers. Indeed, that is one of the most notorious.

In *Buck v. Chesapeake Insurance Company*, 1 Pet. 151, 160, 7 L. Ed. 90, the Supreme Court said:

"A knowledge of the state of the world, of the allegiance of particular countries, of the risks and embarrassments affecting their commerce, of the course and incidents of the trade on which they insure, and the established import of the terms used in their contract, must necessarily be imputed to underwriters. According to a distinguished English jurist, Lord Mansfield, in *Pelly v. Royal Exchange, etc.*, 1 Burr. 341, 'the insurer, at the time of underwriting, has under his consideration the nature of the voyage, and the usual manner of conducting it. And what is usually done by such a ship, with such a cargo, on such a voyage, is understood to be referred to by every policy.' Hence, when a neutral, carrying on a trade from a belligerent to a neutral country, asks for insurance 'for whom it may concern,' it is an awakening circumstance. No underwriter can be ignorant of the practice of neutrals to cover belligerent property under neutral names, or of the precautions ordinarily resorted to that the cover may escape detection. The cloak must be thrown over the whole transaction, and in no part is it more necessary than in the correspondence by other vessels, so often overhauled by an enemy, for the very purpose of detecting covers on other cargoes. Letters, thus intercepted, have often been the groundwork of condemnation in admiralty courts; and underwriters, to whom the extension of trade is always beneficial, must and do connive at the practice in silence. They ask no questions, propose their premiums, and the contract is as well understood as the most thorough explanation can make it."

Two English cases—*Horney v. Lushington*, 15 East, 46, and *Oswell v. Vigne*, 15 East, 70, decided January 28 and January 31, 1812, respectively—are relied upon by the plaintiff in error as establish-

ing the proposition that at the time of the execution of the contract of insurance here involved the law of England was that an insurer is not liable on a war risk policy for a condemnation because of the use of false papers, unless permission to carry false papers is expressly given in the policy. At the time of the execution of the policies involved in those cases Sweden and Russia were at war. The policy in *Horneyer v. Lushington* was on goods "at and from Gottenburg to Riga, beginning the adventure on the goods from the loading thereof aboard the ship at Gottenburg." It appeared in the case that the ship sailed with a license and took on board simulated papers, representing that she came from Bergen in Norway. She arrived at Gottenburg, from whence, after receiving orders, she proceeded to and arrived at Riga, where her papers were taken and her hatches immediately sealed down by the government officers until her papers could be sent to St. Petersburg to be examined; and on such examination orders were immediately sent to Riga to seize the ship and cargo, which was done, and she was afterwards condemned with her cargo on the ground of having simulated papers on board. Lord Ellenborough, with whom concurred the other judges, said:

"I do not pronounce whether the carrying of simulated papers was or was not an enhancement of the risk insured; but my opinion is founded on the effect of the sentence of condemnation, which has proceeded upon the mere personal act of the assured in carrying such papers, which it treats as a crime, and which act is thereby proved to have been the efficient cause of the loss, the very ground of the condemnation. How, then, can the underwriter be answerable for a loss which happened from an act of the assured, done without his leave?"

Oswell v. Vigne was an action on a policy of assurance on the ship *Wassila* at and from London to any port or ports in the Baltic. The interest was averred in one *Yakof Fomin* and a total loss alleged upon attack and seizure of the enemy. It appeared at the trial that *Fomin* was a Russian subject; that the ship sailed with a license, the voyage insured from London to Petersburg, and, after touching at Gottenburg, was captured by a Danish privateer, carried into *Arlborg*, and condemned as prize to the captors, which sentence of condemnation was afterwards on appeal affirmed by the Court of Admiralty at Copenhagen. It appeared that the captain on the voyage used false papers, which was at least one of the causes for the condemnation of the vessel. Lord Ellenborough said:

"This ship had simulated papers on board. The question then is, if the carrying them were one of the causes of her condemnation. If it were, it was a risk to which the underwriter has been exposed without his consent."

The other judges concurred in that conclusion.

In neither of those English cases did the policy of insurance contain any express consent to the carrying of false papers, nor did either of them contain any clause from which such consent could be inferred.

In the case at bar the insurer expressly stipulated in the policy that the assured should be at "liberty to run blockade." Expressly consenting to that, it expressly consented to whatever acts are usually

done in such undertakings, and which, in the usual course of events, were to be expected. And such we understand to be the law of England, as well as of this country. The following excerpts from 2 Duer on Insurance, p. 627, are directly pertinent to the distinction above indicated:

"Sec. 47. The use of false papers to disguise the true character, ownership, or destination of the property insured, or any other circumstances, by which it may be rendered liable to capture or seizure, stands substantially on the same grounds as the want of necessary documents. Where no permission to use such papers is given by the insurer, or his consent to assume the risk, from the known usage of the trade, or other circumstances, cannot be implied, he is not responsible for the loss that the simulated papers may have occasioned, or to which they may have contributed. The risk in such cases is excepted, even where it is not included by a warrant or representation, and the loss, as in the former case, is considered as resulting from a wrongful act of the assured, for which, under the general terms of the policy, the insurer is never liable. Nor is the exemption of the underwriter to be limited to the cases in which false papers are used to conceal the character or ownership of the property insured. The goods insured may be innocent and lawful, and their character as such may be apparent on the bill of lading, and other papers; and yet they are justly liable to confiscation where the assured, or his agent, seeks to cover, by simulated papers, the unlawful goods of other persons shipped by the same vessel. If the policy in such a case embraces a warranty of neutrality, and the goods covered are belligerent property, the act of the assured as a breach of the warranty vitiates the contract; and, where there is no such warranty, as it creates a risk not contemplated by the insurer, he is exonerated from the loss.

"Sec. 48. The language of the Court of King's Bench in some of the reported cases seems to imply that the leave to carry simulated papers must be given by an express provision in the policy, and that a mere disclosure to the insurer of the intention to use them would not be sufficient to charge him with the risk. It is, however, certain from other cases in the English courts and from numerous decisions in the United States that where the carrying of false papers, in the voyage or trade to which the insurance relates, is a known or general usage, or where the use of such papers, from the very nature of the voyage, is indispensable, the law will impute to the insurer the knowledge of the fact and imply his consent to assume the risk; and it appears to be a necessary inference from these decisions that the insurer must be equally liable where his knowledge of the facts is proved by evidence of a direct representation prior to the insurance. Where he subscribes the policy with a knowledge of the facts, his consent to assume the risk may be as justly implied in the one case as in the other."

"In *Planche v. Fletcher*, Doug. 283, the true destination of the ship was concealed by a false clearance, and it was insisted that the omission to disclose the fact was a fraud upon the underwriters; but Lord Mansfield said: 'There was no fraud on them or on anybody, since what had been practiced had been proved to be the constant course of the trade, and notoriously so to everybody.' From this usage, therefore, the underwriter's knowledge of the fact and his consent to assume the risk were inferred. In *Livingston v. Maryland Ins. Co.*, 7 Cranch, 506 [3 L. Ed. 421], where false papers were used to disguise the true ownership of the property, it was urged as a fatal objection to the plaintiff's recovery that the intention to use those papers was not communicated to the underwriter, but the reply was that the papers were rendered necessary by the nature of the trade insured, and by its known course and usage. And Chief Justice Marshall, in delivering the opinion of the court, laid down the general rule in these words: 'Where the underwriters know, or by the usage and course of trade ought to know, that certain papers ought to be on board for the purpose of protection, in one event, which, in another, might endanger the property, they tacitly consent that the papers shall be so used as to protect the property.' The property in this case was in reality American, but the false papers gave it a Spanish character for the

purpose of protecting it in the ports of a Spanish colony to which she was destined, and where a trade by Americans was prohibited. As Spain and England, however, were at war, the false papers exposed the property to English capture, and it was from this cause that the loss arose. The opinion of the court was that, if the jury believed from the evidence that the use of the papers was necessary or justified by the usage of the trade, there was no concealment that could affect the right of the plaintiff to recover. *Calbreath v. Gracy*, 1 Wash. C. C. 198 [Fed. Cas. No. 2,295]; *Maryland Ins. Co. v. Bathurst*, 5 Gill & J. [Md.] 159. *Le Roy v. United Ins. Co.*, 7 Johns. [N. Y.] 343, recognizes the same rule that, where the use of false papers is warranted by the use of the trade, it is not necessary to be disclosed to charge the underwriter with a risk; a fortiori, leave to carry the papers is not necessary to be given by the policy. So, where the policy, by specific or general words, covers the risk of belligerent property, the use of false papers to give a neutral character to the property is not necessary to be disclosed, on the ground 'that no underwriter can be ignorant of the practice of neutrals to cover belligerent property, and of the measures ordinarily resorted to in order that the cover may escape detection.' *Buck & Hedrick v. Chesapeake Ins. Co.*, 1 Pet. 151 [7 L. Ed. 90], opinion of Mr. J. Johnson. It may be added in this case the use of false papers can be no ground of complaint to the insurer, for instead of increasing it diminishes the risk that he agrees to assume, by lessening the chances of a capture and condemnation. The cover is as much for the benefit of the underwriter as of the assured. It seems, therefore, a very just observation of *Benecke*, on the decision of the King's Bench, in *Oswell v. Vigne*, that, as it was known to the insurer when the policy was effected that the vessel insured would be liable to seizure in the continental port of destination unless by false papers the fact of her having sailed from England could be concealed, his consent to the use of such papers ought to have been implied. They were rendered necessary by the nature of the voyage, and it was for the benefit of the insurer that they should be used. It may be regarded as certain that in the United States such would have been the decision. 3 *Benecke*, 331."

Being of opinion, as we are, that both under the law of England and that of the United States the defendant company, under the facts shown, were liable to the assured by the terms of the policy, it is unimportant whether the contract was executed in London or in San Francisco, and therefore it is unnecessary to pass upon the objections made to *Comyn's* testimony.

We think no other point made calls for special notice, although all of them have been carefully considered.

The judgment is affirmed.

WESTFELDT et al. v. NORTH CAROLINA MINING CO.

(Circuit Court of Appeals, Fourth Circuit. March 12, 1910.)

No. 745.

1. COSTS (§ 8*)—POWER TO TAX—JURISDICTION OF COURT.

Where a bill in equity filed in a federal court alleges facts which give such court jurisdiction, but is afterward dismissed on a plea in abatement setting up the pendency of a suit in a state court between the same parties in which the state court had acquired prior jurisdiction over the subject-matter of the suit, the case is not one of want of jurisdiction in such sense that the court cannot adjudge costs against the losing party.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 16; Dec. Dig. § 8.*]

2. COSTS (§ 254*)—ON APPEAL—EXPENSE OF RECORD.

Where a plea in abatement in an equity suit in a Circuit Court was overruled and after a trial of the cause on the merits defendant appealed

*For other cases see same topic & § NUMBER in Dec. & Ann. Digs. 1907 to date, & Rep'r Indexes.

generally, he was justified in bringing up the entire record and to have the expense taxed as costs on a reversal on the ground of error in overruling the plea.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 962; Dec. Dig. § 254.*]

3. COSTS (§ 60*)—APPORTIONMENT—DISCRETION OF COURT OF EQUITY.

The discretion vested in a court of equity to apportion costs does not authorize a departure from the usual practice of awarding costs to the prevailing party, unless for some cause shown equity and good conscience require it.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 261–271; Dec. Dig. § 60.*]

Appeal from the Circuit Court of the United States for the Western District of North Carolina, at Asheville.

Suit in equity by the North Carolina Mining Company against G. R. Westfeldt and others. Decree for complainant, and defendants appealed. On motion of appellee to modify decree of reversal (166 Fed. 706) as to costs. Motion denied.

James H. Merrimon (Joseph J. Hooker and Charles A. Moore, on the brief), for the motion.

F. A. Sondley (Julius C. Martin and Alf. S. Barnard, on the brief), opposed.

Before GOFF, Circuit Judge, and BOYD and DAYTON, District Judges.

BOYD, District Judge. On January 31, 1910, notice as follows was served by counsel for appellee in this case upon the counsel for appellants:

"Comes now the defendant in error, North Carolina Mining Company, by its attorneys and solicitors, and moves the court to modify the judgment or decree in this cause reversing the judgment below and remanding said cause to said Circuit Court of the United States for the Western District of North Carolina, with direction to last-named court to dismiss the bill, and decreeing that the cost of this appeal be taxed against the said North Carolina Mining Company by striking out so much of said decree, order, and judgment as taxes the said North Carolina Mining Company with the cost of appeal in this cause, upon the ground that the said decree of this court directing the said bill to be dismissed is based upon the ground of want of jurisdiction in the said Circuit Court of the United States to maintain jurisdiction of the said cause; and the said defendant in error further moves the court for an allowance of 20 days to serve notice of this motion upon the solicitors for the plaintiffs in error.

"This motion will be called for hearing in the said United States Circuit Court of Appeals at Richmond, on the 18th day of February proximo, at 10 o'clock a. m., or as soon thereafter as the matter can be heard, and when the same shall have been heard, if the motion shall be denied, the appellee will move the court to direct that no costs be taxed for any portion of the record transmitted from the Circuit Court, except such portions as are contained in what has been printed as volume 1, upon the ground that such volume contains all the record that was certified from the said Circuit Court to the said Circuit Court of Appeals.

"Should this latter motion be denied, the appellee will move the court to tax the appellee with only such portion of the record as should have been sent to the said Circuit Court of Appeals, and to make such order in relation to the costs of said appeal as to the court shall seem just and proper.

"This the 31st day of January, 1910."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This case was commenced originally in the Circuit Court of the United States for the Western District of North Carolina, at Asheville, by the filing of a bill by the North Carolina Mining Company v. G. R. Westfeldt et al.; the object of the action being to remove a cloud from title to real estate. The defendants came in and filed answer in which the defense was set up that at the time of the filing of the bill there was an action pending in the superior court of Cherokee county, N. C., between the same parties, and involving the same subject-matter, and thereupon defendants sought to abate plaintiffs' action in the Circuit Court on that ground. The defendants' answer went further to the merits of the cause. The Circuit Court, after investigation and ascertainment of the facts, overruled the first plea and held that the said court had jurisdiction, and thereupon the case was proceeded with in the usual way by the completion of the pleadings, the taking of testimony, and a final decree.

Upon an appeal to this court the ruling of the Circuit Court upon the question of jurisdiction was reversed; it being held that the pendency of the action in the state court at the time the bill was filed in the Circuit Court, the parties being the same, the subject-matter the same, ousted the jurisdiction of the said court.

Upon the taking of the appeal to this court, a complete record of the case was sent up, including not only the proceedings to the time the court decided that it had jurisdiction, but all subsequent proceedings, together with the testimony taken, reports, and decrees in the meantime, and the final decree in favor of the North Carolina Mining Company, the present appellee. In accordance with the opinion and judgment of this court, which was filed on the 12th of January, 1909 (166 Fed. 706), the mandate was subsequently sent down to the Circuit Court at Asheville that the bill be dismissed, with costs to appellant.

It is for the purpose of recalling and modifying the judgment and mandate that the present motion is made. It will be observed that appellee's first motion is that so much of the decree, order, and judgment of this court as taxes the appellee with the costs of appeal be stricken out, and that the mandate be modified to that end. The ground upon which the appellee bases this motion is that, as the bill was dismissed for want of jurisdiction in the Circuit Court, no costs could be adjudged.

A number of authorities are cited by the appellee, both in the oral argument and in the brief, to sustain the position that, where an action is dismissed for the want of jurisdiction in the court to entertain it, no judgment for costs can be entered. This is undoubtedly the law, but in our view it does not apply in this case. Upon the bill filed the Circuit Court had jurisdiction. The necessary elements were shown to exist, there was diverse citizenship, one of the parties being a resident of North Carolina, and of the Western District, in which the suit was brought, and the other of another state. Thus there was the required diverse citizenship. The lands which were the basis of the action were all located in the Western District of North Carolina, and the amount involved in the controversy was far in excess of \$2,000, exclusive of interest and costs, and the Circuit Court was warranted in taking jurisdiction, and proceeding with the case to the point that the appellants

interposed the plea as a defense that a suit between the same parties, involving the same subject-matter, was pending in the state court. This court did not decide that there was a want of jurisdiction of the Circuit Court in the inception of the case, but that it was error of the Circuit Court to retain jurisdiction when the fact of the pendency of the other suit was made known and established. The jurisdiction necessarily attached until the facts involved in the plea to the jurisdiction were ascertained and passed upon.

We do not think, therefore, that this case comes within the rule that, where the action is dismissed for the want of jurisdiction, judgment for costs does not follow.

The further motion of the appellee is that, if the foregoing motion shall be denied, then that the court direct that no costs be taxed for any portion of the record transmitted from the Circuit Court, except such as is contained in what has been printed as volume 1, upon the ground that such volume contains all the record that was certified from the said Circuit Court to this court. We see no merit in this motion. The clerk of the Circuit Court, as he was required to do, when the appeal was taken, not only from the refusal of that court to dismiss the action when it was shown that the case, as above stated, was pending in the state court, but also from the final decree in favor of appellee on the merits, sent up the entire record. It is true that the record consists of six volumes, and when the clerk sent it up on the 20th of May, 1907, his certificate was attached to volume 1, and stated that the foregoing was a full and true transcript of the case. This certificate was followed by another, however, filed by the clerk on the 28th of October, 1907, in which the clerk certified that the record consists of the first volume, and also of five other volumes of testimony, etc. Both of these certificates were on file in this court with the record before the cause was argued or decided. We think, therefore, that the certification of the record, including the entire six volumes, was sufficient.

The appellee moves then, in case the other two propositions are rejected, that the court tax it with only such portion of the record as should have been sent to the Circuit Court of Appeals, and to make such order in relation to the costs of said appeal as to the court shall seem just and proper. We think what we have said above disposes of a part of this last motion, but the latter clause of it appears to invite the court here, sitting in equity, to exercise its discretion and apportion the costs between the parties. As to this proposition we may say that whilst a chancellor is vested with a discretion in the disposition of costs in an equity case, yet the discretion is held to be a sound one to be exercised in view of the special circumstances of each case. It is, however, the usual practice in equity to award costs to the prevailing party in the cause, and this rule should only be varied when the losing parties can show that equity and good conscience require a different judgment. In some cases where a successful party has overloaded the record unnecessarily with irrelevant and immaterial testimony, and in others where, through the fault of both parties, an unnecessarily large and expensive record has been made, and still in others, in which large interests are involved, the law affecting them being unsettled, and there is consequently a reasonable basis for the suits, courts of equity have

divided the costs, or apportioned them among the parties equitably. But we do not see any such conditions here.

When the appellee brought its suit, it was confronted by two defenses—the one to the jurisdiction, and the other to the merits. The appellee succeeded in the Circuit Court in having the jurisdiction retained, and also after a trial in gaining a final decree in its favor. The appellant appealed. This brought up the whole case, and the whole record came with it. We feel constrained therefore to deny the motion of appellee in its every aspect. In view of this conclusion, it is not necessary to pass upon the proposition insisted on by the appellants that the motion comes too late.

Motion denied.

NATIONAL CITY BANK OF CHICAGO, ILL., v. THIRD NAT. BANK OF LOUISVILLE, KY.

(Circuit Court of Appeals, Seventh District. January 4, 1910.)

No. 1,621.

1. BANKS AND BANKING (§ 190*)—PAYMENT OF FORGED DRAFT—LIABILITY TO DRAWER.

Where the drawee of a bank draft paid it on the forged indorsement of the payee's name by a person having no property in the draft or right to indorse the payee's name, proof of such facts establishes a cause of action against the drawee, on behalf of the drawer, under the rule that it is the drawee's duty to pay the draft only to the payee, or to some one who by indorsement or otherwise has good title, or as to whom plaintiff is estopped to deny title.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 733-735; Dec. Dig. § 190.*]

2. BANKS AND BANKING (§ 129*)—DEPOSITS—OWNERSHIP.

B. solicited P. to obtain a loan of \$20,000 to finance a publishing proposition, agreeing to pay a bonus of \$5,000 therefor. B. executed notes for the amount, part of which was deposited to the credit of a special bank account under the agreement that it should be withdrawn only on checks countersigned by P. *Held*, that the relation of the parties was that of borrower and lender only, and that P. had no interest in the deposit either as a partner in the publishing enterprise or as a tenant in common of the fund.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 312; Dec. Dig. § 129.*]

3. BANKS AND BANKING (§ 190*)—DEPOSITS—DRAFTS—INDORSEMENT—FORGERY.

Where a special deposit of borrowed money in a bank was subject to the borrower's check only when countersigned by the lender, the lender, as a matter of law, had power to limit the payment of the borrower's check on the fund or draft purchased with such check to a particular person, and hence the borrower's indorsement of the payee's name on the back of the draft so purchased, without authority, constituted a forgery, and passed no title to the holder, nor did it authorize the drawee bank to charge the draft to the drawer's account.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 733-735; Dec. Dig. § 190.*]

4. BANKS AND BANKING (§ 190*)—PAYMENT OF FORGED DRAFT—NEGLIGENCE.
P., having loaned money to B., deposited in a special bank account sub-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ject to checks only when countersigned by P., countersigned a check on the deposit to purchase a draft payable to the B. M. Company. B. purchased the draft, and, forging an indorsement of the B. M. Company, deposited it to the credit of his personal account in another bank, by which it was collected from the drawee and charged to the drawer's account. *Held*, that the drawer was entitled to rely, in the absence of notice that its reliance was misplaced, on the assumption that the drawee would not pay the draft on such forged indorsement, and hence neither the drawer nor P. were chargeable with any negligence that misled or contributed to misleading either the bank in which the draft was deposited after forgery, or the drawee in paying the draft on such indorsement.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 733-735; Dec. Dig. § 190.*]

5. BANKS AND BANKING (§ 190*)—PAYMENT OF FORGED PAPER—CUSTOM.

In an action by the drawer of a draft against the drawee for payment on a forged indorsement, a custom of banks to accept items for deposit bearing the indorsement of payees on the responsibility of the depositor, without examining the genuineness of the indorsement or signature of the payee or person other than the depositor, was irrelevant as not going to the extent of exhibiting a custom that a failure to examine a title conferred a good title, or that a banker's reliance on a customer's indorsement of a bad title exempted the banker from liability on his own indorsement.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 733-735; Dec. Dig. § 190.*]

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by the Third National Bank of Louisville, Kentucky, against the National City Bank of Chicago, Illinois. Judgment for plaintiff, and defendant brings error. Affirmed.

Defendant in error (hereinafter styled plaintiff) instituted against plaintiff in error (defendant) an action in assumpsit for money had and received. Defendant pleaded the general issue. At the conclusion of all the evidence, the court directed a verdict for plaintiff and thereupon rendered the judgment that is attacked by this writ of error.

To make its case plaintiff proved the following undisputed facts and rested: Throughout July, 1907, plaintiff had to its credit with defendant a general deposit exceeding \$20,000. On July 8, 1907, plaintiff drew its draft upon defendant for \$7,000 payable to the order of Bobbs-Merrill Company. That company, as plaintiff then knew, was a publishing corporation at Indianapolis, Ind. On July 9, 1907, through the Chicago Clearing House, defendant paid the draft to the Continental National Bank of Chicago, charged the amount against plaintiff's account, and at the end of the month returned the draft to plaintiff with other canceled vouchers. When defendant took up the draft the following writings appeared on the back thereof: "Bobbs-Merrill Co." "Ben La Bree, Jr." "All prior indorsements guaranteed, pay to the order of Continental National Bank, Chicago, Ill. Southern National Bank, Louisville, Ky. H. Thiemann, Cashier." The purported indorsement by Bobbs-Merrill Company was not made by that company, nor by its authority, nor with its knowledge or consent. Payment of the proceeds of the draft was never made to Bobbs-Merrill Company, nor to any one upon its order or with its authority, knowledge, or consent. Plaintiff first learned the aforesaid facts respecting the purported indorsement of Bobbs-Merrill Company on February 15, 1908. On that day plaintiff gave notice of said facts to the Southern National Bank of Louisville and to defendant. On February 18, 1908, plaintiff tendered back the draft to defendant and demanded that its deposit be restored and paid to it. Plaintiff has never received from defendant nor from any one the amount so as aforesaid taken by defendant from its deposit with defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Defendant, on its part, proved the following additional undisputed facts: About July 1, 1907, Ben La Bree, Jr., whose indorsement is on the draft in question, and who was engaged in selling subscription books at Louisville, applied to Powers, president of an insurance company and a director of plaintiff, for financial assistance to the extent of \$15,000. He exhibited to Powers what purported to be contracts of sale amounting to over \$37,000 (but which were forgeries, as Powers learned in January and February, 1908), and represented that he would have to have \$15,000 to pay for printing, binding, etc., in order to enable him to make deliveries under the contracts. Among the papers so exhibited was what appeared to be a contract whereby Dana, Estes & Co. of Boston agreed to take from La Bree for \$9,350 certain books as soon as they should be manufactured and delivered, and also what purported to be an undertaking of Bobbs-Merrill Company to manufacture said books for La Bree for \$7,000. As an inducement for Powers to raise the \$15,000 necessary for the aforesaid purposes, La Bree offered to execute his notes to Powers for \$20,000 running from 60 to 120 days, and to give the collateral agreement hereinafter described. Powers thought favorably of the proposition; but, believing that it would be well to have aid in floating the \$15,000 of La Bree paper, he proposed to McHenry, who was interested in various banks and was a director and vice president of plaintiff, that he would give McHenry a La Bree note for \$2,500 (half of the \$5,000 bonus in La Bree notes) if McHenry would join with him in raising the \$15,000. Receiving McHenry's consent, Powers decided to go ahead. So on July 6, 1907, La Bree executed to Powers his notes for \$20,000 as aforesaid, and a collateral agreement, as follows: After reciting the notes, La Bree sold, assigned, and delivered to Powers, in order to secure the payment of said notes, the contracts and choses in action so as aforesaid exhibited to Powers. The next provision was that: "The sum of \$20,000 when as obtained from said Powers is to be deposited in the Third National Bank of Louisville, and checked out on checks countersigned by said Powers, and the account to be designated Ben La Bree, Jr., Special." And the next and final paragraph stipulated that: "Upon the completion and delivery of books under the contract of Dana, Estes & Co., the amount due under said contract is to be paid as per draft on them drawn this day and payable in ninety days or on completion of said contract, the proceeds of said draft to be applied towards the extinguishment of the above mentioned indebtedness. Collections under the other contracts may be made as hereafter agreed upon between the parties." La Bree notes to the amount of \$15,000 were indorsed by Powers and given to McHenry to negotiate. McHenry explained the La Bree-Powers arrangement to the discount committee of plaintiff's directors, and plaintiff took \$5,000 of the notes on McHenry's guaranty that the notes should be paid. In like manner McHenry placed \$10,000 of the notes with other banks. And thereupon \$15,000 so raised was deposited with plaintiff to the credit of "Ben La Bree, Jr., Special." On July 8, 1907, La Bree signed and brought to Powers for counter signature a check for \$7,000 on the aforesaid deposit, payable "to the order of New York Exchange," and represented to Powers that it was necessary to pay Bobbs-Merrill Company in advance in order to secure the manufacture of the books that were to be delivered to Dana, Estes & Co. Powers interlined in the check after the word "Exchange" the words "payable to Bobbs-Merrill Co.," and thereupon countersigned the check and delivered it to La Bree. On presentation of the check by La Bree, plaintiff executed and delivered to La Bree its draft on defendant for \$7,000, payable to the order of Bobbs-Merrill Company, being the draft introduced in evidence by plaintiff as hereinabove stated. La Bree wrote "Bobbs-Merrill Co." and his own name on the back of the draft, presented it to the Southern National Bank of Louisville (where he had an account), and received therefor from that bank \$7,000, which he converted to his own use. Before plaintiff made its demand upon defendant and began this action, plaintiff restored \$7,000 to the "Ben La Bree, Jr., Special" account, and therefrom Powers paid that amount of La Bree notes on which he was indorser.

Defendant also proved that at the end of each month after July and down to December, 1907, when the account was closed, defendant and plaintiff compared their books by means of reconciliation sheets, and that plaintiff made

no complaint during the pendency of the account that defendant had wrongly paid the draft in question.

Defendant also introduced evidence from which the jury might have found that Powers, about the middle of November, 1907, came into the possession of facts, which, if followed up at once, would probably have led to an earlier detection of La Bree's fraud. During November, 1907, down to the 16th, La Bree had on deposit with the Southern National Bank \$1,200; after the 16th his "balance never reached \$500."

Errors are assigned:

On the direction of verdict for plaintiff.

On the refusal to give several instructions, based on the theory that title to the draft passed to the Southern National Bank and thence to defendant, of which the following may be taken as an example: "If you believe from the evidence that Bobbs-Merrill Company had no interest in the draft in question, or claim or title thereto, and if you further believe from the evidence that said draft was delivered to Ben La Bree, Jr., in payment of a check for the same amount drawn against an account deposited with the plaintiff by said Ben La Bree, Jr., and that the money deposited in said account was either the joint property of said La Bree and Powers, or the sole property of said La Bree, then you are instructed that the indorsement of Bobbs-Merrill Company was not necessary in order to transfer a good title to said draft, and your verdict should be for the defendant."

On the refusal to give several instructions, based on the theory that plaintiff's negligence under the facts proven should prevent a recovery, of which the following may be taken as an example: "The jury are instructed that it was the duty of the plaintiff within a reasonable time after the return of the draft to it by the defendant to use diligence in discovering the forgery, and if you believe from the evidence that the forgery might have been discovered by the plaintiff by the use of due diligence within a reasonably short time after the return of the draft by defendant to plaintiff, and if you further believe from the evidence that the defendant was damaged or injured by such lack of diligence, if you believe from the evidence there was such lack of diligence, then your verdict should be for the defendant."

On the refusal to give several instructions, based on the theory that plaintiff was answerable for negligence on the part of Powers, of which the following may be taken as an example: "If you believe from the evidence that Powers did not exercise care and prudence in dealing with said La Bree, and that Powers failed to exercise due care and precaution in countersigning and delivering said check for \$7,000 to said La Bree, or if you believe from the evidence that Powers might have discovered the forgery by the use of reasonable diligence within a reasonably short time after the return of the draft by the defendant to the plaintiff, and that the defendant was thereby prevented from taking steps for its protection against said La Bree and was damaged or injured thereby, then your verdict should be for the defendant."

On the rejection of proffered testimony "that Bobbs-Merrill Company never had an account with the Southern National Bank of Louisville; that its signature was not known at that bank; that La Bree had an account with that bank for about 18 months prior to July, 1907; that it was the custom of bankers of Louisville, when customers brought in items of deposit consisting of checks and drafts which bore the indorsement of payees or other parties to said instruments, to accept the same for deposit upon the responsibility of the depositor and without examination of the genuineness of the indorsement or signature of the payee or other person other than the depositor."

Albert Martin and Bennett H. Young, for plaintiff in error.

Frank A. Helmer and James P. Gregory, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). It was defendant's duty under the law to pay plaintiff's draft only to the payee, or to some one who by indorsement or otherwise had good title

or as to whom plaintiff was estopped to deny title. Plaintiff's undisputed evidence made out its case. The question is whether defendant's evidence tended to establish a defense. We have been unable to imagine any theory in addition to those advanced by defendant.

1. La Bree's indorsement of the payee's name was authorized, so defendant says, because La Bree was either sole owner of the fund with which the draft was bought, or joint owner with Powers as partner or tenant in common.

La Bree's arrangement with Powers gave Powers no interest in common with La Bree as partner or otherwise in the property or funds at hazard in the subscription book business. Powers was not to be a sharer in the profits or losses of the business. The relation of Powers to La Bree was limited to that of lender to borrower. The \$5,000 was a bonus for the loan of \$15,000. It represented in no way an interest in the profits of the enterprise in which La Bree was supposed to be risking the borrowed money. And La Bree's obligation to pay the \$20,000 according to the tenor of his notes was not at all dependent upon the success or failure of the project.

Though La Bree was sole owner of the fund with which the draft was bought, it does not follow that he had an unrestricted dominion. For instance, he was sole owner of the Dana, Estes & Co. contract (supposing for the moment that it was valid), but he did not have unrestricted dominion, because he had given the right of collection to Powers. And likewise, with respect to the deposit with plaintiff, he had given the right of application to Powers. By force of the contract (as a matter of law) Powers had just as much right to limit the payment of that \$7,000 (both in the check and in the draft) to Bobbs-Merrill Company as he had to make the collection from Dana, Estes & Co.

So La Bree's indorsement of the payee's name was a forgery, passing no title to the Southern National Bank, and conferring no right on defendant to charge the draft to plaintiff's account.

2. Too obviously to warrant discussion neither plaintiff nor Powers was guilty of any act or omission that misled or contributed to misleading the Southern National or defendant into taking the draft on a forged indorsement.

The charge of subsequent negligence respecting the discovery of the forgery is unavailing. Plaintiff had the right to rely, in the absence of notice that its reliance was misplaced, upon the assumption that defendant would perform its legal duty. It was not for plaintiff to assume the contrary and to search through its canceled drafts for forged indorsements. *Kearny v. Met. Trust Co.*, 110 App. Div. 236, 97 N. Y. Supp. 274; *Id.*, 186 N. Y. 611, 79 N. E. 1108; *German Savings Bank v. Citizens' Nat. Bank*, 101 Iowa, 530, 70 N. W. 769, 63 Am. St. Rep. 399; *Harter v. Mechanics' Nat. Bank*, 63 N. J. Law, 578, 44 Atl. 715, 76 Am. St. Rep. 224; *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529. Owing no duty, plaintiff could not be guilty of negligence in that regard. And Powers was one step farther removed from the draft.

Even if plaintiff and Powers owed defendant the duty to use diligence in discovering that defendant had paid the draft on a forged in-

dorsement, the result in this case would be unaffected. There is no evidence tending to prove that, if the utmost diligence had been used, defendant (or the Southern National) could have done more than make a partial recoupment of the loss. Not by plea, nor by proffered instruction, nor in any way, did defendant tender the question of a partial defense and concede to plaintiff a partial recovery.

3. Proof of the Louisville custom was irrelevant. Aside from the question of the power of a custom in one city to affect the law merchant, the offer did not go to the extent of exhibiting a custom that a failure to examine a title conferred a good title, and that a banker's reliance upon his customer's indorsement of a bad title exempted the banker from liability on his own indorsement.

The judgment is affirmed.

In re BECKHAUS.

RASMUSSEN v. McKEY.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1910.)

No. 1,564.

1. BANKRUPTCY (§ 184*)—LIENS—CHATTEL MORTGAGE—RECORD—STATUTES.

Bankruptcy Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1909, p. 1314), provides that a person shall be deemed to have given a preference if, being insolvent, he has, within four months before filing the petition, made a transfer of any of his property, the enforcement of which will enable one of his creditors to obtain a greater percentage of his debt than other creditors of the same class, and that, where the preference consists of a transfer, the four months' period shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording and registering is required. *Held*, that it is sufficient to entitle the trustee to refuse to recognize a chattel mortgage alleged to constitute a preference because of want of record, if by the local law such instruments are required to be recorded for any purpose; it being immaterial that they may be valid as between the parties without record under the state law.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 184.*]

2. BANKRUPTCY (§ 184*)—LIENS—CHATTEL MORTGAGES—RECORD—"THIRD PERSON."

The term "third person," as used in 2 Starr & C. Ann. St. Ill. c. 95, § 1, providing that a chattel mortgage shall not be valid as against the interests of any third person, unless possession shall have been delivered, or unless the instrument shall be recorded, etc., includes every one outside of the immediate parties to the instrument and their privies, both the mortgagor's trustee in bankruptcy and his simple contract creditors, though not having reduced their claims to judgment.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 184.*]

For other definitions, see Words and Phrases, vol. 8, p. 6360.]

3. CREDITORS' SUIT (§ 11*)—ELEMENTS—NECESSITY OF JUDGMENT.

The rule that the creditor must first recover judgment before he may recover equitable assets affects the remedy only, and not the right, so that, where the recovery of a judgment becomes impracticable, it is not an indispensable requisite to enforcing the creditor's rights.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 46-66; Dec. Dig. § 11.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Petition for Revision of Proceedings of the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of bankruptcy proceedings against Charles F. Beckhaus. On petition of M. C. Rasmussen to recover certain merchandise, fixtures, book accounts, etc., under a chattel mortgage from Frank M. McKey, the bankrupt's trustee. Petition to review and revise an order denying the petition. Dismissed.

In October, 1907, Beckhaus was adjudged a bankrupt, and respondent came into possession of property consisting of a stock of merchandise, fixtures, book accounts, etc., as the property of the bankrupt. Rasmussen, petitioner here, filed a petition in the District Court, asking that respondent be ordered to surrender the property to the petitioner. The petition was based on a written agreement entered into on March 6, 1907, by Beckhaus, of the first part, Rasmussen, of the second part, and certain of the pre-existing creditors of Beckhaus, of the third part, whereby Beckhaus transferred the property to Rasmussen to hold, use, and ultimately dispose of for the benefit of the first and third parties. On issues joined the District Court found that on March 6, 1907, at and before the time the agreement was made, Beckhaus was insolvent, and so remained; that the agreement was never recorded; that Rasmussen never took notorious, exclusive, or continuous possession of the property, but Beckhaus was permitted to remain, and did remain, in possession until the petition in bankruptcy was filed and respondent came into possession, first as receiver, and then as trustee; that Beckhaus intended to prefer said third parties, and said third parties had reasonable cause to believe that Beckhaus intended by such transfer to give them a preference; and that the effect of the enforcement of such transfer would be to enable said third parties as creditors of Beckhaus to obtain a greater percentage of their debts than any other of Beckhaus's creditors of the same class. Being of the opinion that the agreement of transfer, within the meaning of section 60a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), as amended in 1903 (Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1909, p. 1314]), was "required" to be recorded under the law of Illinois, the District Court adjudged that the petitioner take nothing.

Section 60a: "A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

Section 60b: "If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

Section 3b: "A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment."

Section 1, c. 95, 2 Starr & C. Ann. St. Ill.: "Be it enacted by the people of the state of Illinois, represented in the General Assembly, that no mortgage, trust deed or other conveyance of personal property having the effect of a mortgage or lien upon such property, shall be valid as against the rights and interests of any third person, unless possession thereof shall be delivered to and remain with the grantee, or the instrument shall provide for the possession of the property to remain with the grantor, and the instrument is acknowledged and recorded as hereinbefore directed; and every such instrument shall, for the purposes of this act, be deemed a chattel mortgage."

Harry G. Colson, for petitioner.

Julius Moses, for respondent.

Before GROSSCUP, BAKER and SEAMAN, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). 1. On the basis that the Illinois statute, as construed by the courts of the state, does not declare unrecorded chattel mortgages void except as against the rights and interests of innocent purchasers or mortgagees and attachment or execution creditors; that no such "third person" is concerned in these proceedings; and that the respondent has no standing except as the representative of the bankrupt and his general creditors, against whom an unrecorded chattel mortgage is valid—the petitioner contends that the contract here involved (considered as the equivalent of an unrecorded chattel mortgage), having been executed over four months before the petition in bankruptcy was filed, cannot be assailed by the respondent as a voidable preference, because it was not "required by law" to be recorded within the meaning of amended section 60a.

The contention mainly rests on a comparison of original section 3b with the history of the amendment to section 60a.¹ Section 3b provided that the four months within which an act of bankruptcy was available as the basis of a petition against an insolvent should "not expire until four months after the date of the recording, or registering of the transfer * * * when the act consists in having made a transfer * * * for the purpose of giving a preference * * * if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property." The last sentence of section 60a, "Where the preference," etc., was added by the amendment of 1903. As passed by the House the sentence did not end with "required." The continuation was "or permitted, or, if

¹ In support of the argument, petitioner cited: Collier on Bankruptcy (6th Ed.) pp. 478, 479; In re Hunt (D. C.) 139 Fed. 283; In re Great Western Mfg. Co., 152 Fed. 123, 81 C. C. A. 341; In re McIntosh, 150 Fed. 546, 80 C. C. A. 250; Meyer Bros. Drug Co. v. Pipkin Drug Co., 136 Fed. 396, 69 C. C. A. 240; In re Doran, 154 Fed. 467, 83 C. C. A. 265; Little v. Holly Brooks Hdw. Co., 133 Fed. 874, 67 C. C. A. 46, 13 Am. Bankr. Rep. 422. Respondent, on this point, cited: In re Loeser, 148 Fed. 975, 78 C. C. A. 597, 18 L. R. A. (N. S.) 1233; English v. Ross (D. C.) 140 Fed. 630; First Nat. Bank v. Connett, 142 Fed. 33, 73 C. C. A. 219, 5 L. R. A. (N. S.) 148; In re Reynolds (D. C.) 153 Fed. 295, 18 Am. Bankr. Rep. 666; In re Hickerson (D. C.) 162 Fed. 345; McElvain v. Hardesty, 169 Fed. 31, 94 C. C. A. 399; In re Burlage Bros. (D. C.) 169 Fed. 1006.

it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property transferred." These last-quoted words were stricken out by the Senate. Inasmuch as the present case does not involve "possession," but turns wholly upon "recording," the inquiry is limited to the effect of the excision of the words "or permitted" after "required"; and the particular question concerns the soundness of the petitioner's proposition that such excision compels a construction of the amendment as adopted, whereby a chattel mortgage, which a trustee in bankruptcy is assailing as a voidable preference, is not required to be recorded unless an examination of the local law shows that the chattel mortgage, to be impregnable, must be recorded as notice to the persons presently represented by the trustee.

If, as we are inclined to believe, the Court of Appeals for the Sixth Circuit, in *In re Loeser*, supra, was correct in concluding that "the words 'required' and 'permitted' in the connection used are of synonymous legal meaning," no effect could be attributed to the dropping of the redundant word.

If they are not synonymous, the omission of "permitted" does not imply inevitably (on the basis that no other inference can fairly be drawn) that the lawmakers intended that "required" should be qualified or limited to less than it would have meant if the clause in section 3b and in the original draft of the amendment to section 60a had ended with "required"; for Congress may well have conceived that an insolvent debtor and a diligent creditor were not necessarily to be dealt with in the same way. That is, in the interest of fair and open dealing by those who do business on credit, it might have been thought that an insolvent debtor who does not cause a chattel mortgage given to some of his creditors, to the exclusion of others, to be recorded, whether recording be "required" or only "permitted" by the local law, should be liable to be thrown into bankruptcy; while the diligent creditor (diligence being usually favored in the law) should be permitted, after four months, to retain his security, if on taking it he did all the law "required." See *Little v. Hardware Co.*, supra.

Whether the words be deemed synonymous or not, the dropping of "permitted" only eliminated whatever idea pertained to that word—it could not affect "required," for "required" stands full and untouched, without adverb or clause to cut it down. The primal canon of statutory construction is that the language actually used be given its full and fair meaning, that unqualified words be taken without qualification, and that in the absence of ambiguity extraneous matters be not considered. Under this canon probably nothing more can profitably be said than, if recording is required, it is required. If required for any purpose, or without purpose, how can it be said to be not required? If recording be not required, unless required for all purposes, it could never be said to be required where the instrument is valid between the immediate parties without recording.

We are further restrained by what seems to us to be the absurd consequences of any other ruling. If a good-faith second mortgage

had been taken, then according to the petitioner's theory the trustee could avoid the preference. But if, as is frequently the case, each mortgage was large enough to exhaust the mortgaged property, why should the trustee consume the free assets in his hands in carrying on one end of a lawsuit between the mortgagees? The trustee could gain nothing for the general creditors whichever way the litigation ended, but would be spending their pittances to benefit a preferred creditor. The same would be true even if the recorded second mortgage was less than the value of the mortgaged property; for, on the hypothesis that the trustee has no right to resist the unrecorded first mortgage on behalf of the general creditors, the surplus above the second mortgage would have to be applied upon the first mortgage. Preferential mortgagees and lienholders are "adverse claimants," entitled to have their rights determined in plenary suits. They seek to withhold or diminish the fund which otherwise would be shared among the general creditors, and the general creditors are in fact interested in resisting that reduction. Now if the trustee may not assail preferences except in favor of one preferred creditor as against another, and if the general creditors have no interest in such contests except to pray that their fund be not therein completely consumed in costs and fees, the amendment to section 60a not merely failed to accomplish any benefit—it brought about a positive injustice.

When the amended section is read against the background of the nature and purpose of the act, our interpretation, we believe, is confirmed. The act is a national act. It practically supplants the state insolvency laws. We think it clear that Congress recognized the vast sweep of interstate commerce and meant to free interstate traders from the confusion and harassment attendant upon a multiplicity of variant local laws. Therefore the act in all its parts ought to be interpreted in a national view, doing away as far as possible with the variances in the local laws. To release an insolvent debtor from his debts is an act of grace. Through the whole law runs the clear purpose of extending grace only to honest debtors. Honesty, fairness, equity is the whole spirit of the law. Nothing is more abhorrent to equity than deceitful appearances covering secret preferences. So the diligent creditor who obtains security must not help the debtor to be dishonest, unfair, secretive; he can hold his security only on condition that he give his fellow creditors a four-months opportunity to determine whether or not they will file a petition in bankruptcy against the debtor. The openness and fairness of the preferred creditor are made the terms upon which he may retain his preference. In this view the only inquiry is: Does the local law require instruments of the kind in question to be recorded? There is no need of further investigation into the scope or purposes of the local law. There is no concern whether or not the trustee represents innocent purchasers, mortgagees, attachment or execution creditors. No issue is to be made with respect to the validity of the lien claims supposed to be represented by the trustee. Section 60b, which authorizes the trustee to "recover the property or its value," says nothing about the representation of the trus-

tee. It is enough on this point that the trustee is trustee, and that the preferred creditor has failed to record the instrument of transfer, if by the local law instruments of that kind are required for any purpose to be recorded. Only by this interpretation can this national law be administered with anything like uniformity respecting preferences.

2. Even if the true interpretation of section 60a compelled us to decide this case upon the meaning of the Illinois statute, with due regard to the construction thereof by the Illinois courts, we could not agree with the petitioner.

Recording a mortgage of chattels left in the possession of the mortgagor is required "as against the rights and interests of any third person." The term "third person" is broad enough to include everybody outside of the immediate parties to the instrument and their privies. A simple contract creditor who has not obtained a judgment is just as much a "third person," is just as much a stranger to the mortgage, as is the simple contract creditor who has obtained a judgment. Both have the right to enforce payment, if that can be done. The interests of both are prejudiced if the debtor's property is covered by a fraudulent transfer. If at the time of the fraudulent transfer one creditor has obtained a judgment and the other has not, the only difference is that one has proceeded farther than the other in the enforcement of his rights and the protection of his interests. And when it is said that a fraudulent transfer is void only as to judgment creditors the expression means no more than that a creditor cannot seize his debtor's property until he has obtained some process which authorizes the seizure. As stated in *Skilton v. Codington*, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885:

"The rule that a creditor must first recover a judgment is simply one of procedure and does not affect the right. Therefore, where the recovery of a judgment becomes impracticable, it is not an indispensable requisite to enforcing the rights of the creditor."

Our examination of the Illinois cases² has led us to conclude that the Illinois courts have not decided, independently of procedure and having regard solely to rights, that simple contract creditors, irrespective of the progress they may have made in suing their debtor, are not "third persons" within the meaning and intent of the recording statute. Indeed, we think that the case of *Long v. Cockern* goes quite a way towards holding that they are. But at all events we consider that the question is open, and that we are therefore at liberty to adopt the construction we believe to be sound and righteous.

The petition to review and revise is dismissed.

² Petitioner cited: *Wilson v. Pearson*, 20 Ill. 81; *Frapk v. Miner*, 50 Ill. 444; *Chipron v. Feikert*, 68 Ill. 284; *Badger v. Batavia Paper Mfg. Co.*, 70 Ill. 302; *McDowell v. Stewart*, 83 Ill. 538; *Webster v. Nichols*, 104 Ill. 160; *Sellers v. Thomas*, 185 Ill. 384, 57 N. E. 10; *First Nat. Bank v. Barse Com. Co.*, 198 Ill. 232, 64 N. E. 1097; *O'Neil v. Patterson*, 52 Ill. App. 26; *Niepschield v. Reuss*, 92 Ill. App. 636; *Farnham v. Friedmeyer*, 109 Ill. App. 54. Respondent cited: *Blatchford v. Boyden*, 122 Ill. 657, 13 N. E. 801; *Long v. Cockern*, 128 Ill. 29, 21 N. E. 201; *Sondheimer v. Graeser*, 172 Ill. 293, 50 N. E. 174; *Allcock v. Loy*, 100 Ill. App. 573; *Harding v. Thuet*, 124 Ill. App. 437; *Second Nat. Bank v. Thuet*, 124 Ill. App. 501.

KAYE v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1910. Petition for Rehearing Overruled February 11, 1910.)

No. 1,454.

1. CRIMINAL LAW (§ 878*)—TRIAL—MISDEMEANOR AND FELONY—SUBMISSION—GENERAL VERDICT.

Charges of misdemeanor and of felony having been joined in an indictment in five counts, a general verdict of guilty was returned, on which the court assessed punishment as for felony. No instructions as to the form of the verdict were requested by defendant, nor was any exception taken to the instructions given, nor was there any objection interposed to the verdict as returned, nor any motion made that the jury be directed to specify the counts under which they found defendant guilty. *Held*, that the verdict should be construed as finding defendant guilty as charged in each count of the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2098-2101; Dec. Dig. § 878.*]

2. COUNTERFEITING (§§ 6, 12*)—STATUTES—CONSTRUCTION—"DEVICE, PRINT, OR IMPRESSION, OR ANY OTHER THING WHATSOEVER."

Act Cong. Feb. 10, 1891, c. 127, § 3, 26 Stat. 742 (U. S. Comp. St. 1901, p. 3687), provides that every person who makes, or causes or procures to be made, or shall bring into the United States from any other country, or shall have in possession with intent to sell, give away, or in any other manner use the same, any business or professional card, notice, placard, token, "device, print, or impression, or any other thing whatsoever," in likeness or similitude as to design, color, or the inscription of any of the coins of the United States or of any foreign country that have been or hereafter may be issued as money "either under the authority of the United States or of any foreign government," shall, on conviction, be punished by a fine not to exceed \$100. *Held*, that the words "device, print, or impression, or any other thing whatsoever" must be read in connection with and construed as being of the same general nature as their companion words, "business or professional card, notice, placard, token," and not to cover counterfeit molds and counterfeit coins, the making of which is punishable under section 1 as a felony.

[Ed. Note.—For other cases, see Counterfeiting, Dec. Dig. §§ 6, 12.*]

3. COUNTERFEITING (§ 3*)—INTENT.

Act Cong. Feb. 10, 1891, c. 127, § 1, 26 Stat. 742 (U. S. Comp. St. 1901, p. 3686), provides that every person who, within the United States, or any territory, makes any die, mold, etc., in likeness of any die, or mold designed for the coining of genuine coins of the United States, or who shall have in his possession any such die or mold with intent to fraudulently or unlawfully use the same, or who shall permit it to be used for or in aid of the counterfeiting of any of the coins of the United States, shall be punished by fine and imprisonment. *Held*, that such section establishes two offenses, to wit, the making and having in possession of any mold, etc., and that the intent is material only with reference to the having of such things in possession, and not as to the making thereof.

[Ed. Note.—For other cases, see Counterfeiting, Dec. Dig. § 3.*]

4. CRIMINAL LAW (§ 563*)—PROOF—CORPUS DELICTI.

Where accused, when testifying in his own behalf, unequivocally established the commission of an offense, whether there was sufficient proof of the corpus delicti at the conclusion of the government's evidence was immaterial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1269; Dec. Dig. § 563.*]

5. COUNTERFEITING (§ 3*)—STATUTES—CONSTRUCTION—"FALSELY."

Rev. St. § 5457 (U. S. Comp. St. 1901, p. 3683), provides that every person who falsely makes, forges, or counterfeits, or causes or procures to be falsely made, forged, or counterfeited, etc., any coin or bars in resemblance or similitude of the gold or silver coin or bars coined or stamped at the mints and assay offices of the United States, or in resemblance or similitude of any foreign gold or silver coin which by law is, or may be, current in the United States, or are in actual use and circulation as money within the United States, or who passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or bring into the United States from any foreign place, knowing the same to be false, forged, or counterfeited, with intent to defraud any body politic or corporate, or any other person or persons whatsoever, or who has in his possession any false, forged, or counterfeited coin, with intent to defraud, shall be punished. *Held*, that the adverb "falsely" in the opening line of the section qualifies only the verb "makes," since the verbs "forges" and "counterfeits" carry in themselves the idea of falsity, and hence the intent to defraud is only an element of the offense of having in possession with intent to use, etc.

[Ed. Note.—For other cases, see Counterfeiting, Cent. Dig. §§ 5-8; Dec. Dig. § 3.*

For other definitions, see Words and Phrases, vol. 3, pp. 2654, 2655.]

In Error to the District Court of the United States for the Southern District of Illinois.

James R. Kaye was convicted of counterfeiting, and he brings error. Affirmed

Under an indictment in five counts plaintiff in error was found guilty by the jury and sentenced by the court to two years' imprisonment at hard labor.

The indictment was drawn under sections 1 and 3 of the act of February 10, 1891 (26 Stat. 742, c. 127; section 5462, Rev. St. [U. S. Comp. St. 1901, pp. 3686, 3687]; Act March 3, 1903, c. 1015, 32 Stat. 1223; section 5462, Rev. St. [U. S. Comp. St. Supp. 1903, p. 445]), which are as follows:

"Section 1. That every person who, within the United States or any territory thereof, makes any die, hub or mold, either of steel or plaster or any other substance whatsoever, in likeness or similitude, as to the design or the inscription thereon, of any die, hub or mold designated for the coining or making of any of the genuine gold, silver, nickel, bronze, copper or other coins of the United States that have been or hereafter may be coined at the mints of the United States, or who willingly aids or assists in the making of any such die, hub, or mold, or any part thereof, or who causes or procures to be made any such die, hub, or mold, or any part thereof, without authority from the Secretary of the Treasury of the United States or other proper officer, or who shall have in his possession any such die, hub, or mold with intent to fraudulently or unlawfully use the same, or who shall permit the same to be used for or in aid of the counterfeiting of any of the coins of the United States hereinbefore mentioned shall, upon conviction thereof, be punished by a fine of not more than five thousand dollars and by imprisonment at hard labor for not more than ten years, or both, at the discretion of the court."

"Sec. 3. That every person who makes, or who causes or procures to be made, or who brings into the United States from any foreign country, or who shall have in possession with intent to sell, give away, or in any other manner use the same, any business or professional card, notice, placard, token, device, print, or impression, or any other thing whatsoever, in likeness or similitude, as to design, color, or the inscription thereon, of any of the coins of the United States or of any foreign country that have been or hereafter may be issued as money, either under the authority of the United States or under the authority of any foreign government, shall, upon conviction thereof, be punished by a fine not to exceed one hundred dollars."

First count was for having in possession, with intent to use, two "devices, prints, and impressions" made of metal and plaster and other substances in similitude of the 25-cent silver coin of the United States.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Second, third, and fourth counts, differing only as to denominations of the coins, were for having in possession, with intent to use the same fraudulently and unlawfully, dies, hubs, and molds made of metal and plaster and other substances in similitude of (severally specified) silver coins of the United States.

Fifth count was for making and causing to be made two dies, hubs, and molds of metal and plaster and other substances in similitude of the 25-cent silver coin of the United States, without authority from the Secretary of the Treasury of the United States or other proper officer, and with the intent to use the same fraudulently and unlawfully.

Section 5457 (U. S. Comp. St. 1901, p. 3683), referred to in the opinion, reads as follows: "Every person who falsely makes, forges, or counterfeits, or causes or procures to be falsely made, forged, or counterfeited, or willingly aids or assists in falsely making, forging, or counterfeiting any coins or bars in resemblance or similitude of the gold or silver coins or bars which have been or hereafter may be coined or stamped at the mints and assay offices of the United States, or in resemblance or similitude of any foreign gold or silver coin which by law is or hereafter may be current in the United States, or are in actual use and circulation as money within the United States, or who passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or bring into the United States from any foreign place, knowing the same to be false, forged, or counterfeit, with intent to defraud any body politic, or corporate, or any other person or persons whatsoever, or has in his possession any such false, forged, or counterfeited coin or bars, knowing the same to be false, forged, or counterfeited, with intent to defraud any body politic or corporate, or any other person or persons whatsoever, shall be punished by a fine of not more than five thousand dollars and by imprisonment at hard labor not more than ten years."

The further facts, necessary to be considered, are stated in the opinion.

John F. Greeting and Arthur V. Lee, for plaintiff in error.

Edwin W. Sims, U. S. Atty., W. A. Northcott, U. S. Dist. Atty., and H. A. Converse, Asst. U. S. Dist. Atty.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). Charges of misdemeanor and of felony were joined in the indictment, the jury returned their verdict in the form of, "We, the jury, find the defendant guilty," and the court assessed the punishment for felony. Upon this, defendant insists that the judgment must be reversed because, matching the verdict with the indictment, it does not appear but that the jury intended only to find him guilty of misdemeanor. But we are of the opinion that the verdict should be read in the light of the record which defendant helped to make. The trial, with defendant's acquiescence, was an investigation of an alleged misdemeanor and of two classes of alleged felonies. The misdemeanor charge was distinguished from the felony charges in the court's instructions to the jury. Taking the instructions as a whole, we find that the court told the jury to return a verdict of guilty only on such count or counts as they believed beyond a reasonable doubt were sustained by the evidence. No instructions as to the form of the verdict were requested by defendant. No exceptions to the instructions in that regard were taken. No objection was interposed to the reception of the verdict as returned. No motion was made that the jury be directed to retire and further deliberate concerning their verdict and specify therein the particular counts under which they found the defendant guilty. On this record,

unless procedure be deemed primarily a thicket in which to hide, the only fair reading of the verdict is that the jury found defendant guilty as charged in each count of the indictment, because it is manifest that defendant and his counsel must so have understood the verdict when it was returned in the trial court.

The only "devices, prints, and impressions" shown to have been in the possession of defendant were molds in the similitude of coins of the United States and counterfeit coins molded therein. The words "device, print, or impression, or any other thing whatsoever," in section 3, must be read in connection with, and construed as being of the same general nature as, their companion words "business or professional card, notice, placard, token." So read and construed, they do not cover, in our judgment, counterfeit molds and counterfeit coins, the making of which, respectively, is punishable under section 1 of the act in question and section 5457 of the Revised Statutes. We do not believe that Congress intended that one and the same making should constitute both a hundred dollar misdemeanor and a ten-year felony. But the error in letting this count go to the jury was harmless, because the judgment is attributable wholly to the other counts.

Under section 1 the two offenses of "making" and of "having in possession" are of distinctly different natures. "Every person who makes any mold [in the similitude of the genuine coins of the United States] without authority from the Secretary of the Treasury of the United States or other proper officer, shall be punished." "Every person who shall have in his possession any such mold with intent to fraudulently or unlawfully use the same, shall be punished." To protect the integrity of the coins of our country, Congress has absolutely prohibited the unauthorized, the unofficial, making of molds. The purpose or intent with which unofficial molds are made is of no concern. Simply, they must not be made. But respecting possession the matter is inherently different. There are many circumstances under which persons might come into possession of counterfeiting molds, either without knowledge of their character, or with such knowledge but without intent to use them fraudulently or unlawfully, as, for instance, the officers who took and held possession of the molds in question. Mere possession is inherently colorless; but the making of counterfeiting implements is inherently wrong, or at least was a proper matter for Congress to make wrong, as Congress unmistakably has done.

With this understanding of the offense of making unauthorized molds, the conviction under the fifth count was inevitably right. The allegation in that count that defendant made the molds with the intent to use them fraudulently and unlawfully was surplusage. The pleader could not inject into the offense an element that Congress said should not be an element. *State v. Southern Rld. Co.*, 122 N. C. 1052, 30 S. E. 133, 41 L. R. A. 246; 22 Cyc. 448. The allegations that needed to be proven were unequivocally established by defendant when he testified as a witness in his own behalf. So the questions whether, at the conclusion of the government's evidence, there was sufficient proof of the corpus delicti, whether purported oral and written admissions by defendant out of court were properly received in evidence, and

the like, all become immaterial. Whatever infirmities there were in the government's case under the fifth count defendant voluntarily cured.

If we were to accept an assumption that underlies defendant's argument respecting counts 2, 3, and 4, the conviction thereunder might not be sustainable. Proof that defendant's possession of the molds was with the intent to use them fraudulently or unlawfully was indispensable. Defendant's underlying assumption is that the pleaded intent could not be established except by proof that he intended to use the molds to make counterfeit coins with the intent that he should use the counterfeits, or permit them to be used, in defrauding some one. Defendant testified that he made the molds, and used them in making counterfeit coins, but that he had no intent that the counterfeits should be used to defraud any one by passing them as genuine money,—that his molds and coins were experiments to see if he could become a proficient caster of medals. Counter evidence was introduced which, the government claims, tended to prove that defendant permitted his minor son to take some of the spurious coins, and that the son defrauded a shopkeeper by obtaining merchandise in exchange for three counterfeit dimes; and the dimes were admitted in evidence. If defendant's assumption were well founded, questions would have to be determined concerning the sufficiency of the identification of the coins and of defendant's connection with his son's unlawful act. But we cannot accept the assumption. Section 5457, denouncing counterfeiting, makes three separate classes of acts the equivalents of each other as offenses, visitable with the same punishment. One is the making of false, forged, or counterfeited coins; another is the passing of them; and the third is the having of them in possession. Now, like in the case of section 1 of the act of February 10, 1891, mere possession (or mere passing) is inherently colorless. So Congress explicitly provided, repeating the clause in each instance, that possession and passing should each be innocent except "with intent to defraud any body politic or corporate, or any other person or persons whatsoever." But with respect to the making of counterfeits, the carefully worded expression of intent, twice inserted elsewhere in the same section, was omitted. And no other expression is used from which intent as an element of the offense of making counterfeits can be inferred. The adverb "falsely" in the opening line qualifies only the verb "makes," because the verbs "forges" and "counterfeits" carry in themselves the idea of falsity. So the purpose or intent with which counterfeit coins are made is of no concern. Simply, they must not be made. *U. S. v. Russell* (C. C.) 22 Fed. 390; *U. S. v. Otey* (C. C.) 31 Fed. 68. The act of February 10, 1891, is the later act. It should be read in the light of the elder, in aid of which it was passed. So when we find that Congress had absolutely forbidden the making of counterfeit coins, and in aid of that prohibition has absolutely forbidden the making of unauthorized molds, the intent to use such molds fraudulently or unlawfully should be assigned to the intent to use them for the making of counterfeit coins. The intent to defraud (in the sense of cheating in trade) by section 5457 attaches solely to the possession and the passing

of counterfeits, and not at all to the making. Consequently, the charge, in counts 2, 3, and 4, that defendant had the molds in possession with intent to use them unlawfully (or fraudulently in the sense of committing a fraud upon the government's exclusive right to coin) would be supported by proof that defendant had in his possession unauthorized molds with intent to use them in casting counterfeit coins. And that such were the facts, defendant's own testimony indisputably was sufficient to prove. Therefore the government's undertaking to prove that defendant had a forbidden intent in connection with the use of the coins, as well as a forbidden intent in connection with the use of the molds, was an unnecessary burden, harmful to the prosecution rather than to the defense.

Practically no exceptions were taken to the rulings that are now complained of. Nevertheless we have examined the entire record, and have found no substantial reason for disturbing the action of the trial court.

The judgment is affirmed.

TOLEDO, ST. L. & W. R. CO. v. GORDON.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1909. Rehearing Denied February 9, 1910.)

No. 1,538.

**MASTER AND SERVANT (§ 240*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—
DEFECTIVE EQUIPMENT OF CARS—CONTRIBUTORY NEGLIGENCE.**

Plaintiff's intestate had been employed for a month as head brakeman on a freight train on defendant's railroad, when, as the train was proceeding at night, it twice broke in two in the same place owing to defective couplers, which, while coupling automatically, would not hold. On the second occasion plaintiff's intestate went alone to the place of separation, and after signaling to the engineer two or three times to move forward and back slowly he came apparently from between the cars and gave a quick signal to back, which was done; but in the meantime he had gone between the cars and was caught and killed between the drawbars as the cars came together. *Held*, that on such facts, which were undisputed, whatever was the cause of his going between the cars, he was guilty of contributory negligence, and there could be no recovery from defendant for his death either under the common law or the provisions of Safety Appliance Act March 2, 1893, c. 196, §§ 2, 8, 27 Stat. 531, 532 (U. S. Comp. St. 1901, pp. 3174, 3176), which makes it unlawful for any railroad company to use in interstate commerce any cars not equipped with couplers coupling automatically as therein prescribed.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 240.*]

Grosscup, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Illinois.

Action by Alice M. Gordon, administratrix of the estate of Edwin J. Hair, deceased, against the Toledo, St. Louis & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Charles A. Schmetteau, for plaintiff in error.

Henry A. Neal, for defendant in error.

Before GROSSCUP and BAKER, Circuit Judges, and ANDERSON, District Judge.

ANDERSON, District Judge. Defendant in error's decedent, Edwin J. Hair, was a brakeman in the employ of plaintiff in error, and on the night of August 16, 1907, was engaged in the performance of his duties on one of the freight trains of plaintiff in error. The train was on its way west to East St. Louis, Ill. The train crew consisted of an engineer, a fireman, a conductor, a rear brakeman, and the decedent, who was the front brakeman. When the train was proceeding west of Bayle, in Illinois, it broke in two at a point 7 or 8 cars from the engine and about 45 cars from the rear end of the train. The coupling was of the automatic variety, but was defective, in that it would not hold under the strain of pulling the train. It would apparently couple all right when the cars were brought together, but would not hold. When the train first broke in two at a point west of Bayle the conductor and both brakemen were at the place where it broke, and the three were there when it was recoupled. After the train was thus coupled up, having lost too much time to allow of it reaching the next station in time to permit it to pass a train coming east, the train crew proceeded to back their train into the switch at Bayle. The conductor went back to the rear of the train to open the switch, the rear brakeman also went to the rear, and the decedent remained at the forward part of the train. While matters stood thus, the coupling again failed to hold, and the decedent went to the point where the train came apart and gave the engineer several signals to slack ahead and slack back, supposedly in an attempt to effect a coupling that would hold. At length the decedent appeared as if coming out from between the cars and gave the engineer a quick signal to come back. The cars were then 18 inches or 2 feet apart. The engineer pulled the throttle and brought the engine back. After the train came together, the engineer, receiving no further signals, and not being able to see decedent's lantern, went back to where decedent was and found him standing between the drawbars, "one in front of him and one in the back," as described in the evidence. He was caught in the lower part of the abdomen. The engineer then went to his engine, pulled the cars apart, and decedent fell to the ground and in a few minutes died.

The foregoing are the undisputed facts as shown by the evidence. The only witnesses to the circumstances of the accident were the members of the train crew, and there is no contradiction between any of them upon any point.

At the close of all the evidence plaintiff in error moved the court for an instruction to the jury to find the defendant not guilty. This motion was overruled, and an exception reserved, and this ruling is assigned as error.

As appears from the above statement of facts, after signaling the engineer to slack forward and backward several times in an attempt to effect a coupling, the decedent, while the drawbars were 18 inches

or 2 feet apart, gave a quick signal to back, which the engineer instantly obeyed, but not before decedent had placed himself between the drawbars. We can conceive of but three possible explanations for decedent's conduct: First, he may have deliberately placed himself in the position in which he was killed. This would be suicide and is not to be presumed. The presumptions are against it. Second, he may have attempted to pass to the other side of the drawbars after giving the signal to back, and thus got caught. The closeness of the drawbars together when the signal was given and his position when found might indicate an effort to pass through sidewise. Or, third, he may have given the wrong signal; that is, he may have intended to give the signal to pull forward, may have thought he had done so, and then gone in to examine the coupling further. If the accident happened in any one of these ways, there can be no recovery. Indeed, upon any possible view of the case made by the evidence the decedent was guilty of negligence which contributed to his own injury and death.

One count of the declaration averred that the car was being used in interstate commerce and was not equipped with couplers as required by the safety appliance act. But, whether the case be considered from the view point of the act of Congress (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) or the local law, contributory negligence is a complete defense. *Denver & Rio Grande Railroad Co. v. Arrighi*, 129 Fed. 347, 63 C. C. A. 649.

Plaintiff in error's motion for a directed verdict should have been sustained.

The judgment of the circuit court is reversed, and the cause remanded for a new trial.

GROSSCUP, Circuit Judge (dissenting). The Supreme Court in *St. Louis, Iron Mountain & Southern Ry. Co. v. May Taylor*, Administratrix, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061, passing upon the Safety Appliance Act here involved, says:

"In the case before us the liability of the defendant does not grow out of the common law duty of master to servant. The Congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it."

This makes the case before us one, not of qualified duty on the part of plaintiff in error, but of absolute duty; for that the cars were not equipped with the safety appliances prescribed by the Act, is an undisputed fact.

The majority opinion accounts for the accident in three possible ways:

"First, he may have deliberately placed himself in the position in which he was killed. This would be suicide and is not to be presumed. The presumptions are against it. Second, he may have attempted to pass to the other side of the drawbars after giving the signal to back, and thus got caught. The closeness of the drawbars together when the signal was given and his position when found might indicate an effort to pass through sidewise. Or, third, he may have given the wrong signal; that is, he may have intended to give the signal to pull forward, may have thought he had done so" (the engineer interpreting it to be a signal backward) "and then gone in to examine the coupling further."

The decedent's experience in railroading had not extended beyond thirty days. He was only twenty-one years of age. Now, accepting the immediate cause of the decedent's going between the cars as the third supposition stated—that his signal to the engineer, interpreted by the engineer to go back was in fact meant by him to go forwards—we have a case, not of contributory negligence, but of confusion of signals, due to the inexperience or ignorance of the decedent as a railway brakeman. Does the mistake of the decedent, due to inexperience or ignorance, exempt the railroad company from the consequences of having failed in its absolute duty of equipping the cars with safety devices, in a case where, had there been compliance with the law, the confusion and mistake would not have occurred?

I think not. In my judgment, the conclusion arrived at in the majority opinion is contrary to what Congress, in the Safety Appliance Act, intended should be a comprehensive safety precaution for all the operatives of the road—the inexperienced as well as the experienced—and contrary, to what the Supreme Court intended to lay down in the Taylor Case, above quoted. It is my judgment that Congress intended by this Act to provide, among other things, against just such occasions for confusion as the one here disclosed, by doing away with all occasion for anyone going between the cars for the purpose of coupling; for unless this is true, what we have been calling an absolute duty is, after all, only a qualified duty; and the Safety Appliance Act, instead of being for the protection of all, and against every kind of honest mistake, is not for the protection of the inexperienced against mistakes and confusion that grow out of inexperience.

HAMILTON NAT. BANK OF CHICAGO v. BALCOMB.

(Circuit Court of Appeals, Seventh Circuit. January 19, 1910.)

No. 1,585.

1. BANKRUPTCY (§ 303*)—PREFERENCES—ACTION TO AVOID—KNOWLEDGE AND INTENT OF PARTIES—EVIDENCE—SUFFICIENCY.

In an action by a trustee in bankruptcy to recover a preference under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1909, p. 1314), as having been received by defendant with "reasonable cause to believe that it was intended thereby to give a preference," the test of the sufficiency of the evidence to warrant the submis-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sion of such question to the jury does not rest on the assertions by either party of his intent or belief, but on inferences which may fairly arise from the facts in evidence.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 462; Dec. Dig. § 303.*]

2. BANKRUPTCY (§ 303*)—PREFERENCES—ACTION TO AVOID—KNOWLEDGE AND INTENT OF PARTIES—EVIDENCE—SUFFICIENCY.

Evidence considered, and *held* insufficient to sustain a verdict finding that a payment made by a bankrupt to a creditor was received with reasonable cause to believe that a preference was intended.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 462; Dec. Dig. § 303.*]

In Error to the District Court of the United States for the Northern District of Illinois.

Action by F. W. Balcomb, trustee in bankruptcy of the Lawrence Manufacturing Company, against the Hamilton National Bank of Chicago. Judgment for plaintiff, and defendant brings error. Reversed.

The defendant in error, as trustee in bankruptcy of the Lawrence Manufacturing Company, bankrupt, sued the Hamilton National Bank of Chicago, plaintiff in error, to recover \$1,000 alleged as a preferential payment, received from the bankrupt, in violation of section 60, cls. "a" and "b," of the bankruptcy act. Under issues joined, a jury trial resulted in a verdict against the plaintiff in error, and this writ of error is brought for reversal of the judgment thereupon. The sufficiency of evidence to raise an issue for submission to the jury, raised by appropriate motions, is the only question presented; and the facts bearing thereon are stated in the opinion.

Chester E. Cleveland, for plaintiff in error.

F. W. Balcomb, pro se.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge. The judgment in this case, upon verdict of a jury, awards recovery in favor of the trustee in bankruptcy and against the bank, plaintiff in error, for \$1,000, which was received by the bank, in payment of a note made by the bankrupt, Lawrence Manufacturing Company. As the note was paid February 10, 1906, and the petition for adjudication of bankruptcy was filed June 9, 1906, payment was made and received within the four-months period fixed by section 60a of the bankruptcy act, for preferences therein defined. The contentions for reversal are that the proof fails to show either (1) that a preference was intended by the bankrupt, or (2) that the bank had reasonable cause to believe that the payment was so intended, and that the bank was entitled to direction of a verdict, as requested of the trial court. In the testimony no disputes of fact appear, there is no direct testimony as to the intention of the bankrupt, and the officer of the bank, by whom all of the transactions were conducted, testifies that he had neither information nor suspicion that the debtor was insolvent or "in financial trouble." The test of sufficiency, however, for submission to the jury, does not rest on assertions by either party of his intent or belief in the transaction, but on inferences thereof which may fairly arise from the facts in evidence. So if the facts are sufficient to raise

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a reasonable inference against the bank upon both of these issues, the judgment cannot be disturbed.

While the testimony introduced to show insolvency of the debtor corporation does not satisfactorily prove either the fair value of its property at the date of the transactions, the actual amount of its indebtedness, or the circumstances which caused the sudden sale of its property and business, we believe the circumstances in evidence authorize the inference of intent to give a preference, in payment of the note held by the bank, even under the more stringent rule of proof for which plaintiff in error contends, so that discussion of the various rules mentioned is unnecessary. For consideration of the issue of reasonable cause on the part of the bank to believe a preference was intended, we summarize the pertinent facts (referring to the bankrupt as Lawrence Company) as follows:

All transactions between the parties occurred in January and February, 1906. On January 11, 1906, the bank made a loan of \$5,000 to the Lawrence Company on a judgment note payable in 90 days. Application for the loan was made by Hillmer, vice president of the Lawrence Company, to Pike, president of the bank, upon written statement of financial standing, in substance: Of assets of the Lawrence Company aggregating \$37,375, mainly in a manufacturing plant, finished goods, material, and accounts receivable; total liabilities, \$12,279; capital, \$12,000; insurance on property, \$15,000; sales, \$4,500 monthly; established 1882; capital authorized, \$25,000; cash paid in, \$12,000. Subsequently Pike was informed by an attorney that he believed the officer who signed the note as president was not entitled to that office, and that the Lawrence Company was a borrower at two other banks, naming Oak Park Trust as one of them. Pike made inquiry at that bank, ascertaining that the Lawrence Company was indebted there, contrary to their statement, and proceeded forthwith to have judgment entered upon the note, January 29th. Execution issued, levy was threatened, January 30th, and the amount was paid up by the Lawrence Company January 31st.

On February 1st, Hillmer called upon Pike for explanation of this action, and was informed of their discovery of indebtedness to the Oak Park Trust, showing the financial statement to be incorrect. Hillmer stated that such indebtedness had not been mentioned in the statement, "because he was personally indorsing and had put up bank stock as collateral security for that indebtedness." He also said "that the statement was correct otherwise." Pike expressed regret that judgment had been entered without making inquiry direct, which would have prevented such action. Hillmer then stated that they were "short of a pay roll," that they "intended to continue the business and would make a desirable customer of the bank," that he wanted \$1,000 for 10 days, and would "indorse the paper or sign jointly with the company." He also stated: "They were going to reorganize the business and go ahead with it," and that "he was going to take over the business," and that he owned stock in the Oak Park bank. Thereupon Pike directed the advance to be made, and the note in controversy was given,

dated February 1st, payable in 10 days, signed jointly by the Lawrence Company and Hillmer.

This note was repaid to the bank, by Hillmer, in currency, on February 10th, seemingly as a matter of course, with no remarks by either party. While the trustee testifies that the property of the Lawrence Company was sold on that day to other parties, and that the payment to the bank was made out of the purchase money, it does not appear that either of these circumstances was either stated to Pike, or likely to be known or suspected by him or the bank.

For recovery of the amount so received, as an unlawful preference, section 60b requires proof that the creditor "had reasonable cause to believe that it was intended thereby to give a preference," and the facts recited furnish no ground, as we believe, for such cause to be fairly inferred, within the well-settled meaning of the statutory requirement. *Grant v. National Bank*, 97 U. S. 80, 81, 24 L. Ed. 971; *Stucky v. Bank*, 108 U. S. 74, 75, 2 Sup. Ct. 219, 27 L. Ed. 640; *In re Eggert*, 102 Fed. 735, 741, 43 C. C. A. 1.

Judge Jenkins, speaking for this court (*In re Eggert*, supra), thus states the rule:

"The resultant of all these decisions we take to be this: That the creditor is not to be charged with knowledge of his debtor's financial condition from mere nonpayment of his debt, or from circumstances which give rise to mere suspicion in his mind of possible insolvency; that it is not essential that the creditor should have actual knowledge of, or belief in, his debtor's insolvency, but that he should have reasonable cause to believe his debtor to be insolvent; that if facts and circumstances with respect to the debtor's financial condition are brought home to him, such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose."

The sum in question (\$1,000) was requested as a temporary loan to meet the pay roll—not an uncommon need of a manufacturer—and its repayment in nine days, instead of ten, with no new condition brought to attention, surely gave no intimation of financial difficulty, much less of insolvency. The fact of making the advance is cogent evidence that no thought of impending bankruptcy was then in the mind of the banker, that Hillmer's explanations had satisfied him of injustice in enforcing payment of the prior loan, and that both prompt payment and representations then made were accepted as assurance of solvency of the company, and of a prospective customer for the bank, if the advance was made. Indeed, not a word of testimony is indicative of a cause for suspicion that the business of this company, of 20 years' standing, was either insolvent or to be given up; and want of harmony in the management, not want of means, was the only matter mentioned as cause for "reorganization."

We are of opinion, therefore, that the finding against the plaintiff in error is without support in the evidence, and must have arisen from misunderstanding of the rule of law applicable to the issue.

The judgment is reversed accordingly, and the cause remanded for a new trial.

MORRIS v. DUNBAR.

(Circuit Court of Appeals, Third Circuit. February 15, 1910.)

No. 94 (1,216).

CORPORATIONS (§ 144*)—UNPAID STOCK—TRANSFER—SUBSCRIBER'S LIABILITY—STATUTES.

The Pennsylvania street railway act of June 24, 1889 (P. L. 211), providing for the transfer of corporate stock of a street railway company so as to relieve the original subscriber from liability for future assessments only after the stock shall have been fully paid, was modified by Act June 24, 1895 (P. L. 258), relating to corporations generally, and authorizing the transfer of corporate shares before payment in full on declaring that his assignee shall take it subject to all payments due and to become due thereon, that the assignment shall be entered on the corporation's books, and the assignee thereupon become a member of the corporation and be subject to the same obligations as were formerly imposed on his assignor; and hence, where an original subscriber to the stock of the street railroad assigned certain of his shares before they were fully paid in good faith, the assignee, and not the assignor, was liable for the unpaid portion of the price on the corporation's insolvency.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 529-531; Dec. Dig. § 144.*]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Action by Walter Morris, as receiver of the Kittanning & Cowan-shannock Valley Street Railway Company, against Charles Dunbar. Judgment for plaintiff for less than the relief demanded, and he brings error. Affirmed.

L. C. Barton, for plaintiff in error.

John N. Dunn and A. S. Moorhead, for defendant in error.

Before GRAY and LANNING, Circuit Judges, and YOUNG, District Judge.

LANNING, Circuit Judge. The action in the court below was brought by Walter Morris, receiver of the Kittanning & Cowan-shannock Valley Street Railway Company, against Charles Dunbar to recover the balance alleged to be due to the receiver from the defendant Dunbar on the latter's subscription for 170 shares of the capital stock of the railway company. The par value of the stock was \$50 per share. For the 170 shares it was therefore \$8,500. In his statement or declaration the receiver admits the payment of \$650 on account of the subscription, and claims the balance of \$7,850. Dunbar's subscription was made by signing the articles of association of the railway company, dated December 9, 1901; he being one of the incorporators. The railway company is now insolvent, and the unpaid sums on stock subscriptions are needed for the satisfaction of creditors' claims. Assessments of the whole of the unpaid sums were made by the court below, and the receiver was duly ordered to commence actions to recover such sums. The defense in the present case was that of the 170 shares subscribed for by Dunbar 150 were sold by the railway company to other parties,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

who respectively paid the company either in whole or in part therefor. Of the remaining 20 shares the defense was that Dunbar paid in full for 13 of them. The court, believing these defenses had been established, directed the jury to render a verdict in favor of the receiver for the remaining seven shares—that is, for \$350, with interest, amounting in all to \$388.50—for which judgment was entered. The receiver now prosecutes this writ of error.

The facts disclosed by the record show that the total amount of the authorized capital stock of the railway company was 1,500 shares of the par value of \$75,000. Of these 1,500 shares 400 (including Dunbar's 170 shares) were subscribed for by the incorporators. Certificates for the remaining 1,100 shares were delivered to John Shrader, and an independent examination of the proofs by this court shows that there is no difficulty in ascertaining the names of the persons to whom those 1,100 shares were subsequently transferred, or who are at the present time the record owners thereof. Some of the certificates for the 1,100 shares passed after assignment by Shrader through the hands of Dunbar, but he was not the owner of any of them when the company went into the hands of the receiver, and the action against him is for the recovery of the balance alleged to be due from him for the 170 shares which are a part of the 400 shares subscribed for by the incorporators, and not for any balance due on any of the 1,100 shares. The proofs concerning the history of the 1,100 shares were properly admitted for the purpose of showing that the portion of them which Dunbar once owned constituted no part of the 170 shares for which he subscribed as an incorporator.

The railway company's books show that 150 of the 170 shares subscribed for by Dunbar were sold to other persons between January 7 and September 30, 1902. No certificates for these 150 shares were ever issued to him, but the shares were sold by the railway company to those other persons with his consent. In legal effect, therefore, the sales were made by him. In the absence of any statutory provision on the subject, the general rule of the law is that where a stockholder makes an absolute transfer of his stock in good faith, and the transfer is duly entered on the corporate books, he will not be liable upon future assessments or calls. In some jurisdictions, however, the rule is modified by statute, and in a few of our states the liability of the transferee of stock continues after transfer without legislative enactment to that effect. In Pennsylvania, for example, it was held in *Messersmith v. Sharon Savings Bank*, 96 Pa. 440 (decided in 1880), that a subscriber for stock of a corporation remained liable on calls for the unpaid balance thereof notwithstanding his transfer of the stock. One reason given for this rule was that, by the earlier decisions of the courts of Pennsylvania, a transferee of stock assumed no liability to the corporation for unpaid installments of the stock transferred. In *Bell's Appeal*, 115 Pa. 88, 8 Atl. 177, 2 Am. St. Rep. 532 (decided in 1886), it was said, however, that *Messersmith v. Sharon Savings Bank* must not be understood as a decision that the transferee of stock in a corporation which has become insolvent is not liable for the payment of the unpaid portion of the shares held by him when the unpaid capital is required for the payment of the debts of the corporation, and that, sub-

ject to certain exceptions created by statute, the obligation to make good the unpaid portions of capital stock when the necessities of creditors require it is an equitable obligation founded on no statute, and resting upon those who are the owners of the stock at the time of insolvency. To the same effect was the decision in Lane's Appeal, 105 Pa. 49, 51 Am. Rep. 166. While these cases declare that the transferee of stock of an insolvent corporation must pay a pro rata share of the unpaid capital for the benefit of the corporation's creditors, they do not hold that the original subscriber for such stock does not also remain liable on his contract of subscription. The question before us is whether Dunbar was released from his contractual liability by the transfer of the 150 shares.

It is contended by the plaintiff in error that Dunbar's liability to the full par value of the 150 shares is fixed by the seventh section of the street railway act of Pennsylvania, passed June 24, 1889 (P. L. 211), which, after providing that the capital stock of a street railway company shall be divided into shares of fifty dollars each, payable in installments not exceeding \$5 per share in any period of 30 days, that stock on which assessments are not paid shall be forfeited, and that no forfeiture of stock shall release or discharge the owner thereof from any liabilities or penalties incurred prior to the time of such forfeiture, declares that:

"When such stock shall have been paid in full the board of directors shall cause certificates for the same to be issued to the parties entitled thereto, signed by the president and countersigned by the treasurer and sealed with the corporate seal of the company, which certificates shall be transferable at the pleasure of the holders, on the books of the company, in person or by attorney duly authorized, in presence of the president or treasurer, and the assignee aforesaid shall thereupon be a member of said corporation."

The argument is to the effect that this section is inconsistent with the theory that an original subscriber for stock of a street railway company may, by assigning his stock before it has been fully paid and before he has received certificates therefor, make the transferee a member of the corporation or escape liability for the unpaid balance. We think the section standing alone should be so construed. But the defendant in error insists that it is modified by a later act of the Legislature of Pennsylvania passed June 24, 1895 (P. L. 258), entitled "An act relating to and regulating the issue and transfer of certificates of stock by companies incorporated under the laws of this commonwealth." It has but two sections, which are as follows:

"Section 1. That any stockholder of any company incorporated under the laws of this commonwealth shall be entitled to receive a certificate of the number of shares standing to his, her or their credit on the books of the corporation, which certificates shall be signed by the president or vice president or other officer designated by the board of directors, countersigned by the treasurer and sealed with the common seal of the corporation, which certificate or evidence of stock ownership shall be transferable on such books at the pleasure of the holder, in person or by attorney, duly authorized as the by-laws may prescribe, subject however to all payments due or to become due thereon; and the assignee or party to whom the same shall have been so transferred shall be a member of said corporation and have and enjoy all the immunities, privileges and franchises and be subject to all the liabilities, conditions and penalties incident thereto, in the same manner as the original subscriber or hold-

er would have been. And upon a sale of such stock in satisfaction of any debt for which it is pledged the purchaser shall have the right to compel a transfer of such stock upon the corporation books and the delivery of a proper certificate therefor.

"Section 2. That all laws or parts of laws inconsistent herewith be and the same are hereby repealed."

The Kittanning & Cowanshannock Valley Street Railway Company was incorporated under articles of association dated, as previously stated, on December 9, 1901. The act of 1895 seems impliedly to amend or modify the street railway act of 1889. Its title shows that it is intended to relate to and regulate the issue and transfer of stock generally. Its first section applies to any stockholder of any company incorporated under the laws of Pennsylvania, and its second section repeals all laws and all parts of laws inconsistent therewith. It provides that a stockholder shall be entitled to his certificate of stock as soon as he becomes credited with his shares on the books of the corporation; that he may assign his stock before it has been fully paid; that his assignee shall take it subject to all payments due and to become due thereon; that the assignment shall be entered upon the books of the corporation; and that the assignee shall thereupon become a member of the corporation, and be subject to the same obligations as were formerly imposed on his assignor. The case of *Railway Co. v. Bily*, 11 Pa. Super. Ct. 144, is not in point for the reason that the street railway company there mentioned was incorporated before the act of 1895 was passed. The case of *Bank v. Tumbler Co.*, 172 Pa. 614, 33 Atl. 748, concerning the transfer of stock of a corporation organized under the Pennsylvania general corporation act of 1874 (P. L. 73), is also not in point for the same reason. That the act of 1895 very materially modified the status of stockholders under the general corporation act of 1874 was decided in *Sproul v. Standard Plate Glass Co.*, 201 Pa. 103, 50 Atl. 1003, where it was said:

"Act April 29, 1874, § 7 (P. L. 78), after providing for the issue of certificates of stock to the persons entitled to them, transferable in accordance with the by-laws, etc., prescribed that 'no certificate shall be transferred so long as the holder thereof is indebted to said company, unless the board of directors shall consent thereto.' Without giving the company an express lien, this provision gave what was practically equivalent in the negative power to refuse a transfer. An express lien could be waived or released, and so this potential lien could be waived by consent to transfer, thus substantially producing the same effect. The act of June 24, 1895 (P. L. 258), provided for the transfer of certificates of stock at the pleasure of the holder as the by-laws may prescribe, 'subject to all payments due or to become due thereon,' and then contained the provision in regard to purchasers at sales in satisfaction of debt, already quoted. The only repealing clause is the general one of all laws inconsistent therewith, but as the act of 1895 is upon the same subject and in large part in the same words as section 7 of the act of 1874, but gives an absolute right of transfer inconsistent with the necessity of consent by the board of directors, this requirement of the act of 1874 is necessarily repealed."

We think the act of 1895 as plainly modifies the street railway act of 1889 as it does the general corporation act of 1874, and that the stock of a street railway company organized under the act of 1889, after the passage of the act of 1895, is transferable, and that certificates for it are issuable, before full payment therefor. We think, also, that an original subscriber for such stock, who assigns it in good faith,

is not liable for assessments made thereon after his assignment has been entered on the books of the corporation. The act of 1895 seems to be inconsistent with such a continuing liability. It brings the law of Pennsylvania on the subject of the liability of an original subscriber after a transfer in good faith of his stock into harmony with the general rule in most of the states and in the federal courts. In the states the general rule is that the transferee of stock becomes his assignor's substitute as to liability for all future calls and assessments. 3 *Thomp. Corp.* § 3221; 1 *Cook, Corp.* (6th Ed.) § 255; 3 *Clark & Marshall, Priv. Corp.* § 564a; *Clark on Corp.* (2d Ed.) p. 398. The cases cited in these text-books fully sustain the above statement of the general rule. The Supreme Court of the United States has established the same rule for the federal courts. In *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384, it was held that, where a transferee of stock has been accepted by the corporation as its owner, he becomes liable for future assessments thereon. This conclusion was evidently founded on the theory that when a transfer of stock is made, and the transferee is registered on the books of the company as the owner of the stock transferred, the transferor is exonerated. In *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818, Mr. Justice Strong said:

"The creditors of the bankrupt company are entitled to the whole of the capital of the bankrupt as a fund for the payment of the debts due them. This they cannot have if the transferee of the shares is not responsible for whatever remains unpaid upon his shares; for by the transfer on the books of the corporation the former owner is discharged."

In *National Bank v. Case*, 99 U. S. 628, 631, 25 L. Ed. 448, Mr. Justice Strong again approved the same general rule, saying that one reason for holding a transferee whose stock has been duly entered on the books of the corporation liable for future calls and assessments is "that by taking the legal title he has released the former owner." In that case it appears that the Germania Bank had loaned Phelps, McCullough & Co. \$14,000 on a note of the firm and taken from the firm, as collateral security, 100 shares of the stock of the Crescent City Bank. The note not being paid at maturity, the Germania Bank had the stock transferred to it on the books of the Crescent City Bank. Mr. Justice Strong said:

"When, therefore, the stock was transferred to the Germania Bank, though it continued to be held merely as a collateral security, the bank became subject to the liabilities of a stockholder, and the liability accrued the instant the transfer was made. At that instant the liability of Phelps, McCullough & Co. ceased."

In the present case there is no proof that Dunbar's sales of 150 of the 170 shares for which he subscribed were in any wise tainted with fraud. The record shows that some of the transferees have paid in full for the stock assigned to them. Other transferees have paid only a part of the par value of the stock taken by them. In such cases they are liable for what has not been paid, and Dunbar is not.

Of the remaining 20 shares, Dunbar paid for 13 of them in full. On 7 of them he paid nothing. The instruction to the jury was therefore correct. What has been said disposes of all the assignments of error.

The judgment will be affirmed, with costs.

STATE BANK OF IOWA FALLS v. HAWKEYE GOLD DREDGING CO.,
Limited.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1910.)

No. 2,848.

1. BANKS AND BANKING (§ 154*)—DEPOSITS—ACTION—LEGAL OR EQUITABLE
REMEDY.

A corporation's remedy to recover from a bank money deposited therein in the name of the corporation's treasurer and alleged to have been wrongfully transferred by him to the bank by means of his checks as treasurer and converted by the bank is in equity and not at law; title to the deposit being in the treasurer and not in the corporation.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 154.*]

2. ESTOPPEL (§ 87*)—EQUITABLE ESTOPPEL—REPRESENTATIONS—RELIANCE ON.

B., who was plaintiff's secretary, having largely overdrawn his account with defendant bank, and being guilty of a defalcation of plaintiff's funds to the amount of \$16,077.65, conveyed certain real estate to the bank for an expressed consideration of \$19,000, subject to certain incumbrances; the deeds being in fact mortgages. On the same day B. executed to the bank a demand note for \$16,077.65, which was entered on the bank's cash-book and on the bills receivable register as a bill receivable. On the same day B., as secretary, and M., as treasurer, of plaintiff corporation, signed and delivered to the bank a check for the same amount. After delivering the check, note, and deeds to the bank, a deposit slip was made out by the bank by which M.'s account as treasurer of plaintiff was credited with \$16,077.65, and a passbook showing M.'s account as treasurer was written up by the bank showing such amount credited to his account. This account was shown to plaintiff's stockholders as so written up, and after a stockholders' meeting the bank charged the check against M.'s account as treasurer. From the time the check was delivered until it was so charged, it did not appear on the bank's books, nor did any one connected with plaintiff know of its existence, except B. and M. It also appeared that the bank would not have placed the amount to the credit of M., unless the check had been given. *Held*, that the transaction did not constitute a loan to any one, but was mere fraudulent bookkeeping to cover B.'s defalcation, and, there being no evidence that plaintiff acted or failed to act in reliance on such fictitious credit, the bank was not estopped to question its validity, nor could plaintiff recover the amount from the bank on the theory that it had been wrongfully transferred to the bank by the treasurer's checks.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 87.*]

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

Suit by the Hawkeye Gold Dredging Company, Limited, against the State Bank of Iowa Falls. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions to dismiss.

For opinion below, see 157 Fed. 253.

Robert Healy (Thos. D. Healy, Healy & Healy, F. M. Williams, and Parker, Hewitt & Wright, on the brief), for appellant.

Frank F. Dawley (W. L. Crissman, Albrook & Lundy, and Dawley & Wheeler, on the brief), for appellee.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. This action was brought by the dredging company, an alien corporation, against the bank, an Iowa corporation, for the purpose of having an accounting between the dredging company and the bank in regard to money deposited in the bank to the credit of H. C. Miller, Tr. H. G. D. Co., Ltd., during the year 1904, and for a decree against the bank for such sum as should on such accounting be found due the dredging company. The trial court on final hearing disallowed all the claims of the dredging company except an item of \$16,077.65 for which it rendered judgment against the bank. The bank alone appeals. Hence our inquiry is limited to the question as to whether the court erred in its conclusion in respect to this item. The bank is located at Iowa Falls, Iowa. The dredging company, although a corporation of British Columbia, had its business office at the same place. In regard to the jurisdiction of the trial court over the matters in controversy, as a court of equity, we are satisfied with the views of the trial judge as expressed in his opinion, 157 Fed. 253. We now come to the consideration of the evidence upon which the trial court based its judgment.

The following facts in relation thereto are either undisputed or are clearly shown by the evidence: Byron B. Bliss was secretary, and H. C. Miller was treasurer, of the dredging company from its organization to September 24, 1904. The mode of handling the funds of the dredging company, so far as the bank was concerned, was as follows: If it was necessary to pay a debt of the dredging company, Bliss paid it by his own personal check on his account at the bank. In order to reimburse himself, he would make out a warrant as secretary of the dredging company on Miller, the treasurer, and Miller would give Bliss his check as treasurer on his account at the bank which was kept in the name of H. C. Miller, Tr. H. G. D. Co., Ltd. Four or five days prior to August 29, 1904, Miller made up the books of the dredging company and found Bliss indebted to it in the sum of \$16,077.65. Miller insisted that Bliss pay this indebtedness. Bliss at this time also had overdrawn his account at the bank in the sum of \$10,013.57. There was to be held and was held a meeting of the stockholders of the dredging company at Iowa Falls on August 30, 1904. On August 29, 1904, Bliss and his wife executed and delivered two deeds of conveyance to the bank, whereby for the total expressed consideration of \$19,000 they conveyed to it 480 acres of land subject to incumbrances amounting to \$8,500. These deeds, although absolute in form, were in fact mortgages. Just what they secured the payment of is one of the questions for consideration. On August 29, 1904, Bliss executed and delivered his promissory note payable on demand to the bank for \$16,077.65, which was entered on the cashbook of the bank and also on the bills receivable register as a bill receivable. On the same day, and as part of the same transaction, Bliss and Miller signed and delivered to the bank the following check:

"No. 11,905.

Iowa Falls, Iowa, Aug. 29, 1904.

"Pay to the order of State Bank of Ia. Falls, \$16,077.65 sixteen thousand and seventy-seven 63/100 dollars.

Hawkeye Gold Dredging Co.,

"By B. B. Bliss, Sec.,

"H. C. Miller, Treas.

"To State Bank of Iowa Falls, Iowa Falls, Iowa."

After the deliverance of the check, the note, and the deeds to the bank, and on the same day, a deposit slip was made out by the bank, whereby the account of Miller as treasurer of the dredging company was credited with the sum of \$16,077.65. On the same day a pass-book showing the account of Miller as treasurer of the dredging company was written up by the bank, and this credit to Miller's account appeared thereon. The account was shown to the stockholders of the dredging company as thus written up. On September 14, 1904, the bank, by the authority of the check above mentioned, charged the amount of the check against the account of Miller as treasurer of the dredging company. The check, from the time it was signed and delivered, nowhere appeared upon the books of the bank, nor did any one connected with the dredging company know of its existence except Bliss and Miller. The bank would not have placed the sum of \$16,077.65 to the credit of Miller, as treasurer of the dredging company, unless the check had been given. Bliss did not testify in this case. The reason for his not doing so is explained by the suggestion that some time in September, 1904, he became mentally unbalanced. Miller testified that the deeds herein mentioned were given to secure the repayment by Bliss of said sum of \$16,077.65 which was a loan by the bank to Bliss in order that he might raise the money to square his account with the dredging company. He also testified that the words "Hawkeye Gold Dredging Company By" were not on the check above mentioned when he signed it and that he told Peet, the cashier, when he signed the check, that his name thereon would not make it worth one cent. There was expert testimony tending to show that the words mentioned had been written on the check after the signatures of Bliss and Miller had been written thereon. Evidence contradicting this testimony was introduced by the bank.

B. H. Thomas, the vice president of the bank, and who was in the active management of the same when the transaction in question occurred, testified: That on August 27, 1904, Bliss approached him in regard to obtaining a loan. That he told Bliss that, as he (Bliss) already had overdrawn his account at the bank in the sum of about \$10,000, he could not expect to obtain any more money, but that if Bliss would secure the payment of the overdraft the bank would carry it for a time. That subsequently Bliss told Thomas that he did not want to borrow money for himself, but for the dredging company, which then had under consideration the building of a dredging machine, to be operated on the Fraser river in British Columbia. That if the dredging company decided to build or purchase such a machine it would want to borrow some money; otherwise not. That Thomas told Bliss that he (Bliss) had better find out first whether the dredging company desired to borrow some money, then, if the dredging company wanted to make a loan, the matter could be arranged. Bliss insisted, however, that the loan be made to the dredging company, and if it afterwards turned out that the dredging company did not want the money it could be returned. That as Miller, the treasurer of the dredging company, was going away from Iowa Falls for a period of six weeks, and would not be present to check back the money if the dredging company did not desire it, it was arranged between Thomas and

Bliss that the check should be given before Miller left, and delivered to the bank to be used if the dredging company did not finally want the money. That this arrangement was carried out as hereinbefore stated. That the promissory note of Bliss was taken as collateral security for the loan of \$16,077.65 to the dredging company. That on September 14th Thomas met Bliss and asked him if the dredging company wanted the money. Bliss thereupon answered in the negative, and told Thomas that the amount of \$16,077.65 might as well be charged against the account of the dredging company, which was, accordingly, done. That the deeds of conveyance were taken by the bank to secure the overdraft of Bliss. When the credit above mentioned was charged against the dredging company, the note of Bliss was also canceled, but the deeds were retained.

Upon the foregoing facts, the trial court found: That the transaction thus detailed was a loan to Bliss and not to the dredging company. That, by the credit given the dredging company on the books of the bank, the sum of \$16,077.65 became the money of the dredging company, and that the same could not be again transferred to the bank by the check of Bliss and Miller, given without consideration. That the check was without authority, and this fact the bank knew.

If the liability of the bank was to be determined by the fact as to whether the transaction was a loan to Bliss or to the dredging company, there are strong reasons to support the finding of the trial court. The dredging company on the 29th day of August, 1904, had a cash balance to its credit in the bank of \$26,000. The bank took no obligation from the dredging company except the check above mentioned, and the story to the effect that the dredging company wanted to borrow the exact amount of the indebtedness of Bliss to it in order to purchase or build a dredging machine, which according to the evidence would cost from \$60,000 to \$80,000, is incredible. The transaction, however, when looked square in the face, did not constitute a loan to any one. Called by its right name, it was simply false and fraudulent bookkeeping in order to cover up the defalcation of Bliss to the dredging company. When the bank at one and the same time gave the credit on its books to the dredging company and received the check of the dredging company for the same amount, it loaned no money to any one. So far as the matter of a loan was concerned, it made no difference whether the check was entered on the books of the bank or not. The check could be used at any moment should the dredging company attempt to use the credit, and it was so used. If the check had been given subsequent to the giving of the credit, and the credit had been a loan to the dredging company, there would be force in the contention that it was beyond the power of Miller and Bliss to give the money of the dredging company to the bank without consideration. But the case before us has not that element. The check was given before the credit went on the books of the bank, and the evidence warrants the finding that the credit would not have been given without it. This is not an action at law for deceit or for damages on account of false representation. It is suggested, however, that the bank is estopped from claiming the money in question by reason of having made the representation to the dredging company in regard to the balance stand-

ing to its credit. There might be some force in this position if there was any evidence in the record that the dredging company, relying upon the representation of the bank, acted, or failed to act, while the representation was in force, in such a manner as to lose its claim against Bliss. There is no evidence, however, that it did so act or fail to act. If the land conveyed to the bank was all the property Bliss had available for the payment of his debts, it had been conveyed to the bank before the representation was made. If Bliss had other property, it is not shown that he disposed of it between August 29th and September 14th.

In our opinion the facts as above stated do not warrant a judgment against the bank for the sum of \$16,077.65, and the decree of the trial court is therefore reversed, and the cause remanded, with direction to dismiss the bill.

JAMES REILLY REPAIR & SUPPLY CO. v. SMITH.

(Circuit Court of Appeals, Second Circuit. March 7, 1910.)

No. 164.

1. CONTRACTS (§ 232*)—VESSELS—ALTERATION AND REPAIR—EXTRA WORK.

Where a contract for alteration and repair of a vessel provided that the contractor should make no claim for extra work unless he could show a written order for the work and written approval of the designers and the price, and that no verbal agreement and order of any of the parties or their agents should be claimed by either party to modify the clause, and no waiver thereof not in writing and signed by the parties should have any force, allowances should not be made for extra work based on verbal agreements, unless on proof so clear and convincing as to leave no doubt as to the intention of the parties to waive the contract provision and substitute an oral agreement therefor.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1071-1097; Dec. Dig. § 232.*]

2. CONTRACTS (§ 232*)—EXTRA WORK—WRITTEN ORDER—WAIVER.

Where a contract for alterations and repairs provided that no allowance should be made for extras unless ordered in writing and approved by the designers, etc., the fact that the owner was frequently present when the repairs were being made, consulted with the contractor's employes, and made suggestions, which resulted in changes, was insufficient to warrant a finding of an implied agreement to waive the express terms of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1071-1097; Dec. Dig. § 232.*]

3. CONTRACTS (§ 232*)—REPAIRS—EXTRAS—WRITTEN ORDER.

Where, after the contract repairs on respondent's yacht had been practically completed, it was found that the valves installed pursuant to the architect's design made an objectionable noise when the vessel was in a sea way, and to obviate this, and to prevent loss of time to respondent and his family in docking the yacht, he orally employed libellant to install a sanitary tank, which was not a part of the original specifications, such transaction amounted to a new contract therefor, as to which a provision in the old contract precluding an allowance for extras not ordered in writing was inapplicable.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1071-1097; Dec. Dig. § 232.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Southern District of New York.

Libel by the James Reilly Repair & Supply Company against Robert A. C. Smith for repairs and alterations furnished to respondent's yacht *Privateer*. From a decree for libelant for \$6,689.06, which was less than the amount demanded by \$2,808.06, allowed by the commissioners, but disallowed by the District Court, libelant appeals. Modified and affirmed.

Robinson, Biddle & Benedict (William S. Montgomery, of counsel), for appellants.

Page, Crawford & Tuska (W. H. Page and C. H. Crawford, of counsel), for appellee.

COXE, Circuit Judge. The respondent employed the libelant to alter and repair his yacht *Privateer* for the sum of \$12,850. The contract was in writing and the work was to be done pursuant to carefully prepared and definite specifications. The respondent, undoubtedly having in mind the fate of all who attempt to alter or repair existing structures, whether on land or sea, endeavored by the most stringent written stipulations to protect himself from the apparently inevitable and always exasperating claims for "extra work" which seem inseparable from contracts of this character. It was expressly agreed that the libelant—

"should make no claim for extra work and compensation therefor, in addition to the contract price, as hereinafter specified, unless he can show an order for the work, the written approval of the designers, and the price of such work, all in writing; and no verbal agreement and order of any of the parties hereto or their agents shall be set forth by either party hereto to modify this clause, and no waiver of this clause not made in writing and signed by the parties shall be of any force or effect whatever."

It is difficult to understand how stronger and more explicit language could be used. That it had no deterrent effect upon the libelant is evidenced by the fact that with the contract providing for \$12,850, claims for extra work based upon "verbal agreements" were made amounting to \$20,879. In such circumstances, as is clearly pointed out by the District Judge, the explicit terms of the written agreement should not be disregarded except upon proof so clear and convincing as to leave no doubt as to the intention of the parties to waive them and substitute an oral agreement therefor.

Except in one instance, which will be considered hereafter, the testimony falls far short of establishing a waiver. The mere fact that the respondent was frequently present during the period when the repairs were being made, consulted with the libelant's employes and made suggestions which resulted in changes, is not enough to warrant a finding of even an implied agreement to waive the express terms of the contract. Extra work to the amount of \$8,185 was ordered by the respondent and approved in writing as required by the contract. This sum he paid without demur. There is no pretense that the items in controversy were ever agreed to in writing; indeed, there is no proof, as to these items, that in the various discussions as to proposed changes the respondent was notified that any claim for extras would be made.

In the absence of notice he had a right to suppose that the proposed changes would add nothing to the expense and that no additional charge would be made therefor.

That the respondent is not endeavoring to make use of the terms of the contract to avoid paying his just obligations is evidenced by the fact that he has only excepted to a few of the many items presented, on the ground that a written order has not been shown. It is unnecessary to review the various items in detail. It is sufficient to say that we agree with the District Judge in his disposition of them.

Regarding the item for "making and installing sanitary tank, \$333.53," the testimony indicates that the installation of the tank was made necessary because of conditions for which the libelant was not responsible and that it was ordered by the respondent with full knowledge of the circumstances and to prevent the annoyance and loss of time to himself and family of docking the yacht. The valves which had been put in pursuant to the architects' design made an objectionable noise when the vessel was in a sea way and it was to obviate this defect, which cannot be fairly attributed to the libelant, that the tank was installed. This work was not done until July, when practically all the contract work had been completed. It was ordered by the respondent and may fairly be regarded as a new contract to remedy a defective construction which, though approved by the architects, did not satisfy the respondent and his family. In short, the libelant was not to blame for the original construction and should not be required to pay for an improvement which the respondent desired for his own comfort.

The decree should be modified by adding thereto the above item of \$333.53 and interest, and, as so modified, it is affirmed with costs of this court to the appellee.

In re FILMAR.

LIPPINCOTT et al. v. KLOSTERMAN.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1910.)

No. 1,592.

1. BANKRUPTCY (§ 11*)—PARTNERSHIP ESTATES—EQUITABLE POWERS OF COURT.

The various provisions of section 5 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3424]) are intended to vest a court of bankruptcy with full equity powers in dealing with partnership matters.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 11; Dec. Dig. § 11.*]

2. BANKRUPTCY (§ 351*)—PARTNERSHIP—CLAIMS—PRIORITIES—EQUITABLE DISTRIBUTION OF ESTATE.

Where a bankrupt a short time before his bankruptcy had purchased the interest of his partner in the property of a partnership of which he was a member, which constituted all of the property scheduled by him, a firm creditor with the consent of the retiring partner who appears for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the purpose is entitled to payment of his debt from such property ahead of the claims of the bankrupt's individual creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 563, 564; Dec. Dig. § 351.*]

Appeal from the District Court of the United States for the Northern District of Illinois.

In the matter of John Filmar, bankrupt. Appeal by Lippincott and another from an order dismissing petitions for the allowance of Lippincott's claim as a preferred claim. Reversed.

William Street, for appellants.

James Rosenthal, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. Swigert, a merchant tailor, in October, 1905, sold a third interest in his business to Filmar. The firm of Swigert & Filmar continued the business till January 8, 1906, when Swigert sold his interest to Filmar in consideration of a small money payment and Filmar's agreement to pay the partnership debts and save Swigert harmless therefrom. Partnership assets were then in excess of partnership debts. By payment and novation Filmar very shortly settled all partnership debts except one to appellant Lippincott. Lippincott refused to accept Filmar as debtor in place of the partnership, and proceeded to press Filmar for payment. Filmar, by various promises and representations, warded off Lippincott until February 20, 1906, when he filed his voluntary petition in bankruptcy. The property scheduled by Filmar and turned over to the trustee had all been property of the partnership. The scheduled debts were all separate individual debts of Filmar's except the debt to Lippincott. Thereupon Lippincott filed his petition, asking that his debt be paid from the assets ahead of the claims of Filmar's individual creditors; and Swigert filed a like petition, asking the same relief, without offering to repay the consideration he received on selling his interest to Filmar. The final decree dismissed these petitions for want of equity; and the petitioners have severally appealed.

With the property in custody and all the parties present, and no rights of innocent purchasers or transferees having intervened, a court of general equity powers would concededly award priority to Lippincott, because there had been no application of the property, with the consent of the partners, to the payment of individual debts (*Sargent v. Blake*, 160 Fed. 57, 87 C. C. A. 213, 17 L. R. A. [N. S.] 1040), because Lippincott in his own right as a partnership creditor would be entitled to equity's rule of distribution, and because Swigert for his own protection would have the right to ask that Lippincott be first paid.

Was there less power in the bankruptcy court? Section 5a (Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3424]) declares that:

"A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Section 5f explicitly adopts the equity rule of administration. Section 5g authorizes the bankruptcy court to "marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates." These provisions, we think, indicate very clearly that Congress intended that the bankruptcy courts should have full equity powers in dealing with partnership matters. The particular objection here seems to arise from the fact that Swigert and the partnership were not before the court as bankrupts. Section 5c says that:

"The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property."

And in section 5h it is provided that:

"In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt."

Under the various provisions of section 5, what procedure on Lipincott's part would have been necessary or possible in order to invoke the full equity powers of the bankruptcy court, in case Swigert had not voluntarily appeared and filed his petition, we will not now inquire; for, with his appearance, the bankruptcy court had before it all parties in interest, and his petition was a consent that the partnership property be administered by that court in accordance with the equitable principles approved by Congress. Compare *In re Wilcox* (D. C.) 94 Fed. 84, 107; *In re Jones* (D. C.) 100 Fed. 781; *In re Denning* (D. C.) 114 Fed. 219; *In re Head* (D. C.) 114 Fed. 489.

The decree is reversed and the cause remanded, with the direction to enter a decree in accordance with the prayers of the petitions.

KNICKERBOCKER v. HALLA et al.†

(Circuit Court of Appeals, Ninth Circuit. February 7, 1910.)

No. 1,749.

1. MINES AND MINERALS (§ 23*)—MINING CLAIMS—FORFEITURE.

One who does the assessment work on an association placer mining claim for which he is paid by one of the part owners has no right to enforce a forfeiture of the interest of another part owner for failure to contribute.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 58; Dec. Dig. § 23.*]

2. MINES AND MINERALS (§ 23*)—MINING CLAIMS—FORFEITURE FOR FAILURE TO CONTRIBUTE TO ASSESSMENT WORK.

The publication of notice to a part owner of a mining claim to contribute to the cost of doing the assessment work thereon for the previous year under penalty of forfeiture of his interest under Rev. St. § 2324 (U. S. Comp. St. 1901, p. 1426), is a waiver of a prior personal notice, and the de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

† Rehearing denied March 11, 1910.

linquent may make his contribution at any time within 90 days from such notice by publication.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 58; Dec. Dig. § 23.*]

3. MINES AND MINERALS (§ 23*)—MINERAL CLAIMS—TENDER OF CONTRIBUTION TO ASSESSMENT WORK.

A part owner of a mining claim who holds an option to purchase the interest of a co-owner has the right to tender the contribution of the latter to the cost of assessment work to avoid a forfeiture.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 58; Dec. Dig. § 23.*]

4. MINES AND MINERALS (§ 23*)—MINING CLAIMS—TENDER OF CONTRIBUTION TO ASSESSMENT WORK.

A part owner of a mining claim has implied authority to make a tender of the amount due from a co-owner as a contribution to the cost of assessment work to avoid a forfeiture.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 58; Dec. Dig. § 23.*]

5. MINES AND MINERALS (§ 23*)—MINING CLAIMS—CONTRIBUTION TO ASSESSMENT WORK—VALIDITY OF TENDER.

Where a tender made on behalf of a part owner of a mining claim of his share of the cost of assessment work done by another to avoid a forfeiture of his interest was not objected to on the ground of want of authority of the agent when made, the right to make such objection is waived.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 58; Dec. Dig. § 23.*]

In Error to the District Court of the United States for the Second Division of the District of Alaska.

Action by L. C. Knickerbocker against Otto Halla, W. Sedlacek, John A. Webb, A. L. Butler, Charles R. Ewing, George M. Lincoln, H. Jones, W. H. Smith, Sam Samson, and others. Judgment for defendants, and plaintiff brings error. Reversed.

J. Allison Bruner, Elwood Bruner, Ira D. Orton, Albert Fink, N. H. Castle, and P. M. Bruner, for plaintiff in error.

Albert H. Elliot, O. D. Cochran, F. E. Fuller, W. A. Gilmore, and J. W. Albright, for defendants in error.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

GILBERT, Circuit Judge. The plaintiff in error, together with seven others, located the association placer mining claim of 160 acres, known as the "Halla tract," in the Cape Nome mining and recording district, Alaska. Each of the locators owned an undivided one-eighth interest in the claim. Among the locators were Otto Halla and S. Lapiana. The plaintiff in error brought ejectment against the defendants in error for the recovery of an undivided one-fourth interest in the claim, and damages for the wrongful detention thereof, alleging in his complaint that he had become the owner of Lapiana's interest. The defendant in error answered alleging that the interest of the plaintiff in error and that of Lapiana had been forfeited for the failure of the owners thereof to do the assessment work for the year 1902, and that by such forfeiture their interests had been ac-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

quired by the defendants in error Webb, Butler, and Ewing. The jury returned a verdict for the defendants in error, on which judgment was entered.

The plaintiff in error, among other assignments, assigns error to the refusal of the court to instruct the jury to direct a verdict against the defendants in error, and to submit to the jury, under proper instructions, the question of damages only. We think the motion should have been allowed on two grounds:

First. The proceedings to forfeit the interest of the plaintiff in error and that of Lapiana were based upon their failure to contribute to the annual assessment work for the year 1902, done upon the claim by Webb, together with his partners, Butler and Ewing. Prior to December 16, 1902, Webb had no interest in the claim. On that date Halla executed to him a deed of an undivided one-sixteenth interest; the consideration therefor being the use by Halla of a cabin belonging to Webb, and the promise of Webb to Halla to do the assessment work on that claim and certain other claims for the year 1902. In pursuance of that contract, Webb and his partners, after December 16, 1902, performed the work. It is clear that the performance of the work under the agreement gave Webb no right to claim forfeiture as against any of the owners for failure to contribute to the expense thereof. He was fully paid by Halla for his work. He was hired by Halla to do the work, and the conveyance which Halla made was his pay. Halla, having caused the work to be done, and having paid therefor, had the right to claim contribution and give notice of forfeiture; but neither Webb nor his partners had any such right.

Second. The record makes it clear that within the time allowed by law the plaintiff made due tender to Webb on behalf of himself and Lapiana of the full amount due from each as his proportionate share of the assessment work. It is proven, and is not disputed, that, in company with a witness, he went to Halla and Webb, and made to each of them a tender of the sum of \$50. Halla referred him to Webb, Butler, and Ewing as the parties in interest. Webb made no objection to the form or amount of the tender or to the right of the plaintiff in error to represent Lapiana; but he refused to take the money, stating that Ewing and Butler had done the work. The evidence is that the plaintiff in error and his witness then went to the other parties so referred to, and that they also refused to accept the money. No tender to Butler and Ewing was necessary. The court below, in charging the jury, seems to have entertained the view that the tender, so far as the plaintiff in error was concerned, was of no avail, for the reason that it was made after his time for making it had expired, and that for Lapiana's interest it was of no avail for the reason that there was no proof that the plaintiff in error was authorized by Lapiana to make the tender or that Lapiana afterward ratified it. It becomes important to know at what time the right of the plaintiff in error to redeem expired. Two notices of forfeiture were proven. One was a personal notice, said to have been in writing, the writing having been subsequently lost, served on the plaintiff in error but not on Lapiana, in the early part of January, 1903. The second

was a printed notice dated January 24, 1903, published in compliance with the law, directed to the plaintiff in error, Lapiana, and others, notifying them that, if they failed within 90 days after the date of the last publication of the notice to contribute their proportion as co-owners, their interests in the claim would become the property of the undersigned, under the provisions of section 2324, Rev. St. (U. S. Comp. St. 1901, p. 1426). It bore the signatures of Webb, Butler, and Ewing. While the tender was not made within the time required by law, under the first notice, it was within the time required under the published notice. We entertain no doubt that the second notice was, so far as the time for contribution is concerned, a waiver of the first, and operated to extend the time for making the payments to prevent forfeiture. It contained notice to the plaintiff in error and to Lapiana that, if payment was not made, their interests would be forfeited within 90 days from April 18, 1903. The tender, therefore, was sufficient and in apt time to prevent forfeiture. It was also a good tender for Lapiana. The plaintiff in error testified that, at the time when the tender was made, he was in possession of an option from Lapiana, in the exercise of which he subsequently purchased Lapiana's interest. If this was true, and there was no evidence tending to contradict it, it would seem that he had an interest in the claim such as to entitle him to make the tender for the protection thereof.

Again, the plaintiff in error was a tenant in common with Lapiana. It has been held that an agency to make the tender in such a case would be implied from the relation in which the parties stood. *Gentry v. Gentry*, 1 Sneed (Tenn.) 87, 60 Am. Dec. 137. It is to be noted, also, that no objection was made to the tender on behalf of Lapiana for want of authority in the plaintiff in error to make it. It is held that failure to make such objection is a waiver of the right to urge it thereafter. 28 Am. & Eng. Enc. of Law, 35; *Lampley et al. v. Weed & Co.*, 27 Ala. 621.

The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with the foregoing views.

UNITED STATES v. HAVILAND & CO.

(Circuit Court of Appeals, Second Circuit. January 11, 1910.)

No. 59 (5,034).

1. CUSTOMS DUTIES (§ 85*)—REAPPRAISEMENT—VOIDABILITY.

Where, in making a reappraisement of imported merchandise, a Board of General Appraisers acts outside of or contrary to law, or proceeds upon a wrong principle or without any evidence to sustain their findings, their decision may be set aside.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 201-206; Dec. Dig. § 85.*]

2. CUSTOMS DUTIES (§ 85*)—WANT OF LEGAL EVIDENCE.

A reappraisement decision by a Board of General Appraisers was founded on indirect evidence, the result reached being based upon portions of the evidence read apart from the context, upon unwarranted deductions, and assumptions unsupported by the proof, and upon arbitrary

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

deductions to equalize certain conditions peculiar to the case, and many of the propositions urged in support of the conclusions made were based upon conjecture and guesswork. *Held*, that this was not such proof as is contemplated by the statute, and that, there being no legal evidence to justify the reappraisement, it should be set aside.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 201-206; Dec. Dig. § 85.*]

3. CUSTOMS DUTIES (§ 80*)—PRINCIPAL MARKET.

The evidence in a reappraisement case, relative to china exported from Limoges, was to the effect that 80 per cent. of the entire output of the factory was exported directly to the United States, and that there was no open market for such china at Limoges; but it showed the values established at Paris, where the remaining 20 per cent. of the Limoges output was disposed of. This latter value, however, was affected somewhat by the fact that the Paris house sold at both wholesale and retail, and that the goods handled there differed materially from those sold at Limoges for export to the United States. *Held*, that there was no evidence that Paris was the principal market for the china thus exported.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 196; Dec. Dig. § 80.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Writ of certiorari denied by Supreme Court.

For decision below, see 167 Fed. 414, affirming a decision by Board 3, United States General Appraisers (G. A. 6,655, T. D. 28,382), which had reversed the assessment of duty by the collector of customs at the port of New York. Said assessment was based on a reappraisement by Board 2 of the General Appraisers, which had reversed the reappraisement made by a single General Appraiser.

The merchandise in question was imported from France by Haviland & Co. The local appraiser advanced the entered value, the importers appealed under section 13 of the act of June 10, 1890, and the General Appraiser who heard the appeal found the entered value to be correct. The government thereupon appealed to a Board of three General Appraisers, known as Board 2, who advanced the merchandise 26.5 per cent. above the invoice value.

The collector assessed duty at the rate of 60 per cent. upon the value as thus fixed and the importers appealed to Board 3, which sustained their protest. This Board held that there was no legal evidence to justify the reappraisement as found by Board 2, and directed the collector to reliquidate the entry accordingly. On appeal the Circuit Court affirmed the decision of Board 3, and the government appeals to this court. The opinion of Judge Martin in the Circuit Court is reported in 167 Fed. 414 (T. D. 29,523).

D. Frank Lloyd, Deputy Asst. Atty. Gen., for the United States.

B. A. Levett (Henry F. Wolff, on the brief), for the importers.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above). The questions in controversy have been discussed in four opinions, in which the opposing arguments have been fully and ably presented. In three of these opinions—those written by General Appraiser Waite, by Board 3, and by Judge Martin—the contention of the importers has been sustained. The facts have been so fully presented that it will not be necessary to restate them in detail.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The question here to be considered is whether Board 2, in overruling General Appraiser Waite and advancing the value of the merchandise 26.5 per cent. above invoice value, transcended the powers conferred by the statute or proceeded upon a wrong principle contrary to law. If Board 2 acted outside of or contrary to law or proceeded upon a wrong principle or without any evidence to sustain their finding, they exceeded their power, and the decisions of Board 3 and the Circuit Court should be sustained. As both parties are apparently agreed upon this proposition, it is unnecessary to elaborate it.

Board 2 bases its conclusion upon a letter written by Charles Edward Haviland, the head of Haviland & Co., to Ralph W. Clayton, a special agent of the Treasury, in 1906, in which he gives a frank and compendious statement of the expenses and profits of the Paris branch of the business, in order that a comparison might be instituted between the prices at which the Limoges branch sells in Europe and the prices at which they sell to the New York branch.

It must be conceded that there is no direct proof in this letter establishing the actual market value of the merchandise as bought and sold in usual wholesale quantities in Paris. By reading portions of the letter apart from the context, by deductions scarcely warranted by the writer's language, by assumptions unsupported by the proof and by arbitrary reductions to equalize the expenses between the wholesale and retail prices at Paris, the result is reached that 16.5 per cent. should be added to make market value. There is no proof such as is contemplated by the statute, many of the propositions urged in support of the conclusions of Board 2 being based upon conjecture and guesswork. The letter shows that the Paris house is a comparatively unimportant branch of the entire business, 80 per cent. of the output being exported to the United States. In 1905 the expenses of the Paris house were \$33,000 and the sales about \$127,000; the percentage of expense for total sales was 25.5 per cent. It dealt in Haviland & Co.'s goods, but also handled the goods of other manufacturers of china. The character of the decorations and the number of pieces in the sets sold at Paris differed materially from the china sent to this country.

Mr. Haviland says:

All the richer decorations sold by H. & Co., Paris, are in every respect so entirely different from those ordered by H. & Co., New York, that no comparison between them can be made.

Thirty-five invoices of actual sales at wholesale by the Paris house in 1905-6 were submitted, which show that, after deducting expenses:

The net amount received by H. & Co., Paris, from its buyers after deduction of its Paris expenses is frs. 13,872.94c., while the net amount received by H. & Co., Limoges, from H. & Co. New York for the same would be frs. 15,764.33c.—and this although H. & Co., New York, buy two millions of francs annually and pay cash, while most of the customers of H. & Co. Paris order but a few hundred francs annually.

Commenting upon this statement, Board 3 says:

The 35 invoices in question and the statement in the letter relative thereto furnish the only evidence which the letter contains of the price at which

Haviland's china is sold at wholesale in the city of Paris. This evidence of sales in wholesale quantities shows that the Paris wholesale price was 15.5 per cent. above the Limoges prices. The aggregate price of the merchandise stated in the various invoices under reappraisalment by Board 2 averaged 16.5 per cent. above the Limoges price. The merchandise in question was therefore entered at 1 per cent. more than the Paris value of like merchandise as shown by the invoices in question.

If Haviland & Co., of Paris, had been a wholesale house simply, if it had dealt in the same goods assembled in the same sets and decorated in same manner as the exported goods, and if it had appeared that the entered value was less than the price thus established, the letter might have justified the conclusion drawn therefrom; but as none of these propositions is true, the letter is valueless as proof.

The part of the letter relied on by Board 2, which is quoted in both opinions, when read in connection with the other statements does not warrant the construction placed upon it. Even if their construction be adopted it is still incomplete and indeterminate. This is clearly recognized by Board 2 in making the arbitrary reduction of 10 per cent. based upon the fact that the Paris house sold both at retail and wholesale. The other attempts to establish a wholesale market value in Paris resulted in failure so complete that comment is unnecessary.

The opinion of Judge Martin contains a concise statement of the facts and concurs in the opinion of Board 3 in their view of the insufficiency of the Haviland letter as a basis for the conclusions of Board 2. He goes further, however, and concurs with General Appraiser Waite in finding that Limoges is the principal market in France from which china is imported to this country. His argument to establish this proposition is able and seems unanswerable. The testimony shows that if Limoges had been adopted Haviland & Co. would have been treated substantially as the other importers of china from France have been treated. It is, however, sufficient for us to say that we concur with the protest board and the Circuit Court in holding that there was no evidence before Board 2 which warranted the conclusion reached by them and that their action proceeded upon a wrong principle and was contrary to law.

The decision of the Circuit Court is affirmed.

ST. LOUIS STAVE & LUMBER CO. v. UNITED STATES (two cases).

(Circuit Court of Appeals, Eighth Circuit. March 1, 1910.)

Nos. 3,003, 3,004.

1. APPEAL AND ERROR (§ 966*)—CONTINUANCE—DENIAL—REVIEW.

Denial of a continuance for absence of a witness will not be reviewed by a writ of error, in the absence of a showing of abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. § 966.*]

2. CONTINUANCE (§ 26*)—ABSENCE OF WITNESS.

Where a subpoena was not attempted to be served on an absent witness until a short time prior to the trial, and no reason was given for not hav-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing the subpoena issued at an earlier date, the denial of a continuance because of his absence was not an abuse of discretion; there being no showing that the witness could be produced at a subsequent term, or that the facts intended to be proved by him could not be otherwise shown.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 74-93; Dec. Dig. § 26.*]

3. PUBLIC LANDS (§ 13*)—CUTTING TIMBER—WILLFULNESS OR MISTAKE—EVIDENCE.

In an action by the United States for timber trespass, evidence *held* to sustain a verdict finding that the taking of the timber was not an inadvertence, but the willful act of defendant's servants.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 13.*]

4. PUBLIC LANDS (§ 13*)—CUTTING TIMBER—MEASURE OF RECOVERY.

In an action by the United States to recover from defendant corporation for the wrongful cutting of timber from public land by defendant's servants, whether the act was willful or an innocent mistake was relevant only to the inquiry as to whether plaintiff was entitled to recover the value of the timber in its manufactured state, and not as authorizing the assessment of punitive damages against a corporation for the act of its agent.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 16-18; Dec. Dig. § 13.*]

5. APPEAL AND ERROR (§ 1051*)—EVIDENCE—PREJUDICE.

Where the competency of a surveyor to make certain surveys was otherwise proved, the court did not commit reversible error in allowing a witness on defendant's cross-examination to testify as to the surveyor's competency.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

In Error to the Circuit Court of the United States for the Western District of Arkansas.

Actions by the United States of America against the St. Louis Stave & Lumber Company. Judgment for the United States in each case, and defendant brings error. Affirmed.

E. B. Wall and M. C. Early, for plaintiff in error.

John I. Worthington, U. S. Atty., and L. W. Gregg, Asst. U. S. Atty.

Before HOOK and ADAMS, Circuit Judges, and SMITH McPHERSON, District Judge.

SMITH McPHERSON, District Judge. These two civil actions were brought by the United States against the St. Louis Stave & Lumber Company to recover the value of timber in its manufactured state taken from the lands of the United States. The cases were consolidated for trial purposes, resulting in a verdict in the one case of \$309.80, and in the other of \$1,584.63, the full value, with interest, of the timber thus taken when manufactured by the defendant at its mills near by into staves and plank. The defendant seeks to reverse each of these judgments by writ of error.

The first assignment of error is to the effect that the court erred in denying it a continuance. The rulings upon motions for continuance are discretionary, and cannot be reviewed by writ of error, in the ab-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sence of such a showing that there was an abuse of such discretion. *Isaacs v. United States*, 159 U. S. 487, 16 Sup. Ct. 51, 40 L. Ed. 229; *Means v. Bank*, 146 U. S. 620, 629, 13 Sup. Ct. 186, 36 L. Ed. 1107.

The motion for continuance was based upon the absence of one John Kelley, a witness. The subpoena had been issued for him but a short time in advance of the trial, which was not served because of his absence from the state. There is no reason given for not having had the subpoena issued at an earlier date. There is no showing that the witness could have been procured at a subsequent term of court. The showing made was that Kelley, with defendant's agent, by the name of Pennington, surveyed the lands; it appearing that defendant had the right, by reason of ownership, to cut the timber off of certain tracts of land near by. It appears that Pennington could have testified to the same thing, and in fact did testify upon the trial. But it is claimed that, as Pennington was under indictment for taking this timber, the weight of his testimony would be impaired by reason of the indictment, which was mere conjecture. But there is no showing made that the surveys had not been made by other persons, and no showing made that other surveys could not have been made after it was known that Kelley would not be in attendance. So that, both by reason of the faulty showing, and for the reason that this court will not review the ruling, except in rare cases, our holding is that this assignment is without merit.

It was conceded by one division of the answer in each case, and the evidence leaves it in no doubt, but that the timber was cut from the government lands. The contention is, however, that the timber was taken by inadvertence, and was not willfully taken. Pennington was the duly authorized agent of the defendant to buy timber and lumber. The evidence shows that in some instances he procured parties, by paying their expenses, to homestead land for the purpose of getting the timber; the company furnishing the money with which to make the entry. The evidence shows that in one of these cases, in which the tract of land was known as the "Woolbright land," Pennington, as agent of the company, immediately following the entry by Woolbright, proceeded to have the timber cut and removed from the homestead. This was done by Pennington under the pretense that it was necessary to use some of this timber for the erection of the house on the homestead tract. There was no good faith in the Woolbright entry. He never resided upon the tract of land, and never made any improvements, but quite soon after making the entry he fled the country. There is no showing that at any time he intended to reside on the land; and Woolbright was an employé of the company at the time he made the entry. This contract between Pennington, as agent of the company, and Woolbright, relative to the timber, was corrupt and unlawful. *Shiver v. U. S.*, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231; *Stone v. U. S.*, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. Ed. 127.

At most it can only be said in behalf of the defendant that there was a fair conflict in the testimony as to whether Pennington procured this timber by inadvertence or by his willful act. But the jury was fully warranted in finding as evidenced by the two verdicts. In the

one case there was no conflict in the testimony whatever but that the company took the timber, and such fact is conceded in one paragraph of the answer, and the court so charged the jury. But the court expressly charged the jury that they were to find and determine whether the act was the result of a mistake as to boundary lines of the land, or whether it was taken by the wrongful and willful act of the company.

Plaintiff in error insists that to find the value of the timber when manufactured is in the nature of punitive damages, and invokes the rule, upheld in some jurisdictions, that the corporation would not be liable for punitive damages for the act of an agent. But counsel entirely mistake the question. It is not a question of punitive damages, but it is a question as to the measure of damages for the thing actually taken. The cases of *Woodenware v. U. S.*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230, *Benson Mining Co. v. Alta Mining Co.*, 145 U. S. 428, 434, 12 Sup. Ct. 877, 36 L. Ed. 762, *United States v. Mock*, 149 U. S. 273, 277, 13 Sup. Ct. 848, 37 L. Ed. 732, and *Northern Pacific R. R. v. Lewis*, 162 U. S. 366, 383, 16 Sup. Ct. 831, 40 L. Ed. 1002, are to the effect that the measure of damages for an unlawful trespass is that the wrongdoer shall respond in damages to the value of the thing taken, and as first taken, for the reason that the same is the result of an innocent mistake, but, if done willfully, then that the measure of recovery shall be for the value in its manufactured state; and the judgment and verdict of the court must be for the one sum or the other, accordingly as it is found as to whether the taking is a mistaken one, or the result of willfulness. And one, even though innocent, buying the timber, must respond in damages of like amount as the original trespasser. See cases above cited.

Another assignment of error is to the effect that the court erred in allowing the witness Tellier to testify as to the ability and competency of two other witnesses, Stermer and Burn, as surveyors, who ran the lines to ascertain how much timber was taken, and from what lands. This assignment of error is without merit, because this matter was elicited by defendant's counsel on cross-examination. But that assignment of error is without merit for the further reason that Tellier stated from his own personal knowledge that Stermer and Burn had done surveying for him on numerous occasions, and he had knowledge of their experience and acquirements. But not only this, Stermer and Burn were both upon the witness stand, and their competency and knowledge of the art of surveying was fully disclosed, showing that they were fully competent to make surveys.

The jury were properly instructed, and the evidence supports the verdicts. There was no error in any of the proceedings in the Circuit Court.

It is therefore ordered that each of the judgments be, and the same are hereby, affirmed.

HOLMES v. DOWIE et al.

IRVINE et al. v. THOMAS.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1910.)

No. 1,616.

1. COURTS (§ 508*)—PROCEEDINGS IN STATE COURT—FEDERAL COURT—JURISDICTION.

Rev. St. § 720 (U. S. Comp. St. 1901, p. 581), providing that an injunction shall not be granted by any federal court to stay proceedings in a state court except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy, does not apply to a suit in a state court by which it is attempted to fasten an easement on the fee of lands taken into the possession of a federal Circuit Court for the administration of an estate through a receiver, since the federal court's possession drew to it power to hear and decide all controversies relating to rights and interests in the property.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 508.*]

Federal courts enjoining proceedings in state courts, see notes to 16 C. C. A. 90; 27 C. C. A. 575; 63 C. C. A. 437.]

2. RECEIVERS (§ 110*)—ADMINISTRATION OF ESTATE—SCOPE—QUESTIONS DETERMINED.

Where insolvent was the owner of a large tract of land subject to many leases containing restrictions as to the use of the property when a receiver was appointed, who asserted dominion over the incorporeal rights of the insolvent, his right to relieve the lessees severally from the restrictive conditions was a valuable asset in the hands of the receiver, and hence, the extent to which the recited restrictive conditions was affected by other paragraphs of the leases, by the character of the plat or by the oral or written representations of the insolvent, were questions affecting the value of the receiver's reversionary interest, to be presented to and adjudicated by the court of administration.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 110.*]

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by William B. Holmes against John Alexander Dowie and others, consolidated with a bill by Gus D. Thomas, as receiver of the estate of Dowie, against Charles D. Irvine and others. From a decree in favor of the receiver, Irvine and others appeal. Affirmed.

In July, 1906, in a suit by Holmes against Dowie and others, appellee's predecessor was appointed receiver and directed to take immediate possession of all property, real, personal, and mixed, situated in Lake county, Ill., then in the name of or claimed to have been owned by Dowie. Of the tangible property appellee's predecessor and appellee took and held actual possession; over the intangible they exercised dominion so far as that was possible.

About 1901 Dowie purchased 6,500 acres of land in Lake county, Ill., and thereon established what was and is known as Zion City. When the receiver was appointed, a considerable portion of the Zion City site (in lots and blocks) remained in fee simple absolute in Dowie; the balance he had transferred by uniform residential or uniform business property leases to various persons who went into possession thereunder. All leases were to run till January first, A. D. 3000.

In the leases of residential property one of the covenants of the lessees was that the premises "shall not, nor shall any portion thereof, or any building,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

or structure of any kind, now or hereafter located on said premises, ever be used (without the written consent of the lessor is first obtained) as or for other than residential uses and purposes."

In March, 1909, appellants, lessees of residential property, filed their bill in the Lake county circuit court against the lessees of three other lots in the residential district to restrain them from using the lots for other than residential purposes. The receiver was not a party to this Lake county suit. None of the parties to the Lake county suit had been made parties to the suit of Holmes against Dowie in the United States Circuit Court.

The Lake county bill, after setting forth the above recited facts relating to the Zion City site and the leases of lots, further averred in effect that in the plat certain portions were set aside and forever reserved exclusively for residential purposes; that Dowie, before any leases were made, represented to the world in public speeches and prints that the title to the site would be held and protected so that the conditions as to residence and business lots would be preserved forever; that appellants (and more than 300 others similarly situated in whose behalf also the bill was alleged to have been brought) relied upon said representations in taking leases; that the defendants were threatening and were about to violate the conditions of their leases; that others, in pursuance of a conspiracy with the defendants, would from time to time seek to do likewise; and that appellants and all others similarly situated had acquired, by virtue of the premises, easements over and appurtenant to all the lands within the Zion City site. The prayer was, not only that the named defendants be enjoined, but that the easements of appellants (and of all others similarly situated who should come into the case) be adjudicated and established in and to all the lands in Zion City.

A few days after the aforesaid bill was filed in the Lake County circuit court appellee as receiver presented to the court below his petition in which, after setting forth the situation as hereinabove outlined, he alleged that the lands within the Zion City site had been scheduled in his inventory of the assets of the Dowie estate; that in some he owned as receiver the fee simple, and in the balance the reversionary interest; that, under orders of the court, he was engaged in converting these assets into money; and that the filing and pendency of appellants' Lake county bill constituted a cloud upon his title. Appellants' answer admitted the facts stated in the petition, but denied the legal conclusion. Thereupon the court entered the decree from which this appeal is taken, enjoining the maintenance of the Lake county suit.

George W. Field and Leslie A. Needham, for appellants.

C. H. Poppenhusen, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). We deem it too obvious to require elaboration that section 720, Rev. St. (U. S. Comp. St. 1901, p. 581), has no application to the Lake county suit as an attempt to fasten an easement upon the fee of the lands that the United States court had taken into its possession for the purposes of administration. That possession drew with it the power (and the exclusive power, without the consent of the administering court) to hear and decide all controversies relating to rights and interests in such property. *Farmers' Loan & Trust Co. v. Lake St. Elevated Rld. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 664; *Porter v. Sabin*, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815; *Swope v. Villard* (C. C.) 61 Fed. 417; *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296, 22 C. C. A. 334; *J. I. Case Plow Works v. Finks*, 81 Fed. 529, 26 C. C. A. 46; *American Loan & Trust Co. v. Central Vermont Rld. Co.* (C. C.) 84 Fed. 917; *Buckhannon & N. Rld. Co. v. Davis*, 135 Fed. 707, 68 C. C. A. 345.

This really would be enough to justify an affirmance of the decree, for the Lake county bill very clearly is aimed at affecting the title to Zion City lands that had never been leased, and the question is the right of appellants to maintain that bill, not some lesser bill.

But if appellants were thought to be right in assuming that the larger aspects could properly be ignored and the bill considered merely as one in personam, on behalf of appellants only, against the lessees of three lots to compel them to respect negative easements, we should regard the decree well rendered. The lessees were in physical possession; but appellee was asserting dominion over the incorporeal rights of the lessor in the leases. If the lessor, as against all the lessees, had the right by his written consent to relieve lessees severally from restrictive conditions, that would be a valuable property right, a valuable asset in the hands of appellee. To what extent the recited condition in the uniform leases is colored by other paragraphs, or by the character of the plat, or by the oral or written representations of Dowie, are questions that would affect the extent and value of appellee's reversionary interests; and therefore are questions that, on reason and authority, as we believe, should be presented to the court of administration.

The decree is affirmed.

In re JOHN OSBORN'S SONS & CO., Inc.

(Circuit Court of Appeals, Second Circuit. March 21, 1910.)

No. 159.

BANKRUPTCY (§ 324*)—CLAIMS—ALLOWANCE—"JUDGMENT"—PAYMENT OF INTEREST.

Though the rule that a creditor who has not stipulated for interest and accepts payment of the indebtedness in full cannot subsequently recover interest thereon is applicable to the payment of claims by a trustee in bankruptcy, allowed claims proved in bankruptcy proceedings as required by Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]) § 57, and General Order 21 (89 Fed. ix, 32 C. C. A. xxii), are entitled to be treated as judgments, and, as such, to interest before and after allowance.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 511; Dec. Dig. § 324.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3827-3842; vol. 8, pp. 7695, 7696.]

Petition to Review Order of the District Court of the United States for the Southern District of New York.

In the matter of the bankruptcy of John Osborn's Sons & Company, Incorporated. On petition of Howard J. M. Cardeza and others as trustees in liquidation to revise an order of the District Court refusing to require the trustee in bankruptcy to pay over to the trustees in liquidation a balance of the funds in his hands. Affirmed.

W. G. Cook, for petitioners.

Maxwell C. Katz, for respondents.

Before LACOMBE, COXE, and WARD, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WARD, Circuit Judge. This is a petition to revise an order of the District Court refusing to require the trustee in bankruptcy to pay over to the trustees in liquidation of a bankrupt corporation a balance of funds in his hands. The petition in the District Court alleged that none of the debts of the bankrupt corporation was based upon any contract providing for the payment of interest, but that they were all ordinary debts arising out of the purchase of goods, that the principal of all the indebtedness had been paid in full, and that the ground of the trustee's refusal to pay over the balance was that he intended to collect enough out of the bankrupt estate to pay interest on the said indebtedness. These allegations are uncontradicted.

There can be no doubt as matter of law that, if a creditor who has not stipulated for interest accepts payment of the indebtedness in full, he cannot subsequently recover interest thereon. The reason is that interest, in the absence of an express agreement to pay it, is a mere incident of the debt, and is to be recovered as damages for its detention. *Stewart v. Barnes*, 153 U. S. 456, 14 Sup. Ct. 849, 33 L. Ed. 781. It makes no difference that the payment is accepted under protest (*Cutter v. The Mayor*, 92 N. Y. 166); nor that the payment is made while a suit for both principal and interest is pending (*Canfield v. School District*, 19 Conn. 529; *Davis v. Harrington*, 160 Mass. 278, 35 N. E. 771). The district judge, admitting this to be the general rule, held that it did not apply to bankruptcy proceedings because they constitute a mere division of the fund belonging to the creditors, dividends from which are not to be regarded as payments on account of the bankrupt's indebtedness. In other words, that it is a distribution among equitable co-owners of their own property. We cannot accede to this view. The creditors are not owners of the bankrupt's assets; on the contrary, the trustee owns them in trust to pay the bankrupt's debts and any surplus to the bankrupts. Payment by the trustee, unless differentiated for some other reason, is as much subject to the rule that after a debt unaccompanied by a contract for interest is paid in full no interest can be recovered as if the payment were made by the bankrupt.

The trustee, however, contends that upon authority the rule does not apply to payments by executors, administrators, or receivers or trustees in bankruptcy. He cites a number of cases to prove this which do not appear to us to be controlling. In *Williams v. President, etc., of American Bank*, 4 Metc. (Mass.) 317, the question whether the creditors of a decedent's estate were entitled to interest in addition to principal arose before the principal had been paid. Chief Justice Shaw decided merely between the equities of the creditors and the next of kin without the question under consideration being raised at all. The subsequent case of *Brown v. Lamb*, 6 Metc. (Mass.) 203, under the insolvent laws of Massachusetts, did involve the question, but it was not considered, and the decision was rested entirely upon *Williams v. President, etc., of American Bank*. Judge Bond's decision in *Re Bank of North Carolina*, 12 N. B. R. 130, Fed. Cas. No. 895, is founded on these two cases. In the *Matter of Murray*, 6 Paige (N. Y.) 204, a proceeding under the insolvent laws of New York in which the

indebtedness had not been paid in full, Chancellor Walworth held that the balance with interest was payable out of funds subsequently collected. In *People v. Trust Co.*, 187 N. Y. 293, 79 N. E. 1004, it was held that interest should be paid out of the estate of an insolvent trust company to depositors and holders of certified checks who had no contract for interest and whose claims had been paid in full. The court said it felt committed to this doctrine because of certain obiter observations in the earlier case of *People v. American Loan & Trust Co.*, 172 N. Y. 371, 65 N. E. 200. In that case, however, all that was decided was that interest ceases from the appointment of a receiver of an insolvent trust company. This is the usual rule in all cases of insolvency, because, the assets almost invariably not being sufficient to pay the debts, calculations of interest are waste of time. The court added what is also everywhere the rule, that, if the assets are sufficient, interest must be paid. Of course, it meant interest that is due, whether by contract or as damages. Judge Haight further relied upon *Sickels v. Herold*, 149 N. Y. 332, 43 N. E. 852, holding that interest as damages was due after demand; *Richmond v. Irons*, 121 U. S. 27, 64, 7 Sup. Ct. 788, 30 L. Ed. 864, holding that stockholders of an insolvent national bank subject to assessment were liable for interest if the bank was; *Wheeler v. Millar*, 90 N. Y. 353, 363, holding that stockholders whose stock had not been fully paid are liable to pay interest; *Mahoney v. Bernhard*, 45 App. Div. 499, 63 N. Y. Supp. 642, affirmed 169 N. Y. 589, 62 N. E. 1097, in which the question as to interest was raised before the indebtedness was paid in full. None of these authorities seems to us to justify Judge Haight's conclusion. But he did cite another authority (*National Bank of Commonwealth v. Mechanics' National Bank*, 94 U. S. 437, 438, 24 L. Ed. 176), which deserves separate consideration because it proceeds upon an entirely different theory. In it depositors in an insolvent national bank in the hands of the Comptroller of the Currency whose claims had been paid in full were held entitled to interest on the ground that when their claims were proved to the satisfaction of the Comptroller they were to be treated as judgments. Mr. Justice Swayne said:

"The fiftieth section of the national banking act (13 Stat. 113) requires the Comptroller of the Currency to apply the moneys paid over to him by the receiver 'on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction.' The act is silent as to interest upon the claims before or after proof or judgment. Can it be doubted that a judgment, if taken, would include interest down to the time of its rendition? Section 996, p. 182, Rev. St., declares that all judgments in the courts of the United States shall bear the same rate of interest as judgments in the courts of the states, respectively, where they are rendered. Interest is allowed by the law of New York upon judgments from the time they are perfected. 3 Rev. Code N. Y. (Ed. 1859) p. 637. If these claims had been put in judgment, whether in a court of the United States or in a state court of that state, the result as to interest upon the judgment would have been the same. It was unnecessary to reduce them to judgment, because they were proved to the satisfaction of the Comptroller. After they were so proved, they were of the same efficacy as judgments, and occupied the same legal ground. Hence they are within the equity, if not the letter of these statutes, and bear interest as judgments would have done. *Sedgw. on Constr.* 311, 315."

We think that allowed claims in bankruptcy are as much entitled to be treated as judgments. Section 57 of the bankruptcy act (Act July

1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]) provides that the proof of debts shall be in writing, signed and sworn to by the creditor, stating the consideration and other particulars, and, when this proof is filed in the court or before the referee, the claim shall be allowed unless objected to. The subject is further regulated by General Order 21 (89 Fed. ix, 32 C. C. A. xxii), and by forms prescribed by the Supreme Court.

Following the case of *National Bank of the Commonwealth v. Mechanics' National Bank*, supra, the order is affirmed.

In re HUMPHREY ADVERTISING CO.

TRIBUNE CO. et al. v. HUMPHREY ADVERTISING CO.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1910. Rehearing Denied February 19, 1910.)

No. 1,613.

1. CORPORATIONS (§ 14*)—ORGANIZATION—DIFFERENT LINES OF BUSINESS.

Under the Illinois statutes authorizing the creation of corporations, a corporation may be organized to carry on two distinct and independent lines of business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 16; Dec. Dig. § 14.*]

2. BANKRUPTCY (§ 72*)—CORPORATIONS—SUBJECT TO ACT—BUSINESS.

Where a corporation was organized to publish, distribute, and place advertising matter in railroad cars, waiting rooms, and depots along the right of way and in and around other property of railroads and in other places, and also to own and place and operate vending machines and other self-acting mechanical devices, and the corporation carried on both lines of business extensively up to the time of the filing of the bankruptcy petition against it so that neither could be said to be its principal business and the other incidental, the advertising business not being within the bankruptcy act, the corporation was not subject to adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 72.*]

What persons are subject to bankruptcy law, see note to *First Nat. Bank v. Mattoon Nat. Bank*, 42 C. C. A. 4.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of the bankruptcy of the Humphrey Advertising Company. On petition by the Tribune Company and others for a bankruptcy adjudication against the Humphrey Advertising Company. From an order denying the petition, petitioners appeal. Affirmed.

Julius Moses and Isaac Rothschild, for appellants.
C. H. Poppenhusen, for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

KOHLSAAT, Circuit Judge. Appellants filed their petition to have appellee declared a bankrupt, making allegations therein, which, if true, would have brought appellee within the provisions of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]). Thereafter, certain other creditors were permitted to and did join in said petition. Appellee thereupon filed its plea denying the jurisdiction of the court. On issue being joined, the cause was referred to the referee, as special master.

From the stipulation of facts, it appears that appellee is a corporation of Illinois, and that its corporate objects, as stated in its charter, were as follows, viz.:

"Publishing, distributing, and placing of advertising matter in railroad cars, waiting rooms, and depots along the right of way, and in and around other property of railroads, and in other places; and the owning and placing and operating vending machines and other self-acting mechanical devices."

And that appellee carried on both of said lines of business extensively up to the time of filing the petition in bankruptcy herein. From all the evidence submitted, the special master found that "for some time prior to filing the petition in bankruptcy," appellee was—

"actually engaged principally and within its charter powers, in the pursuit or occupation of soliciting and preparing advertising matter to be placed in newspapers, magazines, and other publications, and arranging with the same for the rates at which such advertisements should be inserted and paid for; and that such pursuit is not within the language of the statute; and that the said corporation was not engaged principally in the business of trading, publishing, and mercantile pursuits, or either of them, as alleged in the creditor's petition"

—and thereupon recommended that the petition be dismissed.

Upon hearing before the District Court, the report was approved and the petition dismissed. The matter is now before this court on appeal. The error assigned is, in substance, that the court erred in holding that appellee was not subject to the bankruptcy act.

It will be seen that the statutes of Illinois permit the creation of corporations having more than one corporate object. Consequently, it happens that a corporation may carry on two distinct and independent lines of business, one of which may prosper, while the other languishes; or, both having become insolvent, one may be within the provisions of the bankruptcy act, and the other without the act.

There are many cases in the bankruptcy reports in which the question as to which is the principal business of a corporation is discussed. Those cases turn largely upon the proposition as to which business is principal and which is incidental. Here, both lines of business are covered by the articles of incorporation, and neither can be said to be in any sense incidental to the other or to the charter powers. The reasoning in the one case is not applicable to the other. The liberality of the Illinois statute permits a situation not contemplated by the framers of the bankruptcy act. It cannot be that, as between two separate lines of business, one within, and the other without, the act, and both included in the charter, it is the duty of the bankruptcy court to weigh, measure, estimate, balance, and compare the one with the other with a view to ascertaining the relative importance of the

several classes of business embraced within the specifically declared objects of the corporation and actually carried on by it, in the absence of clear statutory authority—bearing in mind the strictness with which this section of the act should be construed. In *re* Empire Metallic Bedstead Company, 98 Fed. 981, 39 C. C. A. 372.

We concur in the finding of the special master and the District Court that the advertising business as carried on by appellee, so far as the record discloses, was conducted within the objects of the charter, and did not come within the act. Assuming, as insisted by appellant, that the other branch of appellee's corporate objects does come within the act, there existed two distinct classes of business in which appellee was engaged, neither of which can be termed its principal business, and both of which stood on the same footing for the purpose of ascertaining what was the principal business of appellee. If the court should assume to decide that one or the other is the business in which the corporation is principally engaged, it could not find that the rejected line of business is incidental thereto, for it is not. The case is novel, and one of first impression, growing out of the language of the Illinois statute. We are of the opinion that the facts of the case create a situation not within the bankruptcy act, for the reasons stated.

The order of the District Court, dismissing the creditors' petition to have appellee declared a bankrupt, is affirmed.

BAKER, Circuit Judge, concurring, is of the opinion that it is unnecessary to consider whether the business of soliciting advertisements and arranging for their publication in magazines was within the true interpretation of the bankrupt's charter, for the reason that appellants are not the representatives of the state with authority to inquire whether or not its grant to the bankrupt was misinterpreted or abused.

PENNSYLVANIA R. CO. v. KELLY.

(Circuit Court of Appeals, Second Circuit. March 7, 1910.)

No. 134.

MASTER AND SERVANT (§ 301*)—MISCONDUCT OF SERVANT—INJURIES TO THIRD PERSONS—SPECIAL POLICE OFFICER.

The New York City charter authorizes the police commissioner to appoint special patrolmen for special duty at any place in the city, the applicant paying for such services in advance, and declares that such special patrolmen shall be subject to the orders of the chief of police, shall obey the rules and regulations of the police department of the city, and conform to the general discipline and such special regulations as shall be made, and shall possess all the powers and discharge all the duties of the police force applicable to regular patrolmen. *Held* that, where a special policeman was assigned to duty on defendant's pier to regulate traffic, and committed an unprovoked and unjustifiable assault on plaintiff in a public street leading to the pier, the fact that defendant paid the patrolman's

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

wages for keeping order on its premises did not render it liable for the assault.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1212; Dec. Dig. § 301.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by John Kelly against the Pennsylvania Railroad Company. Judgment for plaintiff on a verdict in his favor of \$730.50, and defendant brings error. Reversed.

Robinson, Biddle & Benedict (Norman B. Beecher, of counsel), for plaintiff in error.

House, Grossman & Vorhaus (Louis J. Vorhaus and Charles Goldzier, of counsel), for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. On the morning of November 9, 1906, the plaintiff, who was a truckman and piano mover, started with a two horse team and two helpers to the pier of the defendant at the foot of West Thirty-Seventh street, New York, to receive and move a Tiffany grand piano. When the plaintiff, who was driving, reached the foot of the street Michael Gunn, a policeman of the city of New York assigned to special duty on the defendant's pier and paid by the defendant, raised his hand as a warning signal to the plaintiff to halt. This he did not do immediately and an altercation arose which culminated in his receiving a severe blow from the policeman's club which caused the injuries complained of.

The version of the occurrence given by Gunn is to the effect that the plaintiff was contumacious and insulting and that the blow was struck to prevent an assault by the plaintiff and his companions. It is, of course, unnecessary for us to consider the question of fact thus presented. The basic question is, should the court have submitted the facts to the jury, and, in such circumstances, the plaintiff is entitled to the most favorable view of the testimony.

The complaint alleges that on the day in question, "The defendant had in its employ as a special officer, one Michael Gunn, whose duty it was as such special officer, to regulate the traffic on the defendant's pier at the foot of West Thirty-Seventh street." This appointment was made pursuant to the provisions of the city's charter which provides, in substance, that, when the necessity therefor is shown, the police commissioner may appoint and swear in any number of special patrolmen to do special duty at any place in the city, the applicant paying for such services in advance. Such special patrolmen shall be subject to the orders of the chief of police, shall obey the rules and regulations of the police department of the city and conform to the general discipline and such special regulations as may be made. They shall "possess all the powers and discharge all the duties of the police force, applicable to regular patrolmen."

In short, for the purposes of this controversy, it may be stated that Gunn possessed all the powers of a regular patrolman. His salary

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was, it is true, paid by the defendant for special services upon its pier but any act which a regular officer could do lawfully, Gunn could do. The converse of this proposition is also true. An act unlawful for the regular was unlawful for him, he had no immunity not possessed by the ordinary officer.

The question, then, for us to determine may be stated as follows: Is a corporation which pays for the services of a policeman to guard its property and preserve order upon its premises liable for an unprovoked and wholly unjustifiable assault committed by him upon a public street? We are constrained to answer this question in the negative.

The witnesses all agree as to location of the assault. It was not on the pier but at the foot of West Thirty-Seventh street at least 50 feet from the entrance to the pier. We may take judicial notice of the fact that West Thirty-Seventh street is a public highway in no way under private control and that it is the duty of police officers to control the movement of teams and regulate traffic at the point in question. The testimony of the plaintiff indicates that he was doing nothing unlawful or unusual at the time in question. He says he was proceeding towards the pier when he received the signal to stop. He immediately reined in his team but because he did not stop soon enough Gunn drew his club, jumped upon the wagon and dealt him a blow which rendered him unconscious.

To hold the person who pays a policeman's wages for keeping order upon his premises liable for such a malicious assault as this, committed upon a public highway, goes far beyond the doctrine of any well considered case with which we are familiar. If the plaintiff tells the truth there was no justification for the brutal assault made upon him but the defendant has done no act of omission or commission which renders it liable therefor.

The judgment is reversed with costs.

In re SCHULMAN et al.

(Circuit Court of Appeals, Second Circuit. March 7, 1910.)

No. 38.

1. BANKRUPTCY (§ 467*)—APPEAL AND ERROR—REVIEW.

Unless convinced that manifest error has been committed, the Circuit Court of Appeals will not interfere with the administration of a bankrupt's estate by the officers of the bankruptcy court, nor reverse an order adjudging one of the bankrupts in contempt for refusing to answer questions concerning his property and for concealing from his creditors the material facts relating thereto.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 467.*

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. A. 9.]

2. BANKRUPTCY (§ 229*)—EXAMINATION OF BANKRUPT—REFUSAL TO ANSWER QUESTIONS—CONTEMPT—HEARING.

Bankr. Act July 1, 1898, c. 541, § 41, subd. "a," cl. 4, 30 Stat. 556 (U. S. Comp. St. 1901, p. 3437), provides that a person, after having taken the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

oath, shall not refuse to be examined according to law, and if he does so the referee shall certify the facts to the judge, who shall thereupon in a summary manner, hear the evidence, and if it warrants him, punish the person as for a contempt committed before the court of bankruptcy. *Held*, that such section does not contemplate a hearing of contempt proceedings before a referee, but before the judge of the bankruptcy court.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 229.*]

3. BANKRUPTCY (§ 241*)—EXAMINATION OF BANKRUPT—CONCEALMENT—CONTEMPT.

Where a bankrupt, after being sworn before the referee, in an examination concerning his property, by answers of "I don't remember," and "What do you mean?" etc., evinced a deliberate purpose to conceal the truth and prevent the trustee from learning the facts which would lead to a recovery of the missing property, the referee was not bound to continue the examination, but was justified in instituting contempt proceedings against the bankrupt prior to the conclusion of his testimony, and before he had been cross-examined.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 241.*]

Petition to Review Order of the District Court of the United States for the Southern District of New York.

In the matter of the bankruptcy proceedings of Samuel Schulman and others. On petition of Samuel Schulman to review an order of the District Court adjudging him in contempt of court for refusing to answer questions concerning his property and for concealing from his creditors all material facts relating thereto; the bankrupt's testimony having been certified to the court by the referee. Affirmed.

The opinion below is reported in 167 Fed. 237. See, also, 164 Fed. 440.

Morris Myers, for appellant.

James, Schell & Elkus (Abram I. Elkus, James N. Rosenberg, and Robert P. Levis, of counsel), for trustee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The questions of fact presented by this appeal are peculiarly within the province of the referee and District Judge. The law cannot be promptly and efficiently administered if the collection and division of the bankrupt's property is to be suspended and delayed pending appeals from the orders of the court and referee having in view the discovery of the bankrupt's property and the prevention of its fraudulent concealment and conversion. Unless convinced that manifest error has been committed, this court should refrain from meddling with the administration of the estate which can safely be intrusted to the officers of the bankruptcy court who are familiar with the local environment and the character and conduct of the parties.

In the case at bar we know nothing of the bankrupt, Schulman, except as he is portrayed in the printed record. The referee, on the contrary, had an opportunity to see and hear the bankrupt and observe his manner while testifying, which is an inestimable advantage in cases of this character. The testimony of a witness may sound plausible when read afterwards from a printed book and yet his conduct on the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

stand may have been such that no one who heard him testify believed that he was telling the truth. The referee certifies that after having taken the oath the bankrupt refused to be examined according to law and deliberately withheld facts within his knowledge as to the disposition of the property of the bankrupt's firm. Again, he certifies that the bankrupt withheld from the trustee and the court, with the deliberate intention of concealing his condition, the true facts relating to the conduct of his business, his dealings with his creditors and the amount and whereabouts of his property. The referee says:

"The manner of the bankrupt, his recollection when he desired to exercise it convinced me as I watched him that where he desired to give the facts he could do so."

Disingenuous and evasive as his testimony appears when read, it is obvious that the opportunity to "watch" the bankrupt gave the referee a very marked advantage in determining whether he was acting honestly. His answers "I don't remember," and "What do you mean?" so often given might in some instances have been the result of a defective memory or an honest inability to understand. An appellate court may be unable to detect, under such conditions, the false from the true, the honest from the fraudulent, but any intelligent person, after observing the witness for hours on the stand could not be deceived as to his purpose.

The testimony as it appears in the record evinces a deliberate purpose to conceal the truth and prevent the trustee from becoming possessed of facts which would lead to a recovery of the missing property. The witness was being asked regarding transactions directly within his knowledge and facts which he must have known. When, therefore, he answered repeatedly "I don't remember," it is obvious that he was deliberately withholding information to which the trustee was entitled. In effect his attitude was one of defiance. He did not affirmatively tell the referee that he refused to disclose the facts which would enable the trustee to follow the property, although these facts were well known to him, but his conduct produced the same result as if he had stated his purpose openly.

Section 41, subd. 4, of the act (Act July 1, 1898, c. 541, 30 Stat. 556 [U. S. Comp. St. 1901, p. 3437]) provides that:

"A person shall not * * * after having taken the oath, refuse to be examined according to law."

The section further provides that the referee shall certify the facts to the judge and the judges shall thereupon, in a summary manner, hear the evidence and, if it warrants him in so doing, punish such person as for a contempt committed before the court of bankruptcy. The section does not contemplate a hearing of the contempt proceedings before the referee but before the judge and there is no pretense that the bankrupt was not given the fullest opportunity to be heard upon the motion.

Criticism is made because these proceedings were commenced before the bankrupt's examination was concluded and before he was "cross-examined." When it is remembered that this is a proceeding

to punish the witness for contempt for refusing to be examined according to law, it will be seen that this complaint is not well founded. When the examination was concluded on January 7th, the offense had then been finally and irrevocably committed and the trustee was justified in presenting it to the court. He was not required to continue an examination which was absolutely abortive. It will hardly be pretended that a witness who, during his direct examination, makes an assault upon the presiding judge, cannot be punished for contempt until his cross-examination is concluded. In other words, if the acts complained of amount to a contempt they can be punished immediately, if they do not amount to a contempt they cannot be punished at all.

It is unnecessary to pursue the subject farther. Under section 7 of the act it was Schulman's duty to "submit to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property." He was lawfully summoned to testify and was interrogated as to all of these subjects. He refused to give the information which he possessed and sought to evade his duty by pretended ignorance, deceit, and falsehood.

We think the action of the District Court was fully justified by the facts and that the order should be affirmed.

In re WHITE.

FROEHLING et al. v. AMERICAN TRUST & SAVINGS BANK.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1910.)

No. 1,595.

1. BANKRUPTCY (§ 326*)—JURISDICTION OF COURT—"CONSENT."

Where a creditor of a bankrupt, who was also a debtor, on filing his claim, sought to set off his own indebtedness as a credit thereon, and went to trial on such issue, he thereby gave his "consent," within the meaning of Bankr. Act July 1, 1898, c. 541, § 23b, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3431), that the court of bankruptcy should determine the amount due from him and enter judgment therefor on the disallowance of the set-off claimed.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 326.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1437-1441; vol. 8, p. 7612.]

2. BANKRUPTCY (§ 326*)—CLAIMS AGAINST ESTATE—RIGHT TO SET-OFF.

Where the creditors of an insolvent corporation took charge of its business and property through a committee, and such committee with their consent sold a portion of the property to one of their number, in part on credit, within four months prior to the adjudication of the corporation as a bankrupt, the court properly refused to set off the amount due from the purchasing creditor as a credit on his claim against the estate, on the ground that such allowance would result in giving him a preference.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 326.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of Burton F. White, a corporation, bankrupt. From an order of the District Court, Frank Froehling and George Heppe, partners as Froehling & Heppe, appeal. Affirmed.

Burton F. White, the bankrupt, is a corporation, organized under the laws of Illinois to engage in the restaurant and catering business. Its corporate affairs and business were conducted by a Board of Directors, consisting of three members. It operated and owned restaurants at number 92 East Washington Street; number 124 East Adams Street, known as the Lakeside Restaurant; number 153 La Salle Street; and number 567 North Clark Street; all in the city of Chicago. On October 27, 1907, on the petition of certain creditors, it was declared a bankrupt.

As early as the first of April preceding, the corporation became insolvent, going into the hands of an advisory committee of five representatives of the larger creditors; three of this committee becoming directors of the corporation upon the resignation of the old directors. One of these three directors was appellant Froehling, a member of the firm of Froehling & Heppe, appellants.

Within the next three months all the restaurants were disposed of by the corporation, through these directors, except the one at number 124 East Adams Street, which, on the 17th of August, 1907, was sold at the price of \$17,000 (\$2,500 in cash, the remainder to be paid on or before December 18, 1907) to Froehling & Heppe, the sanction of the creditors having been obtained. Froehling resigned as director just before the sale.

The amount of appellants' claim, as creditors of the Burton F. White company, in existence at the time of the purchase of the above mentioned restaurant, was \$28,797.41. Between the purchase and the time of filing their claim, appellants claim that they paid off \$3,552.08, and that there was still outstanding and unpaid \$2,951.58, on account of wage claims, liens, repairs, and other matters connected with the restaurant; leaving remaining upon the original purchase price \$7,996.34, which, on the filing of their claim against the estate, April 30, 1908, they sought to set off as so much paid upon the \$28,797.41; and it is from the decree of the District Court refusing them this set-off, in the way of payment; allowing their claim as an unsecured claim for the full \$28,797.41, and holding them debtors to the bankrupt's estate for \$10,753.53, as still unpaid upon the purchase price of the restaurant, that this appeal is prosecuted. Further facts are stated in the opinion.

Frank L. Cheney, for appellants.
Clarence J. Silbur, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge (after stating the facts as above), delivered the opinion.

1. Error is assigned that the District Court did not have jurisdiction to determine the amount due from appellants to the bankrupt's estate under the purchase contract of August 17, 1907, and to enter judgment and order execution thereon. This assignment is based on section 23, subsection b, of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]), as follows:

"Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision c"

—the argument being that the facts stated do not constitute "consent" of the appellants within the meaning of the section.

This assignment of error is not well taken. Had appellants filed their claim for the total amount, leaving the bankrupt's estate to pursue them as debtors of the estate for the purchase price, there would have been no consent that such proceeding should be brought in any other Court than had jurisdiction provided there "had been no bankruptcy proceedings." But the appellants chose, not only to file their claim in the bankruptcy Court, but to ask the Court to credit, as payment pro tanto, the amount of the purchase price. This raised the question whether appellants were entitled to such credit—an issue distinctly put forward by the trustee in bankruptcy in the objections filed, setting forth in detail the facts out of which the purchase, by appellants, of the restaurant arose. And issue thus joined, appellants chose to press to judgment in the bankruptcy Court the claim made. These being the facts, the appellants were thereby put in a position, in our judgment, where they were called upon to elect, either to withdraw the claim with the credit attached, presenting it as a simple claim against the estate without reference to the purchase money, or consent that the Court, that was thus called upon to settle the rightfulness of the set-off, should have jurisdiction to make effective the judgment that would follow.

2. The remaining assignment of error that we deem it necessary to discuss, is in the finding of the District Court that the allowance of the credit claimed would constitute a preference. Section 60, subd. a, of the Bankruptcy Act, provides as follows:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, * * * made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

The transaction, it seems to us, must be one of these two alternatives: (a) that the estate of the bankrupt, in April preceding the adjudication of bankruptcy, was taken by the committee of creditors, who thereafter became directors (appellant Froehling included), as a trust estate for the creditors, to be disposed of and distributed ratably among the creditors—the circumstance that one of the restaurants was sold to appellants not making this feature of the transaction any different from the sale of the other restaurants—from which it follows that, by their contract of purchase, appellants are prohibited from using the remainder of the purchase price as a credit or set-off that would have the effect, to that extent, of paying their claim in full; or (b) the bankrupt was insolvent at the time of the transfer of the restaurant to appellants; the then directors of the Burton White company knew it was so insolvent, and knew that the effect of the transaction (assuming that they did not rely upon the feature above set forth) would result in a preference to appellants; appellants knowing, also, through Froehling, one of the members of the partnership, that the bankrupt was then insolvent, and that the effect would be to give them a preference; thereby, the transaction having occurred within four months

before the adjudication of bankruptcy, fastening upon the transaction the status of a preference, within the meaning of the foregoing section.

This view of the case makes it unnecessary to discuss the other assignments of error, the principal one of which relates to what character of claims can be set off against each other; for it is not because the claims might, within the purview of the bankruptcy law (other considerations laid aside) be set off the one against the other, but because, under the state of facts disclosed, to so set them off would be either to run counter to the contract between the parties, or to give the appellants a preference, that the decree below disallowed to set off. Upon the grounds stated, that order, we think, is without error.

The order appealed from is affirmed.

In re LIQUOR DEALERS' SUPPLY CO.

ANHEUSER-BUSCH BREWING ASS'N v. HIESTAND.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1910.)

No. 1,604.

1. CORPORATIONS (§ 370*)—POWERS.

A corporation organized under Illinois law has none of the natural rights or capacities of its individual members, its powers being only those conferred by charter, either in express terms or by necessary implication for the exercise of the powers named.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1511-1515; Dec. Dig. § 370.*]

2. CORPORATIONS (§ 484*)—POWERS—DEBTS OF OTHER CORPORATION—GUARANTY—ULTRA VIRES.

The bankrupt, a corporation authorized to engage in wholesale liquor and rectifying business, and to supply liquor dealers and rectifiers with goods of every description at wholesale and to transact a general commission business, passed a resolution that G. & Co. and another corporation and one of its customers desired to borrow \$4,000 to increase its business, and had requested the bankrupt to guarantee the payment of its notes for that sum, and that the treasurer was thereby authorized to guarantee the payment of the notes as requested. At the time the notes were guaranteed the bankrupt sold liquors to the borrower to the amount of \$100 per month, and so continued thereafter. *Held*, that the benefit to be derived by the bankrupt through the increase of the borrower's business was indirect, making the transaction one of naked guaranty, which was ultra vires.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1815; Dec. Dig. § 484.*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of the bankruptcy proceedings of the Liquor Dealers' Supply Company. An order was passed disallowing the claim of the Anheuser-Busch Brewing Association on objections filed by Henry Hiestand, as trustee in bankruptcy, and claimant appeals. Affirmed.

The appellant, Anheuser-Busch Brewing Association, filed a claim in bankruptcy against the estate of Liquor Dealers' Supply Company, bankrupt,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which was disallowed by the referee on objections filed by the trustee (appellee), and on application for review the District Court confirmed the disallowance; hence this appeal. The claim in question consists of 19 promissory notes, for \$100 each, made by E. Goldstein Company, each indorsed with a guaranty of payment, signed by "Sam Moyses" and "The Liquor Dealers' Supply Co., Sam Moyses, Treas."

All the facts were stipulated for submission of the claim and objections thereto substantially as follows:

The bankrupt, Liquor Dealers' Supply Company, was incorporated under the laws of Illinois, and authorized "to engage in the wholesale liquor and rectifying business, and to supply liquor dealers, rectifiers and distillers with goods of every description at wholesale, and to transact a general commission business." Two of its officers, together with E. Goldstein, organized a separate Illinois corporation, named E. Goldstein Company, for a restaurant and saloon business. When the notes in controversy were executed, "Sam Moyses was practically in sole control of Liquor Dealers' Supply Company, owning almost all of its stock, and also owned and controlled the stock of E. Goldstein Company." Up to March 1, 1907, the E. Goldstein Company operated its business, but its "stocks and assets" were then "sold to other parties." In April, 1906, E. Goldstein & Co. entered into an arrangement with the appellant to purchase beer from the appellant—having theretofore used in its saloon other beer—for the purpose of securing a loan of money from the appellant; and the latter agreed to loan \$4,000, provided the notes were guaranteed by Liquor Dealers' Supply Company. The loan was made accordingly and 40 notes of \$100 each were given therefor, bearing such guaranty. Each note was dated April 24, 1906, payable to appellant's order, "maturing monthly for forty months," with interest. Twenty-one of these notes were taken up and paid by the guarantor, and the present claim is for the remainder.

By way of authority for the purported contract to guarantee payment of the notes, a resolution was adopted by Liquor Dealers' Supply Company, reciting, in substance, its engagement "in the business of buying and selling liquors"; that it "is desirous of increasing and extending its said business"; that "any increase in the business of its customers tends directly to increase the business of this corporation"; that "E. Goldstein Company, one of its customers," desires to borrow \$4,000 "for the purpose of increasing its business, and has requested this corporation to guarantee the payment of its notes for said sum"; and that the treasurer "be, and he is hereby, authorized and directed in the name of the corporation to guarantee in writing the payment" of the notes as described.

The Liquor Dealers' Supply Company "sold to E. Goldstein Company liquors to the amount of \$100 per month" at that time, and so continued thereafter.

Julius Goldizer, for appellant.

William Freidman, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The bankrupt is an Illinois corporation, and the claim filed by the appellant for allowance against the estate in bankruptcy rests alone on purported contracts of the corporation, guaranteeing payment of specific debts of another corporation. All facts involved in the controversy are settled by stipulation, and the appeal from an order disallowing the claim presents a single question of law: Are the promises so made valid obligations against the estate? We are impressed with no doubt either of the true bearing of the material facts so submitted, or of the rule of corporate limitation which then applies for answer to this question.

As the bankrupt, Liquor Dealers' Supply Company, was a corporation organized under the laws of Illinois, it had no powers except those which were conferred by charter, either in express terms or by neces-

sary implication for the exercise of the powers named. It obtained none of the natural rights or capacities of its individual members. *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 48, 11 Sup. Ct. 478, 35 L. Ed. 55, and cases cited; 7 Am. & Eng. Encyc. of Law (2d Ed.) 695. Under its corporate charter the grant of authority is "to engage in the wholesale liquor and rectifying business, and to supply liquor dealers, rectifiers and distillers with goods of every description at wholesale and to transact a general commission business." The inquiry for powers which may be implied for the purposes of the business thus authorized is not free from confusion in opinions cited in the argument (from various jurisdictions), but comment here is unnecessary upon the considerations which have influenced departures from the above stated rule of strict limitation, for the reason that we believe such rule to be settled, for the instant case, by the Illinois decisions, not only through their adoption of the general rule, but by direct interpretation of like charter powers, to confer no implied authority to become answerable for the indebtedness of another party, without interest therein and for mere accommodation, declaring such promises ultra vires the corporation. *National Home Building Association v. Bank*, 181 Ill. 35, 39, 54 N. E. 619, 64 L. R. A. 399, 72 Am. St. Rep. 245; *Wheeler v. Home Savings Bank*, 188 Ill. 34, 37, 58 N. E. 598, 80 Am. St. Rep. 161.

In partial recognition of these authorities (as we infer), it is conceded in the brief for appellant:

"That a naked guaranty whereby a corporation enters into a contract of suretyship for another person or corporation in a matter in which it is in no manner interested is outside of the powers of a corporation."

Nevertheless it is contended that a resolution of the corporation—reciting, in effect, that its guaranty is requested by a customer, for a loan desired by the customer to increase his own business, and that such increase of the customer's business "tends directly to increase the business of this corporation"—is effective to escape the rule referred to and give validity to such promise. For this contention, the appellant relies upon a line of cases marking exceptions from the general rule above stated, with the following Illinois decisions cited as leading examples: *Richelieu Hotel Co. v. Mil. Encampment Co.*, 140 Ill. 248, 263, 29 N. E. 1044, 33 Am. St. Rep. 227; *Green Co. v. Blodgett*, 159 Ill. 169, 42 N. E. 176, 50 Am. St. Rep. 146; *Central Lumber Co. v. Kelter*, 201 Ill. 503, 66 N. E. 543; *Kraft v. West Side Brewery Co.*, 219 Ill. 205, 76 N. E. 372; *Blue Island Brewing Co. v. Fraatz*, 123 Ill. App. 26, 29. The *Richelieu Hotel Co.* and *Green Co.* Cases are satisfactorily distinguished from the case at bar, in the opinion by Mr. Chief Justice Cartwright, in *National Home Building Ass'n v. Bank*, ante, and each of the other citations is alike distinguishable. In the first-mentioned case, a subscription made by the hotel company, jointly with numerous other subscribers, to procure the location in Chicago of a military encampment, was held to be within its corporate powers as an "expedient directly calculated to increase the number of patrons of the hotel"; and each of the others is of like nature, having for the single purpose of the subscription or agreement a benefit directly accruing

therefrom to the business of the promisor corporation in obtaining new customers. Assuming that power may be implied "to adopt and promote all reasonable expedients directly calculated to increase the number of patrons of the business," this resolution of the corporation to guarantee payment of its present customer's loan neither states nor contemplates any such direct benefit to the guarantor. The pretense of benefit through increase of the customer's business is indirect, not within either authority cited; and the utmost import of the resolution is to secure the good will of the customer, the usual inducement held out to guarantors, making it a case of "naked guaranty" of the debt of another, not within the corporate powers.

The fact that Moyses owned most of the stock in both corporations may explain the transaction, but it gives the corporation no authority to exceed its powers wherein the interests of creditors and the public are involved.

The claim was rightly disallowed, and the order of the District Court is affirmed.

BALTIMORE & O. R. CO. v. ROOT.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1910. Rehearing Denied February 10, 1910.)

No. 1,588.

1. MASTER AND SERVANT (§ 185*)—RAILROAD COMPANY—DUTY TO KEEP ENGINES IN REPAIR—DELEGATION OF DUTY TO FELLOW SERVANT OF INJURED EMPLOYÉ.

The obligation resting upon a railroad company as master to exercise reasonable care in keeping its engines in repair, which includes the making of inspection, tests, and examinations at proper intervals, is one of positive duty, directly owing to the servants engaged in their use; and the company is answerable to such servants for nonperformance of this duty by its other servants to whom its performance is delegated, and this irrespective of the relation otherwise existing between its various employés.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

2. MASTER AND SERVANT (§ 189*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—RAILROAD COMPANY—DEFECTIVE ENGINE.

Plaintiff was severely injured by the blowing out of a wash-out plug in the boiler of the locomotive engine on which he was working as fireman in the employ of defendant railroad company. Such plugs were made of copper or brass, and screwed in. They were required to be unscrewed every six or eight days at the shops to wash out the boiler, and, owing to the soft material, the threads soon became worn, and required constant inspection and attention by the foreman at the shops, who was charged with that duty, and renewal every eight or nine months. The boiler of such engine was washed out on the morning of the accident, but the washer was unable to unscrew the particular plug in question, and so reported to the foreman, who directed him to leave it in place and use another opening, and sent the engine out without further inspection of the plug. After it was blown out, the threads were found to be worn and in a stripped condition. *Held* that, in relation to his duty to inspect the plug and see that it was in good condition, the foreman of the shop was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not a fellow servant of plaintiff, and that the facts warranted a finding that defendant was negligent and liable for plaintiff's injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 428, 433, 442; Dec. Dig. § 189.*]

In Error to the Circuit Court of the United States for the District of Indiana.

Action by Claude E. Root against the Baltimore & Ohio Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff in error was defendant below in the suit of Claude E. Root to recover for injuries incurred in its service and alleged to be caused by its negligence. Upon trial of the issues to a jury, verdict was rendered against the plaintiff in error, and this writ is prosecuted for reversal of a judgment entered accordingly. The only question raised is the sufficiency of evidence for submission to the jury, and the material facts involved therein are stated in the opinion.

Samuel D. Miller, for plaintiff in error.

H. W. Mountz, for defendant in error.

Before BAKER and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge. The verdict and judgment in this case rest upon undisputed facts in evidence of an explosion and resultant injury suffered by the plaintiff below, together with facts and circumstances either proving or tending to prove the cause of the explosion, and no controversy appears to have arisen upon the trial beyond the contention on behalf of the defendant that these facts were insufficient to authorize a finding of liability. Under this contention, as a proposition of law, motions were made to direct a verdict in favor of the defendant, and error is assigned for the adverse rulings of the trial court thereupon, as the sole ground upon which reversal is sought.

The plaintiff was a locomotive fireman in the service of the defendant railway company, and was seriously injured in an explosion caused by the blowing out of a wash-out plug in the front end of the engine while he was on duty. In reference to the tendency of these plugs to become defective, and the care required and usually exercised by the foreman and special servants of the company charged with such duty, the testimony shows that wash-out openings were provided in the boiler, to be securely closed by means of these plugs when the engine was in use; that the special servants referred to were required to wash out the boilers to fit them for service, usually every six or seven days, removing the wash-out plugs for such purpose; that the plugs were made of copper or brass and screwed into the openings in the steel flue sheets; that the softer threads of the plugs thus became speedily worn and thereafter unsafe for further use under the pressure of steam in the boilers, so that frequent inspections of the plugs—usually at each washing of the boilers—and renewal when defective were well recognized duties, delegated to these special servants; that ordinarily the plugs in use required renewal every eight or nine months; and that the plaintiff had no part in the performance of these

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

duties. On the occasion in controversy, the engine was delivered from the shops for service, after it had been washed out, and the engineer had started up, under normal steam pressure, with the fireman (plaintiff) attending to the fire, when the plug referred to was blown out, and the fireman overwhelmed in a blast of steam, fire, and ashes from the fire box. The plug was found, identified, and produced in evidence, and the foreman, charged with inspection and repair (called on behalf of the plaintiff below as a witness), aptly describes its appearance in these words: "The thread is worn and in a stripped condition."

In the testimony of Foreman Wade, the above-mentioned witness, his duty is defined to be "complete inspection and repair work on engines delivered" to the shop, and he states, in substance, these further facts: That this engine was so delivered, the plug in question taken out, and the boiler washed on July 2d; that after service the engine was again returned to the shops, on the morning of July 8th—the day of the accident—when the flues were calked and the boiler washed out; that on this last occasion the boiler washer attempted to remove such plug by use of a wrench, but failed to unscrew it and so reported to the foreman (witness), who then made like trial and failure; that thereupon the foreman directed the helper to leave that plug in place and wash out the boiler through another opening; and that this course was followed out, and the engine thus delivered for the service in question, without further trial or examination of the plug so left in place and discovered to be out of order.

The entire argument for reversal proceeds on the assumption that the last-mentioned direct evidence upon the issue is without force, as tending merely to prove "negligence of fellow servants" therein, and it is contended, in substance, that the other facts are insufficient to support the charge for the alleged reason that they amount only to proof "that the plug blew out," or of "the happening of an accident," and that the doctrine of *res ipsa loquitur* is not applicable in favor of the plaintiff in such view, under the relationship of master and servant. We believe both of these theories in reference to the effect of the evidence to be untenable, and that a finding of breach of duty on the part of the defendant company, as charged in the complaint, was authorized under the facts recited. The proposition that the doctrine of *res ipsa loquitur* is inapplicable between these parties to raise a presumption of negligence from the mere happening of an accident is beside the present inquiry. Nor is it needful, as we believe in the light of these facts, to ascertain whether that doctrine may not be applied within the general rules of evidence to infer negligence in fact from the occurrence.

The obligation resting on the defendant company, as master, to exercise reasonable care in keeping its engines in repair—which includes the making of "inspection, tests and examinations at proper intervals"—is one of positive duty, directly owing to the servants engaged in their use, and the rule is well settled that the master is answerable to such servants for nonperformance of this care by its other servants, to whom performance is delegated, and this irrespective of the relation otherwise existing between the various employes of the master. *Union Pacific Railway Co. v. Daniels*, 152 U. S. 684, 688, 14 Sup. Ct. 756,

38 L. Ed. 597, and authorities cited; Northern Pacific R. R. Co. v. Peterson, 162 U. S. 346, 353, 16 Sup. Ct. 843, 40 L. Ed. 994. The plaintiff's complaint plainly charged breach of duty on the part of the defendant within this rule as the cause of his injury, and the above-mentioned testimony of the foreman, who was the personal representative of the master for performance of the duty, tended to prove the alleged nonperformance—both by way of direct evidence as to the transactions and in statement of facts from which negligence may reasonably be inferred—so that its materiality is established by the rule above cited.

While the testimony does not disclose the length of time the plug had been retained in use—whether longer or shorter than the usual period of renewal, “every eight or nine months”—we believe that the facts which were in evidence furnish ample authority for the inferences of fact that the threads of the plug were worn and stripped when the engine was returned to the shop on the morning of July 8th, and that reasonable and ordinary care was not then exercised to remove the plug and remedy the defect. Whether this condition was due to long use, or to faulty insertion of the plug on July 2d—a well-known cause of stripping and danger, under the evidence—it may well be inferred, not only that the inspection usually required when the boilers were washed out would have disclosed the defect, but that reasonable care under the circumstances shown required such inspection and renewal of the plug.

We are of opinion therefore that error is not well assigned, and the judgment against the plaintiff in error is affirmed.

MacDONALD ENGINEERING CO. v. MANNS.

(Circuit Court of Appeals, Second Circuit. March 7, 1910.)

No. 124.

1. MASTER AND SERVANT (§ 116*)—INJURIES TO SERVANT—NEW YORK LABOR LAW—“SCAFFOLD.”

Defendant desiring to remove certain false work in the ceiling over the bins of an elevator, stringers were laid on angle irons standing 3 feet above the floor on each side of an open bin about 20 feet apart, and loose planks were laid across the stringers. The stringers were made, under directions of defendant's assistant superintendent, out of 2x6 material which had been previously used, varying from 5 to 9 feet long. These were laid together, overlapping each other, and fastened together with nails, which did not go through more than two planks; the whole stringer being 21 feet long and 6 inches thick. Plaintiff, a laborer, laid two of the stringers on the angle irons over one of the open bins, and while taking down the false work a piece 2x6 and 5 feet long fell on the plank, breaking one of the stringers and precipitating plaintiff to the bottom of the bin, 75 feet below. *Held*, that the structure was a “scaffold” within Labor Law N. Y. (Consol. Laws, c. 31) § 18, which defendant caused to be furnished to plaintiff, making defendant absolutely answerable for the safety of such erection.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 116.*

For other definitions, see Words and Phrases, vol. 8, p. 7795.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MASTER AND SERVANT (§ 288*) — INJURIES TO SERVANT — ASSUMED RISK — QUESTION FOR JURY.

Whether plaintiff assumed the risk of any obvious defect in the stringer held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

Assumption of risk incident to employment, see note to National Acc. Soc. v. Dolph, 38 C. C. A. 314.]

In Error to the Circuit Court of the United States for the Western District of New York.

Action by John Manns, by Fred Manns, his guardian ad litem, against the MacDonald Engineering Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Love & Keating (G. P. Keating, of counsel, and William J. Donovan, on the brief), for plaintiff in error.

Bissell & Ladd (C. E. Ladd, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. In this case the defendant was erecting a grain elevator building, and it became necessary to remove certain false work from the ceiling above the bins. To accomplish this stringers were laid upon angle irons which stood some 3 feet above the floor on each side of an open bin about 20 feet apart, and loose planks laid across these stringers. The false work was only about 5 feet above the planks, so that the workmen standing on them could reach up and remove it. Three stringers had been made under the direction of the defendant's assistant superintendent out of 2x6 material which had been previously used, varying from 5 to 9 feet in length. These were laid together, overlapping each other, and fastened with nails that did not go through more than two planks; the whole stringer being 21 feet long and 6 inches thick. The plaintiff, who was a general laborer, and another workman, laid two of these stringers on the angle irons over one of the open bins, and across them placed plank on which to stand. While taking down the false work, a piece of it, 2x6 and 5 feet long, fell upon the planks, with the result that one of the stringers broke, and the plaintiff dropped some 75 feet, to the bottom of the bin, sustaining severe injuries; his companion being killed.

We think this structure was a scaffold, within section 18 of the New York labor law, which the defendant "caused to be furnished" to the plaintiff. That law makes the defendant answerable absolutely for the safety of such a scaffold. *Stewart v. Ferguson*, 164 N. Y. 553, 58 N. E. 662. The accident itself indicates that the stringer which broke was insufficient, and there was testimony to the effect that it was improperly constructed from unsuitable material. Notwithstanding this, the plaintiff assumed the risk of any obvious defect in the stringer. Whether there was such a defect was a question for the jury, and they have answered it to the contrary under instructions which, taken together, correctly advised them of the law.

Judgment affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

UNITED STATES v. ST. LOUIS, I. M. & S. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1910.)

No. 2,960.

CARRIERS (§ 211*)—TWENTY- EIGHT HOUR LAW—EQUIPMENT OF STOCK PENS.

The 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1178]) does not require a carrier to maintain any particular kind of equipment of its stock pens, permanent or otherwise, except in so far as to render them suitable for the humane purpose of properly feeding, watering, and resting the particular shipment of stock unloaded into them.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 926-928; Dec. Dig. § 211.*]

In Error to the District Court of the United States for the Eastern District of Arkansas.

Action by the United States against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

William G. Whipple and Powell Clayton, for plaintiff in error.

E. B. Kinsworthy and Lewis Rhoton, for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and McPHERSON, District Judge.

ADAMS, Circuit Judge. This was a suit to recover a penalty imposed by section 3 of the act of June 29, 1906 (34 Stat. 608, c. 3594 [U. S. Comp. St. Supp. 1909, p. 1179]), known as the "Twenty-Eight Hour Law." The United States charged in its complaint that the defendant railway company at a certain time and place failed to unload a shipment of cattle and sheep in a humane manner into properly equipped pens for rest, water, and feeding, as required by the act. The trial below resulted in a judgment for the defendant, from which the United States prosecutes error.

The agreed facts upon which the case was submitted conclusively show that the stock was unloaded within the time prescribed by the act, driven in a humane manner into pens conveniently located, fed with good and wholesome hay, watered with fresh and wholesome water, and kept there for more than five hours. The pens were located on high level ground, which at the time in question was perfectly dry. The hay was eaten from the dry ground, upon which it had been thrown, and the water was drunk from clean tubs temporarily placed within the inclosures. In the language of the agreed facts, "on this particular occasion the car load of cattle and sheep were properly fed and watered." The only complaint is that no permanent hayracks or water troughs were in the pens from which the stock could eat and drink. We think this complaint is without any merit. No penalty is imposed by the act, except for individual violation of its provisions. It contains no provision requiring the carrier to maintain any particular kind of equipment of its stock pens, permanent or otherwise. The condition of the pens seems to have concerned Congress in making the enactment so far, and so far only, as it served the dominant and hu-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mane purpose of properly feeding, watering, and resting the stock. The equipment of the pens must be such, and need be only such, as serves that purpose at the time the stock is unloaded into them.

The judgment is affirmed.

ATCHISON, T. & S. F. RY. CO. v. FREDERICKSON.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1910.)

No. 1,734.

1. COURTS (§ 322*)—JURISDICTION OF FEDERAL COURTS—AVERMENT OF CITIZENSHIP.

A mere averment that a party is a resident or inhabitant of a certain state is not an averment of his citizenship in that state, for the purpose of showing the jurisdiction of a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 878; Dec. Dig. § 322.*]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

2. COURTS (§ 325*)—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP.

Absence of sufficient averment of diversity of citizenship, or of facts in the record showing such diversity, is fatal to the jurisdiction of a federal court, where no other ground of jurisdiction appears, and the defect cannot be waived by the parties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 884; Dec. Dig. § 325.*]

In Error to the Circuit Court of the United States for the Southern Division of the Southern District of California.

Action by Andrew J. Frederickson against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

E. W. Camp, U. T. Clotfelter, and A. H. Van Cott, for the plaintiff in error.

Burt Chellis and J. W. Swanwick, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

GILBERT, Circuit Judge. The plaintiff in error raises in this court for the first time the question of the jurisdiction of the Circuit Court. There was no ground of jurisdiction other than diversity of the citizenship of the parties, and the only allegation as to the citizenship of the defendant in error was that "he is an inhabitant of the city of Los Angeles, in the county of Los Angeles, state of California." On the witness stand he testified that his "home" was in Detroit, Mich. To allege that one is an inhabitant is not to allege that he is a citizen. *United States v. Rhodes*, 1 Abb. U. S. 39, Fed. Cas. No. 16,151. It is equivalent only to saying that he is a resident. "It has long been settled," said Mr. Justice Harlan, "that residence and citizenship are wholly different things, within the meaning of the Constitution and the laws defining and regulating the jurisdiction of the Circuit Courts of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

the United States, and that a mere averment of residence in a particular state is not an averment of citizenship in that state for the purpose of jurisdiction." *Steigleder v. McQuestion*, 198 U. S. 141, 25 Sup. Ct. 616, 49 L. Ed. 986, citing *Parker v. Overman*, 18 How. 137, 15 L. Ed. 318; *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057; *Everhart v. Huntsville College*, 120 U. S. 223, 7 Sup. Ct. 555, 30 L. Ed. 623; *Timmons v. Elyton Land Co.*, 139 U. S. 378, 11 Sup. Ct. 585, 35 L. Ed. 195; *Denny v. Pironi*, 141 U. S. 121, 11 Sup. Ct. 966, 35 L. Ed. 657; *Wolfe v. Hartford L. & A. Ins. Co.*, 148 U. S. 389, 13 Sup. Ct. 602, 37 L. Ed. 493.

Absence of sufficient averments of diversity of citizenship, or of facts in the record showing such diversity, is fatal; and the defect cannot be waived by the parties, nor can their consent confer jurisdiction. *Thomas v. Board of Trustees*, 195 U. S. 207, 25 Sup. Ct. 24, 49 L. Ed. 160.

It follows that the judgment must be reversed, and the cause remanded to the Circuit Court, with instructions to dismiss the same.

CRANFORD CO. v. TRAINOR.

(Circuit Court of Appeals, Second Circuit. March 7, 1910.)

No. 154.

MASTER AND SERVANT (§§ 286, 288*)—INJURIES TO SERVANT—DEFECTIVE SCAFFOLD—NEGLIGENCE—ASSUMED RISK—QUESTION FOR JURY.

In an action at common law for injuries to a servant caused by a fall from a scaffold constructed of defective material, whether defendant was negligent in failing to exercise reasonable care to furnish safe appliances, and whether plaintiff assumed the risk, were for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1010-1050, 1068-1088; Dec. Dig. §§ 286, 288.*

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

In Error to the Circuit Court of the United States for the Eastern District of New York.

Action by Andrew Trainor against the Cranford Company to recover damages for personal injury. From a judgment for plaintiff, defendant brings error. Affirmed.

W. A. Jones, Jr. (Alden S. Crane, of counsel), for plaintiff in error.

Robert Stewart (Ralph G. Barclay, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The plaintiff, a servant of the defendant, was engaged in cleaning the tubes of a horizontal cylindrical steam boiler. To do this he had to stand on two planks, about 2x12, resting at one end on a wooden horse standing directly in front of the boiler, and at the other end upon a joist placed there for that purpose. The plaintiff had to push a steel brush at the end of a long handle forward and back in these tubes of the boiler, and so was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

obliged to walk forward and back on the planks. While so doing he says one of the planks tilted sidewise, and, the heel of his left foot catching between the planks, he lost his balance and fell to the ground, a distance of some 4½ feet. The proof is that the planks, which were brought into court and shown to the jury, were somewhat warped, so that, if laid upon their convex sides, they had a tendency to roll or wobble. This particular horse and these particular planks, no others being furnished by the defendant, had been used in this way in the cleaning of the boiler tubes for some three years, and the plaintiff had used them twice before the accident.

The action was at common law, which imposes the duty on the master to exercise reasonable care in furnishing safe appliances to his servants. On the other hand, the servants assume the risk of obvious defects. No conclusive inferences could be drawn from the proofs, so that the question of the defendant's negligence and of the plaintiff's assumption of defects could not be disposed of by the court as matters of law. They were properly submitted to the jury, and, taking the whole charge and the answers to the requests to charge together, we think the jury was fairly instructed as to the law.

Judgment affirmed.

WALSH v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. December 3, 1909.)

No. 1,469.

BAIL (§ 44*)—FEDERAL COURTS—RIGHT TO RELEASE ON BAIL AFTER AFFIRMANCE ON ERROR.

The affirmance by the Circuit Court of Appeals of a judgment of conviction in a criminal case is the end of the proceedings in error, and that court has no power to continue defendant's bail, nor to admit him to new bail pending his application to the Supreme Court for a writ of certiorari; but the court may, for good cause shown, defer the beginning of his sentence for a reasonable time.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 44.*]

Criminal prosecution by the United States against John R. Walsh. On motion to continue bail. Motion denied.

See, also, 174 Fed. 615, 621.

Before GROSSCUP and BAKER, Circuit Judges, and HUMPHREY, District Judge.

PER CURIAM. The petition for rehearing having been overruled, motion is made to continue the present bail, or admit Walsh to new bail, pending his application to the Supreme Court for a writ of certiorari. This motion must be overruled. Bail is a stay of proceedings, arising out of, and a part of, the pendency of a writ of error. The proceedings in error ended, the right to admit bail is ended. The proceedings in error are now at an end. This court is not, in cases of this kind, an intermediate court, from whose judgment a writ of error can, as a matter of right, be sued out. This court cannot itself issue a writ of error to the Supreme Court. If there is to be fur-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

ther review, the writ must come, if it comes at all, from the Supreme Court itself. The order of this court, unless and until arrested by the Supreme Court, is a final order; and in the interval, no proceedings in error are pending. There is, therefore, no pending proceeding upon which to predicate the continuation or taking of bail.

But, although Walsh must be surrendered to the custody of the officers of the law, the court has power, on his motion, to defer the beginning of the sentence, named in the judgment, for such time as, within the judgment of the court, is reasonable, as for instance, in case of temporary illness, or a necessity, involving the interest of others as well as himself, that his affairs should be arranged, or an application, in good faith, being about to be made to the Supreme Court for a writ of certiorari, pending such application, provided the same be within a reasonable time. This power is frequently exercised in the case of sickness, and the necessity of arranging affairs, by the court imposing sentence, and, for the purpose of affording a reasonable time to make application to the Supreme Court, has been exercised by the Court of Appeals for the Second Circuit in the Morse Case, in committing Morse to the Tombs, instead of to the imprisonment named in the sentence. And, in the exercise of this power, if Walsh, in open court moves for it, we will commit him to the custody of the marshal, pending application to the Supreme Court for writ of certiorari, provided such application be submitted to that court on or before the 3d day of January, 1910.

EDINGTON v. MASSON et al. †.

(Circuit Court of Appeals, Fifth Circuit. March 29, 1910.)

No. 1,903.

BANKRUPTCY (§ 178*)—RIGHTS OF INSOLVENT—SETTLEMENT OF LIEN.

Where an insolvent in Alabama contested his father's will, he **was** entitled, as against his creditors, to abandon or settle the contest at any stage, at his election, and on his subsequent adjudication as a bankrupt his trustee had no cause of action growing out of the settlement or abandonment, unless to recover any sum or sums the bankrupt might have received and afterwards transferred in derogation of the bankruptcy law.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. 178.*]

Appeal from the District Court of the United States for the Southern District of Alabama.

Action by D. H. Edington against J. Henry Masson and others. Judgment for defendants, and plaintiff appeals. Affirmed.

W. H. McIntosh, Jos. C. Rich, and Chas. P. Fenner, for appellant. Gregory L. Smith and Harry T. Smith, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. In Alabama, when an insolvent contests his father's last will, he may abandon or settle the contest at any stage of the litigation upon any terms he pleases, and his creditors have no cause to complain, and his subsequent adjudication in bankruptcy will

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not give the trustee any cause of action growing out of such settlement or abandonment, unless it be to recover any sum or sums the bankrupt may have received and afterwards transferred in derogation of the bankruptcy law.

The decree of the District Court is affirmed.

PARKER v. STEBLER et al.

(Circuit Court of Appeals, Ninth Circuit. March 7, 1910.)

No. 1,699.

1. PATENTS (§§ 58, 62*)—PRIOR USE—BURDEN AND MEASURE OF PROOF TO ESTABLISH.

The burden of proof to establish a defense of prior use to invalidate a patent rests on the defendant, and, where oral testimony of witnesses speaking from memory only is relied on, it must be so clear and satisfactory as to convince the court beyond a reasonable doubt.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 75, 78; Dec. Dig. §§ 58, 62.*]

Priority and continuance of public use of invention as affecting patentability, see note to *Eastman v. Mayor*, etc., of City of New York, 69 C. C. A. 646.]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—HAND-TRUCK.

The Bryan patent, No. 714,140, for a hand-truck particularly designed for moving boxes in a fruit packing house and having a clamping device by which the lower one of a tier of boxes may be grasped and the whole tier lifted and moved without separate handling, was not anticipated and discloses patentable invention of such merit as to entitle it to a fairly liberal construction. Also, *held* infringed.

Appeal from the Circuit Court of the United States for the Southern District of California.

Suit in equity by Fred Stebler and Austin A. Gamble against George D. Parker. Decree for complainants, and defendant appeals. Affirmed.

The appellees, as owners of the patent issued to Edgar J. Bryan on November 25, 1902, letters patent for a new and useful hand-truck, brought a suit against the appellant, alleging that he had infringed their patent. Upon the final hearing the trial court sustained the patent as to claims 1, 12, 14, 15, and 16, found that the appellant had infringed the same, and referred the cause to a master to state the amount of gains, profits, and advantages and to assess damages therefor, and enjoined the appellant from further infringing said claims. The claims are as follows:

"1. The combination with a truck of a pair of pivoted clamp members, and a foot-lever fulcrumed upon the truck adjacent to the front end and arranged at the inner side thereof within reach of the foot of the operator while grasping the handles of the truck in the elevated position of the latter, said foot-lever being connected to both clamp members for simultaneous operation thereof."

"12. The combination with a truck of a pair of clamp members which normally lie in a longitudinal alignment transversely of the truck, and have intermediate fulcrum connections therewith, spring actuated means to normally hold the clamp members in mutual alignment, and controlling means to overcome the tension of the spring and to throw the clamp members out of alignment."

"14. The combination with a truck of a pair of clamp members, and means for manipulating the same to grip an object to be carried upon the truck,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

each clamp member embodying a shank which is disposed transversely of the truck and projected in opposite directions across the adjacent side of the truck; the shank being intermediately fulcrumed within the area of the truck to swing longitudinally thereof, and the outer free end of the shank being provided with a jaw which is set at an angle to the plane of the truck and works in an arc of a circle disposed longitudinally of the truck.

"15. The combination with a hand-truck of foot-controlled, object-supporting means carried by the forward end portion of the truck, and hand-grips projected rearwardly at substantially right angles from the opposite side members of the truck and located intermediate of the ends thereof and near the rear end of the truck.

"16. The combination with a hand-truck having the rear ends of its side members formed into handles, of object-engaging means working at the front of the truck, a foot device for controlling the object-engaging means, said device being arranged adjacent to the front end of the truck and at the inner side thereof within reach of the foot of an operator when the truck is in an elevated position, and hand-grips projected rearwardly at substantially right angles from the opposite side members of the truck and located adjacent to and independent of the handles at the rear ends of the side members of the truck."

Tracy C. Becker and Raymond Ives Blakeslee, for appellant.

Frederick S. Lyon, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). The Bryan truck is devised for the purpose of transporting boxes, and was particularly designed for use in packing houses in which oranges and lemons are packed in boxes. The boxes being stacked in tiers in the packing house, the invention provides a means operated by the foot of the operator to throw clamping jaws into engagement with the lower box or crate of the tier so that the pile of loaded boxes so engaged may be moved without touching any of them with the hands and without the necessity of tipping the pile so as to insert the truck beneath the lower box as was necessary with the trucks theretofore in use. With the Bryan truck it is necessary only to push the truck up to the front of the tier of boxes, tip the truck into an upright position so that the clamping jaws are projected alongside the lower box, then with the foot depress the foot-lever so as to bring the jaws into engagement, pull back on the truck, and carry the tiers of boxes wherever desired. There the tier of boxes is tipped until the lower box rests on the floor. The weight of the box being relieved from the clamps, the latter are automatically released by a spring and the tier of boxes is deposited. The advantages of the invention are apparent. One is that the tier of boxes is not required to be tipped forward in order to be taken on the truck; another is that the load may be discharged by simply tipping the truck forward until the lower box touches the floor; and another is that it dispenses with the necessity of stacking up the boxes in a packing house in such a manner as to leave room to tip back the tiers in order to get the nose of the truck under the lowest box as was done with the trucks formerly in use, thereby securing economy of space in the packing house.

The evidence is that the invention went into immediate and general use. The appellant does not deny the value of the invention nor the

fact that it at once went into general and extensive use, a use which has continued up to the present time, to the supercession of all other trucks. His principal defense is that of prior use. He relies upon the evidence that one Ruggles in the year 1897 invented and thereafter used a truck which embodied all the essential features of the Bryan patent. The evidence as to the nature of the Ruggles' invention, its successful use, and its precise features, is somewhat conflicting. He made but two trucks. The first was not satisfactory and was used but for a very short time. There is testimony that he then constructed another with certain changes and used it in a packing house in Redlands for two or three years, when the irons were removed therefrom and were sent East to the Kilbourne-Jacobs Manufacturing Company at Columbus, Ohio, in 1901. There was produced in evidence some of the irons taken from the first truck made by Ruggles, and also a truck prepared under the direction of Ruggles in June, 1908, for use as an exhibit upon the trial in the court below. The old irons of the first truck differ from the irons in the truck so exhibited; but the testimony of Ruggles and that of other witnesses is that the reconstructed truck is in all respects the same as the second truck which he made, the irons of which were shipped East as above stated. The irons which were sent East were not produced in evidence. Some attempt was made to show that inquiry had been made for them, and that they could not be found; but there was no deposition taken of any member of the firm to which they were sent, and their absence is not satisfactorily accounted for. Ruggles never made or caused to be made or used more than the two trucks so mentioned. He never took steps to manufacture trucks under his invention, and it is a significant fact that, although he was an inventor of other devices and was at that time applying for patents thereon, an application for one of which he filed on December 26, 1899, and for two others on October 20, 1900, he never filed an application for a patent on his truck, but, on the other hand, discarded his own invention and used the appellees' trucks. The evidence is convincing that Bryan knew nothing of the Ruggles invention prior to the time of applying for his patent; but there is testimony that Ruggles thereafter called his attention to the fact that he had invented a similar truck and informed him that it had not been what he would like it to be, and that he had set it aside.

In view of all the testimony, some of which is conflicting, on this branch of the case, we are not prepared to say that the trial court was in error in holding that the evidence was insufficient to show that the Ruggles invention anticipated the Bryan invention or was a successful device, but that, on the contrary, it was a disappointment to Ruggles and was a failure and was discarded by him. It is well settled that the defense of prior use must be established by evidence which proves it beyond a reasonable doubt. The question of novelty is a question of fact. *Turrill v. Michigan Southern R. R. Co.*, 1 Wall. 491, 17 L. Ed. 668. And it has been held that the oral testimony of many witnesses, if unsupported by any evidence consisting of documents or things, must be very reasonable or very strong to establish the defense of prior use. *The Barbed Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154; *Deering v. Winona Harvester*

Works, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153. In the present case no physical evidence of the Ruggles invention is produced in evidence save a truck which was made for use in evidence, constructed from memory seven years after the original truck had disappeared from view. The irons which are produced and which were taken from the first experimental truck made by Ruggles cannot be said to furnish physical evidence of his invention, for only a portion of those irons was produced, and those which were produced obviously could not be used, fashioned as they are, in the device which is exhibited as the Ruggles invention. In *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017, the court said:

"The burden of proof is upon the defendants to establish this defense. For the grant of letters patent is *prima facie* evidence that the patentee is the first inventor of the device described in the letters patent and of its novelty."

And in the Barbed Wire Patent Case the court said:

"The frequency with which testimony is tortured or fabricated outright, to build up the defense of prior use of the thing patented, goes far to justify the popular impression that the inventor may be treated as the lawful prey of the infringer."

In brief, the courts have recognized the rule that the oral testimony of witnesses speaking from memory only in respect to past transactions and old structures claimed to anticipate a patented device, physical evidence of which is not produced, is very unreliable, and that it must be so clear and satisfactory as to convince the court beyond a reasonable doubt before it will be accepted as establishing anticipation. *Knickerbocker & Co. v. Rogers* (C. C.) 61 Fed. 297; *Pratt et al. v. Sencenbaugh et al.* (C. C.) 64 Fed. 779; *Wickes v. Lockwood* (C. C.) 65 Fed. 610; *Singer Mfg. Co. v. Schenck* (C. C.) 68 Fed. 191; *Emerson Electric Mfg. Co. v. Van Nort Bros.* (C. C.) 116 Fed. 974; *Pettibone, Mulliken & Co. v. Penn. Steel Co.* (C. C.) 133 Fed. 730.

The patents which the appellant cites as anticipating the appellees' truck requires but brief mention. The Pratt & Munhall truck does not embody any of the claims of the appellees' patent and could not be adapted to the use for which the appellees' invention was devised. The Cather truck is not so constructed that the weight of the load or stack of boxes will automatically tighten the grip of the clamping jaws thereto. It grips the object to be carried, not by the use of a foot-lever, but by the use of a hand-lever, and it is apparent that the grip upon the load can be maintained only by the application of constant pressure. In short, it is not shown to be, and it obviously is not, successful in operation. Of the Tower patent it is only necessary to say that it is no part of the prior art; Tower's application not having been filed until February 17, 1902.

A stipulation was filed in the court below in which the appellant admitted that the hand-trucks manufactured by him "contain and embody the combination of parts in the interrelations set forth in claims 1, 14, 15, and 16 of the Bryan patent." This stipulation, the appellees contend, removes from the case all dispute on the subject of infringement. The appellant insists, however, that such is not its effect or purport, and argues that the reason why the admission was made

was that the language of the claims relied upon in the patent in suit was so comprehensive that it could not be denied that it was broad enough to cover the combination and interrelation of parts in the trucks made by the appellant. But the appellant contends that the Bryan patent, if sustained, must be limited to the precise construction described therein, and that his device differs so far therefrom as to avoid infringement. We think, in view of the prior art, that the Bryan invention marked a distinct step in advance, whereby a notable success was achieved, and that its claims are entitled to a fairly liberal construction. The idea of so arranging the clamping irons that they were brought into engagement with the load by the depression of a foot-lever, after which they were held in position by the tension created by their own weight, thus dispensing with further application of power to the lever or a locking device to hold them in place, was of such novelty and merit as to justify its protection as against a mere change of form or a different location of the clamping irons or any variant construction of substantially the same device. Giving the claims such construction, it is apparent that the appellant's truck infringes them.

The decree is affirmed.

WAKEFIELD SHEET PILING CO. v. CITY OF NEW ORLEANS et al.†

(Circuit Court of Appeals, Fifth Circuit. March 1, 1910.)

No. 1,918.

PATENTS (§ 328*)—VALIDITY—PRIOR PUBLIC USE BY ANOTHER—SHEET PILING.

The Wakefield patent, No. 370,108, for sheet piling made of triple-lap planks, *held* valid as against the defense of prior public use by another, where such use was within less than two years prior to the application, and in addition to the *prima facie* case made by the patent there was evidence tending to carry the date of invention by the patentee back of such use.

[Ed. Note.—Priority and continuance of public use of invention as affecting patentability, see note to *Eastman v. City of New York*, 69 C. C. A. 646.]

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Suit in equity by the Wakefield Sheet Piling Company against the City of New Orleans and others. Decree for defendants, and complainant appeals. Reversed.

Benj. W. Kernan, Jno. W. Hill, and Henry P. Dart, for appellant. Omer Villere and Edgar H. Farrar, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. This is a suit in equity for the infringement of letters patent No. 370,108, granted to James A. Wakefield, September 20, 1887, for improved sheet piling, to wit:

"A sheet piling composed of three thicknesses of plank secured together by bolts or rivets, so that the middle plank shall project out at one edge of a section at a distance corresponding to the depth of the groove whereby, when several sections are driven down, the edges of the exterior plank and the in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied April 18, 1910.

ner plank will respectively come together and form a wall or sheet piling of three thicknesses of plank securely held together and the joints centrally broken, as and for the purposes specified."

The application for patent was filed July 14, 1887, and in connection with drawing describes the invention as follows:

"Figure 1 is an end elevation of the framework of a dam, with an edge view of my improved sheet piling in position to be driven down into the bed of the water. Figure 2 is a perspective representation of four sections of my

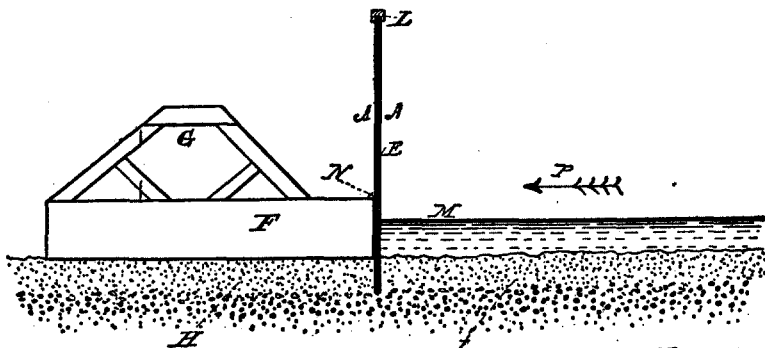


Fig. 1.

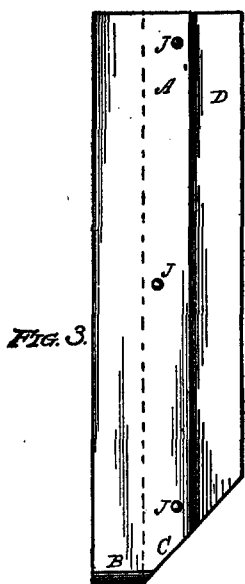


Fig. 3.

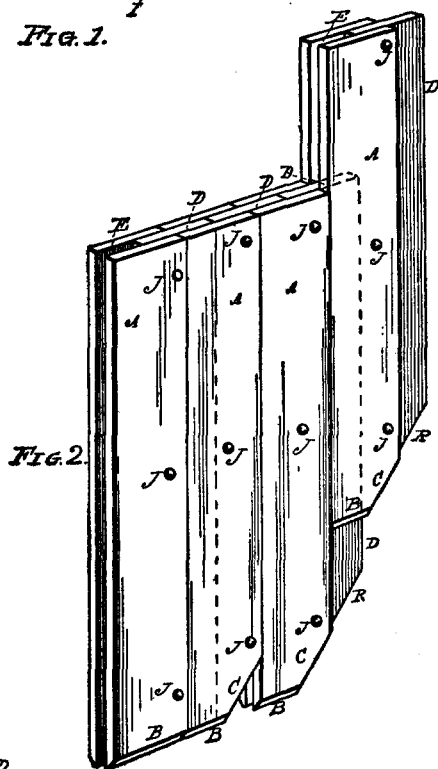


Fig. 2.



Fig. 4.

improved piling in position relatively as they are when driven, except the right-hand section, which is in position to be driven. Fig. 3 is a side elevation of one section of piling; Fig. 4, a top or plan view of Fig. 3. The purpose of this invention is to provide a sheet piling which will prevent water from getting through it or under it. It has been the custom to construct sheet piling of several thicknesses of plank, with the intention of setting them so closely together as to prevent water from getting under or through such piling and breaking down the dam or earth shore; but thus to drive sheet piling has been found to be an engineering impossibility, as experienced by government officers and others equally skilled. The theory that one row of planks can be driven to lie so closely to a previously driven row of plank as to exclude water remains a theory unsupported by practice. Attempts have been made to drive a sheet piling of tongued and grooved solid stuff; but this proved to be a failure, in that the tongues and grooves could not be available without cutting away to form them three-sevenths of the lumber."

The bill prays for an injunction against further infringement and for an accounting of profits and damages. The term of the patent having expired during the pendency of this suit, no injunction can issue, and only an accounting for infringement during the life of the patent is now claimed.

By a liberal construction the answer may be taken as pleading: (1) The general issue; and thereunder (2) that Wakefield was not the original first inventor or discoverer of any material or substantial part of the thing patented; (3) that it had been in public use in this country for more than two years before application was made for a patent; (4) that the discovery had been abandoned to the public; and (5) use of the patented method is admitted.

On evidence taken, the case was tried in the Circuit Court, and the learned judge thereof dismissed the bill for the following reasons:

"Without deciding whether the other defenses are valid or not, I am therefore clear that there must be judgment against the complainant on the ground that it had been shown that the device of triple-lap sheet piling was in public use for nearly two years before Wakefield applied for his patent, and it is not shown that Wakefield's alleged invention antedated this use."

From a decree dismissing the bill, this appeal is prosecuted.

The complainant's evidence establishes, and the answer practically admits, that the claimed invention was a useful article, manufacture, or device, and as such patentable. The answer charges, however, that the same or material parts of the claimed invention were well known and in public use in the United States anterior to Wakefield's claimed invention, the same having been employed by one C. J. A. Morris, engineer and contractor, in constructing a dam across the Mississippi river in St. Cloud, Minn., in 1883 and 1884, and that the same or material parts of the claimed invention were used in construction work in Providence, R. I., in the years 1884 and 1885 by one A. McL. Hawks, civil engineer. The evidence shows clearly that what Hawks used in 1883, 1884, and 1885 was not the patented device of three planks spiked together, but a double sheeting reinforced with one plank at the corners. The evidence in regard to Morris' use of the three planks spiked together on the St. Cloud dam in Minnesota shows that, whatever the use was, it was in the fall of 1885, and within two years prior to Wakefield's application for a pat-

ent, and, therefore, does not necessarily defeat the patent. See *Bates v. Coe*, 98 U. S. 31, 46, 25 L. Ed. 68.

Assuming that it was in all respects the device claimed by and allowed Wakefield in his patent, the question is whether Wakefield's discovery antedated the public use of the device by Morris on the St. Cloud dam. This question is decisive of the case, for the claimed abandonment of his invention by Wakefield is not shown by any sufficient evidence. See *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000. Wakefield was living at the commencement of the suit, but died pending the same, and his evidence was not taken; and, therefore, as no records have been shown, the decision as to time of invention must be made on the prima facie case made by the patent, the secondary evidence of his associates and acquaintances, and the circumstances preceding and following the issuance of the patent.

As to the presumption in favor of the validity of the patent, see *United States v. Bell Telephone Company*, 167 U. S. 240 et seq., 17 Sup. Ct. 809, 42 L. Ed. 144. Three of Wakefield's associates and acquaintances testified as to conversations with Wakefield, and, finding no motion to suppress their depositions in this respect, we think their evidence, under the circumstances, entitled to some consideration.

Mr. Rosenthal, who is now the general sales manager of the Davenport Locomotive Works, testifies that he saw Mr. Wakefield almost daily and had frequent conversations with him about his invention. "Mr. Wakefield told me many times that he considered the triple-lap sheet piling one of the greatest inventions in the engineering field in his time. He told me that he had been perfecting sheet piling for several years before he took out a patent. He said that he wanted to make it perfect, although he had been using it before getting the patent, practically in the shape in which it was patented." Asked as to whether Wakefield said he had used it, the witness said: "He told me he had used it himself, but had not put it on the market." The witness testifies that he had no interest in the outcome of the suit in any way.

Mr. Peckham, who had been in technical and mechanical business for years, is now vice president of the William J. Oliver Manufacturing Company, of Knoxville, Tenn. At the time he knew Wakefield he was Western manager of Engineering News. He frequently talked with Wakefield about his invention, being instructed by the publishers of Engineering News to get all the information he could on the subject for his paper. He used to discuss Wakefield's engineering experience with him, as he (the witness) was interested and had been working in hydraulic engineering more than any other. On being asked as to whether Wakefield told him when he invented his triple-lap sheet piling, the witness said:

"Yes, he said that he had been using this for five or six years, and that he had experimented with it with a view to getting something that would be absolutely water-tight and suitable for cofferdam work, and had made different designs at different times, but he had finally settled on this one. That was the one I got from him and wrote up in the paper."

And in answer to a cross-question as to use the witness said:

"I stated that he had told me that he had been experimenting for five or six years, and that he has used this particular form in a number of places, believing that it was the best type he had gotten out."

Mr. Nelson, the secretary of the complainant company, testified that Wakefield died on or about January 19, 1906, in Chicago. This was before the defendants had completed their depositions for the defense. It seems that Morris testified in November, 1905, nearly two months before Wakefield died. This was the testimony referred to by Nelson when he testifies:

"Mr. Wakefield was not required in making up our first proofs, and we had nothing calling for a rebuttal until the defendant had put in certain testimony, and then we consulted Mr. Wakefield as to this identical point that we are making to-day, as to the date of Mr. Wakefield's first making his patented triple-lap sheet piling invention. In the meantime, Mr. Wakefield died. Mr. Wakefield stated to me on several occasions that he made this invention several years prior to the date of his obtaining the patent therefor, or his application for patent; that he had occasion to stop a leak on some work that he had that required great expedition, and in that connection he nailed three boards together and cut off a pocket of sand and water that was bothering him, I think in the wing of some dam in the north; that he buried the material, but watched for results, and found it perfectly effective, and studied the matter for a long time, to see if he could improve on it. Q. Did he say why he carefully covered it up, as you have testified? A. He said he covered it so that others would not see it and claim the invention. He considered it a great invention at the time of its first use. * * * Q. You may state whether or not Mr. Wakefield at any time told you why he did not apply for a patent immediately after making that first experiment with sheet piling which he covered up? A. To my questions along the same line as this question put to Mr. Wakefield, he stated several times that he was busy for several years, and also that he wished to study over the matter, and see if there was any method by which the matter could be improved or parties get a patent that would circumvent his ideas."

In his original examination, Morris, who claimed that he had used the triple-lap sheet piling process, as afterwards patented by Wakefield, for the St. Cloud dam in Minnesota, further testified:

"I know that there is a patent called 'Wakefield sheet piling,' said to be invented by Mr. James A. Wakefield. I know this from seeing it illustrated and advertised in engineering journals for the last 12 or 15 years; also from having been called upon by Mr. Wakefield, or some one claiming to be he, in the winter of 1888 and 1889, and notified that I was infringing on his patent rights by using this method of construction in building a cofferdam for a bridge pier at St. Paul. When I explained that I had never heard of the patent before, and that I had used that method of construction a year or more before the date of the patent, Mr. Wakefield did not file any claim for damages or royalty against me, and I never heard anything further from him, or any representative of his."

In a subsequent deposition, Morris, answering cross-interrogatories, testified that he was a member of the firm of contractors which used the Wakefield sheet piling in the construction of government harbor work at Two Rivers, Wis., in 1904; that his firm paid present complainant for the use of said Wakefield sheet piling used in the construction of such work, for 1,844 lineal feet, a royalty of 25 cents per lineal foot; that he made the payments himself. The case shows, irrespective of the letter exhibits, that, closely following the issuance

of the patent to Wakefield, the method of triple sheet piling according to his claim went into general use with government railroad and contracting engineers, with full recognition of the validity of the patent.

Considering the presumption in favor of the patent, the evidence of Nelson, Rosenthal, and Peckham, the fact that Morris, who used triple sheet piling at the St. Cloud dam in 1885, but never made or claimed invention, afterwards became a licensee of the patent and paid royalty, and the recognition of Wakefield as the inventor of the process by the skilled engineers and the public generally, and nothing to the contrary, we feel constrained to hold that no public use antedates the invention of Wakefield. See *Tilghman v. Proctor*, 102 U. S. 707, 713, 26 L. Ed. 279.

For the reasons herein given, the decree appealed from is reversed, and the cause is remanded, with instructions to enter a decree for complainant for an accounting of profits and actual damages.

LANGE v. McGUIN et al.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1910.)

No. 1,601.

1. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—DETERMINING VALIDITY ON DEMURRER.

A patent for a process cannot be declared void on demurrer to a bill for its infringement, where what is described therein as a process is such a matter as under the law might be claimed and protected as a process if the patentee was in fact the first and true deviser thereof and if the devising required the exercise of the inventive faculty, because, in such case, if void, it must be so on account of matters of fact de hors the patent which can only be shown as a defense.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 528; Dec. Dig. § 310.*]

2. PATENTS (§ 310*)—DETERMINING VALIDITY ON DEMURRER.

If a bill for infringement of a patent in and by its own averments states a prima facie case, it cannot be overthrown by the chancellor on demurrer merely on the ground that he judicially knows of facts which would support an answer, but his judicial knowledge must go farther and be so broad and all-embracing that he can properly hold that no facts exist that would tend to controvert the supposed answer and support a replication and the bill.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 528; Dec. Dig. § 310.*]

3. PATENTS (§ 328*)—VALIDITY—PROCESS FOR EXTRACTING SPIRITS FROM USED CASKS.

The Lange patent No. 893,253, for a process for recovering spirits from internally charred liquor casks which have been once used, which consists of charging the casks with a small quantity of water, agitating the same from time to time, and permitting the cask to stand for a sufficient time to secure a mixture of the water and alcohol by diffusion, and then drawing off and distilling the contents, is not void on its face.

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit in equity by Leopold Lange against Michael F. McGuin and others. Decree for defendants, and complainant appeals. Reversed.

Appellant filed his bill in the usual form, alleging infringement of patent No. 893,253, July 14, 1908, to appellant, for a "process for recovering spirits from internally charred liquor casks which have been once used."

The claims, and the explanation thereof given in the specification, read as follows:

"In carrying out my process, I first charge said empty casks with a small quantity of water, preferably from two to five gallons, and close the cask, thereafter agitating the water by movement of the cask, such, for example as rolling, upending or otherwise, so that the contained water will thoroughly saturate the interior of the cask. After this is done, I permit the charged cask to stand for a period of time, depending upon the condition of the cask, at intervals agitating the contents as before. I have secured very good results by letting the charged cask stand a period of time, approximately, 72 hours, agitating the same at intervals as stated. In freshly emptied casks, however, this time may be shortened considerably. After letting the casks stand, as stated, I then draw off the contents and redistill the same in the well-known manner to recover the spirits. This procedure, I usually continue a plurality of times generally running from 3 to 5, according to the condition of the cask, and I find that by this process, substantially all of the contained spirits is recovered, the total amount recovered sometimes equaling nearly a gallon to a cask and seldom running below one-half gallon. * * *

"My understanding of the process is, that the water being of greater specific gravity than the spirits, and aided by a well-known affinity of alcohol for water, seeks out the spirits in the cells of the charred interior and displaces the same, the water filling the cell and the spirits commingling with the contained water in the cask. * * *

"1. The herein described process of recovering the cellularly contained spirits from internally charred liquor casks, comprising, first, charging said casks with a small quantity of water and after closing the casks, agitating the water by movement of the cask, second, letting the charged cask stand a period of time sufficient to secure a mutual solution, by diffusion, of the water and alcohol, at intervals agitating the contents thereof as before, and third, drawing off the contents and redistilling the same to recover the spirits therefrom.

"2. The herein described process of recovering cellularly contained spirits from an internally charred liquor cask, which consists (1) in charging said cask with a comparatively small quantity of water, and, after closing the cask, agitating the contents by the movement of the cask, (2) letting the charred cask stand for a period of time sufficient to secure a complete mutual solution, by diffusion, of the water and alcohol, at intervals agitating the contents, as before, (3) drawing off the contents, (4) repeating the steps a plurality of times, and (5) finally distilling the aggregate quantity of fluid recovered from the several charges.

"3. The herein described process of recovering the cellularly contained spirits from internally charred liquor casks, comprising, first, charging said casks with a comparatively small quantity of water and after closing the cask, agitating the water by movement of the cask, second, letting the charred cask stand a period of time sufficient to secure a mutual solution, by diffusion, of the water and alcohol, at intervals agitating the contents thereof as before, and maintaining an equable temperature of the contents at between 60 to 80 degrees Fahrenheit, and third, drawing off the contents and redistilling the same to recover the spirits therefrom."

A demurrer was sustained on the ground that, by reason of matters appearing on the face of the patent and matters of which the court would take judicial notice, the patent was void.

By leave of court appellant filed an amended bill. The amendments we notice consisted of, first, the file wrapper and contents, which exhibited the examiner's references to the prior art in support of his disallowance, the examiner's further consideration resulting in allowance, and interference proceedings decided in appellant's favor; and, second, prior patents, which showed that for many years preceding 1908 pressure and heat had been employed in

processes "for recovering spirits from internally charred liquor casks which had been once used."

On exceptions these amendments were stricken out. The demurrer was renewed and sustained; and thereupon a decree was entered dismissing the bill for want of equity.

In argument, besides the common household processes of soaking and rinsing to clean utensils, references were made to the following:

Watt's Dictionary of Chemistry: "Alcohol has a very strong affinity for water and mixes with it in all proportions."

Century Dictionary: "Diffusion: The gradual and spontaneous molecular mixing of two fluids which are placed in contact one with the other. It takes place without the application of external force and even when opposed by the action of gravity. It is explained by the motion and mutual attraction of the molecules of the two fluids. Diffusion is most rapid and marked between gases, but it is also an important phenomenon of liquids.

"Diffusion of liquids, or diffusion through each other, occurs when two liquids that are capable of mixing, such as alcohol and water, are placed in contact, even in spite of the action of gravity. It is closely related to the phenomenon of exosmosis and endosmosis, which takes place when liquids are separated by a porous diaphragm."

Webster's Dictionary: "Osmose: The tendency in fluids to mix or become equally diffused, when in contact. It was first observed between fluids of differing densities, and as taking place through a membrane or an intervening porous structure. The more rapid flow from the thinner to the thicker fluid was then called endosmose, and the opposite, slower current exosmose. Both are, however, results of the same force. Osmose may be regarded as a form of molecular attraction, allied to that of adhesion."

Report of United States Commissioners to the Paris Exposition of 1867, published by the United States government in 1869: "Extraction of Sugar by Diffusion: This process has been brought before the public at the Paris Exhibition in the form of a collection of specimens illustrating the entire manipulation as applied to sugar cane, and the results obtained in actual, though not as yet in completely organized, practice. The collection of Mr. Minchin's samples is placed in the Indian department close to the other exhibits of sugar from India, with which it contrasts very remarkably in many respects. We may repeat here wherein Mr. Robert's process consists. The plants are cut up into thin square slices by means of very sharp and clean cutters so as not to destroy the cellular structure of the plant, but only to produce a large surface on which the liquids employed for extraction can act. The slices are filled into large vessels and covered with water at an elevated temperature, the precise temperature used varying with the circumstances of the case. The water in contact with the slices of the beet root or cane extracts from the cells of the plant a certain proportion of sugar by the natural and spontaneous process of endosmosis and exosmosis—a process which is known to take place with all organic membranous and cellular structures, and which consists in an exchange of all liquids placed in contact with the membrane at opposite sides. The contents of an organic cell surrounded by water are in this manner mixed or exchanged with the outer liquid, so that a cell containing a solution of sugar, and surrounded by pure water, will after a certain time contain a weaker saccharine solution, while the water outside will have taken up some of the sugar contained in the cell. If carried to the extreme, the liquids will exchange contents until the same mixture or solution will exist both inside the cell and outside."

Century Dictionary: "Grog, v. t.:—2. To extract grog from, as the wood of an empty cask, by pouring hot water into it. (British excise slang.)" "Grogging, n.: The act of extracting spirits from empty casks with hot water."

John W. Hill, for appellant.

Albert H. Adams, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). The office of a general demurrer to a bill is to test the legal sufficiency of the averments to state a good cause of action in equity. Of course, a demurrer may be addressed to a bill for infringement of a patent as well as to any other bill. And, though the bill be in due form and complete in all its parts, yet, if the exhibited patent be inevitably void either on its face or by reason of matters of universal knowledge, the demurrer should be sustained.

Thus, if a design patent claims a monopoly, not merely of the particular arrangement of parallel lines pictured and described in the specification, but also of every variety of arrangement that can be effected by the use of parallel lines, such a claim is void, because it is beyond the legal scope of a design patent. *N. Y. Belting Co. v. N. J. Rubber Co.*, 137 U. S. 445, 11 Sup. Ct. 193, 34 L. Ed. 741.

Again, if an inventor devises a machine which in a process of manufacture does better, quicker, and cheaper work than had been done in the same process previously carried out by hand, he cannot hold a process patent, for the reason that the advantages of a better product more quickly and cheaply made are the result, not of a new or improved process, but of the superiority of machine work over hand work in the same steps of manufacture. *Risdon Locomotive Works v. Medart*, 158 U. S. 68, 15 Sup. Ct. 745, 39 L. Ed. 899.

So, also, if concededly old elements are brought together, not in the co-operative union of a true combination, but in the forced relationship of a mere aggregation, a patent therefore is void, because a patent cannot lawfully be issued for an aggregation. *Richards v. Chase Elevator Co.*, 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991.

In each of the above-cited instances the patent was void on its face as a matter of law. No amount of testimony could have affected the result, for testimony is powerless to enlarge or diminish the statutory warrant for the issuance of patents. But here the patent is not void on its face as a matter of law. What is described in the patent as a process is such a matter as under the law might be claimed and protected as a process, if the patentee was in fact the first and true deviser thereof, and if the devising required the exercise of the inventive faculty. Therefore, if the patent in suit is void, it must be so on account of matters of fact dehors the patent—defenses of anticipation and want of invention as matters of fact.

Bills in patent causes and demurrers thereto are not so unique that they are exempt from the general principles and rules of equity pleading. And therein it is not the province of a demurrer to speak of matters beyond the bill. Of course, every bill is written against the background of common knowledge; and in that view a demurrer may be said to invite the chancellor to take judicial notice of the background. But if a bill, in and by its own averments, states a *prima facie* case, that case cannot properly be overthrown by the chancellor merely on the ground that he judicially knows of facts that would support an answer. His judicial knowledge must go farther, and be so broad and all-embracing that he can properly hold that no facts exist that would tend to controvert the supposed answer and support a replication and the

bill. This is so because, if such facts exist, the complainant is entitled to a hearing where he can present and argue the facts, and such a hearing cannot be had on demurrer to the bill.¹

Respecting the defense of anticipation, no facts of alleged common knowledge have been brought to our notice which inevitably establish that the patented "process for recovering spirits from internally charred liquor casks which have been once used" had ever been described or employed by any one before appellant. The "grogging," of British excise slang, started with pouring hot water into the cask. Where it continued and ended we do not know. Appellant's very process may have been carried out, but the dictionary does not say so. In the common household processes of soaking and rinsing to remove grease and dirt from vessels, we do not conclusively see an application, as in appellant's process, of the natural principle of diffusion of liquids by molecular attraction operating regardless of gravity.

Respecting the defense of want of invention, we might think that, in view of the common facts above stated, of the well-known law of diffusion of liquids, and of the application of that law to the extraction of sugar from cane as early as 1867, the application in 1908 of the same law to the extraction of liquor from the cells of charred wood was not an inventive act. Grant that that is a strong and persuasive showing; but it is a showing of the kind that ordinarily must be made by evidence in support of an answer—that must always be so made except in the extremely rare case where judicial knowledge extends to the point of knowing that no competent and relevant evidence in support of the patent's presumptive validity can be produced. The Patent Office is conducted by experts who have access there to almost endless words and things respecting the prior stages in all the arts. Suppose the records of prior efforts in the art of extracting liquor from the charred interior of casks should disclose that, although the process of extracting sugar from cane by endosmosis and exosmosis was known in 1867, yet in this art such a process had never been suggested or used by any one before appellant, but that radically different, slower, less efficient, more expensive processes had been used, while there had been a succession of unsuccessful efforts to find a quicker, cheaper, more efficient process—would not such evidence be competent in rebuttal of defendants' case? Clearly, on issues joined, it would be error to reject it. How much of such evidence was before the Patent Office experts when they made their finding of fact respecting invention we do not know, for it is not a matter of common knowledge, but of special information. That there was any such evidence we do not properly know, for, of course, the Circuit Court was right in striking out the file wrapper and contents and the prior patents as amendments

¹ See *American Fibre-Chamois Co. v. Buckskin Fibre Co.*, 72 Fed. 508, 18 C. C. A. 662; *Caldwell v. Powell*, 73 Fed. 488, 19 C. C. A. 592; *Higgin Mfg. Co. v. Scherer*, 100 Fed. 459, 40 C. C. A. 491; *Beer v. Walbridge*, 100 Fed. 465, 40 C. C. A. 496; *Milner Seating Co. v. Yesbera*, 111 Fed. 386, 49 C. C. A. 397; *Chinnock v. Patterson Tel. Co.*, 112 Fed. 531, 50 C. C. A. 384; *General Electric Co. v. Campbell* (C. C.) 137 Fed. 600; *Southern Plow Co. v. Atlanta Agric. Works* (C. C.) 165 Fed. 214; *Neidich v. Edwards* (C. C.) 169 Fed. 424; *West-rumite Co. v. Com'rs Lincoln Park* (C. C. A.) 174 Fed. 144.

to the bill (it still being improper to plead evidence); but it is enough to require the overruling of a demurrer for want of invention in fact that we are unable to find conclusive ground for saying in advance that no competent evidence can be produced to aid the patent's presumptive validity.

The decree is reversed, with the direction to overrule the demurrer.

WESTERN ELECTRIC CO. et al. v. FOWLER.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1910.)

No. 1,593.

1. PATENTS (§ 112*)—SUIT TO OBTAIN PATENT—MEASURE OF PROOF.

In a suit under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), by an unsuccessful applicant for a patent to establish his right, where in interference proceedings before the Patent Office between complainant and defendant all of the examiners who passed upon the matter, the Commissioner, and the Court of Appeals for the District of Columbia concurred in adjudging priority of invention to defendant, who was awarded a patent, such judgments can only be overcome by clear and convincing proof, which strongly outweighs that of the other side in the interference proceedings.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 162-165; Dec. Dig. § 112.*]

2. PATENTS (§ 112*)—SUIT TO OBTAIN PATENT—MEASURE OF PROOF.

Evidence considered, and *held* insufficient to overcome the judgments of the Patent Office and the Court of Appeals for the District of Columbia in interference proceedings, on which the McBerty patent, No. 817,867, for apparatus for telephone switchboards, was granted.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 162-165; Dec. Dig. § 112.*]

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by Samuel B. Fowler against Western Electric Company and Frank R. McBerty. Decree for complainant, and defendants appeal. Reversed.

The bill in the Court below was to secure a patent for an invention relating to a telephone exchange system, notwithstanding the adverse action of the Patent Office and the Court of Appeals for the District of Columbia in interference proceedings. The bill was under section 4915 of the Revised Statutes (U. S. Comp. St. 1901, p. 3392), resulting in a decree finding that appellee was entitled to receive letters patent of the United States upon his claims set forth in his application, serial number 116,086, filed July 18th, 1902, and that claims Nos. 7, 8, 9, 10 and 11, contained in patent No. 817,867, issued to appellant Western Electric Company, as assignee of Frank R. McBerty, April 17th, 1906, and any other claims in said patent substantially like these, are null and void and of no avail. The facts are stated in the opinion.

George P. Barton, De Witt C. Tanner, and George E. Folk, for appellants.

Charles A. Brown and Lynn A. Williams, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GROSSCUP, Circuit Judge, delivered the opinion.

Section 4915, Revised Statutes of the United States, reads as follows:

"Sec. 4915. Whenever a patent on application is refused, either by the Commissioner of Patents or by the supreme court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

In the interference proceedings, the respective rights of McBerty and Fowler to the issuance of a patent, were examined in succession by the Examiner of Interferences, the Board of Examiners in Chief, the Commissioner of Patents, and the Court of Appeals for the District of Columbia; and in each tribunal judgment of priority of invention was in favor of McBerty. To overcome these judgments, the proof must be clear and convincing—by evidence which shall strongly outweigh that of the respondent below, as put by Judge Putnam—*Brooks v. Sacks*, 81 Fed. 403, 26 C. C. A. 456. *Morgan v. Daniels*, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657; *United States v. Bell Telephone Company*, 167 U. S. 224, 17 Sup. Ct. 809, 42 L. Ed. 144. Have appellees made out a case that is clear and convincing? Have they submitted proof in favor of their claim of priority that strongly outweighs the proofs on the other side?

Upon parties coming into interference in the Patent Office, there is forwarded to each notice thereof, together with a designation of the time within which preliminary statements shall be filed. The preliminary statement must be under oath and must show the following facts:

"(1) The date of original conception of the invention set forth in the declaration of interference.

"(2) The date upon which a drawing of the invention was made.

"(3) The date upon which a model of the invention was made.

"(4) The date upon which the invention was first disclosed to others.

"(5) The date of the reduction to practice of the invention.

"(6) A statement showing the extent of use of the invention."

The following caution is contained in the rule:

"The preliminary statements should be carefully prepared, as the parties will be strictly held in their proofs to the dates set up therein.

"If a party prove any date earlier than alleged in his preliminary statement, such proof will be held to establish the date alleged and none other.

"The statement must be sealed up before filing (to be opened only by the Examiner of Interferences; see Rule 111), and the name of the party filing it, the title of the case, and the subject of the invention indicated on the envelope. The envelope should contain nothing but this statement."

Rule 111 is as follows:

"111. The preliminary statements shall not be opened to the inspection of the opposing parties until each one shall have been filed, or the time for such filing, with any extension thereof, shall have expired, and not then unless they have been examined by the proper officer and found to be satisfactory.

"Any party in default in filing his preliminary statement shall not have access to the preliminary statement or statements of his opponent or opponents until he has either filed his statement or waived his right thereto, and agreed to stand upon his record date."

Manifestly, the purpose of these rules was to draw from each applicant both an honest and a carefully ascertained statement of facts bearing upon his claim of priority—a statement unaffected by any knowledge that he otherwise might have of his rival's claim. And presumptively, a statement thus submitted, embodies not only the applicant's knowledge most favorable to himself, but a knowledge that has been carefully scrutinized and guarded by his legal advisers, especially when, as in this case, his advisers are among the most competent attorneys practicing the patent law.

Pursuant to this practice, appellee submitted a statement to the effect that he conceived the invention involved in the interference and made drawings thereof in the early part of December, 1900; disclosed the invention to others about the middle of March, 1901; made no model of the invention; but reduced the invention to practice in the early part of June, 1901. The invention has gone into extensive use.

McBerty stated that he conceived the invention July 16, 1896, and on that day made a drawing thereof; disclosed this invention to others September 9th, 1896; and made a model of the invention on or about May 29, 1901, reducing the invention to practice on that day. On the face of these statements, priority of invention was with McBerty. Thereupon, Fowler made his first effort to mend his hold. It took the form of a motion to amend his statement, whereby reduction to practice would be carried back to the middle of March, 1901. This motion was denied, but testimony was admitted to support the proposed amendment—the testimony of Fowler, Doolittle, Hulburd, Denig and Marack, the last four all connected with the Sterling Electric Company—the President of the Company, one Cook, not having been called as a witness; upon consideration whereof (the testimony of the witnesses being fully discussed in the opinion), judgment of priority went to McBerty. In due course, appeals were taken to the Examiner in Chief and to the Commissioner, on each of which appeals the testimony was discussed and considered, the preceding judgment being, in each case, affirmed. Thereupon, the matter was appealed to the Court of Appeals for the District of Columbia, upon the same evidence, and with the same result.

This suit is appellee's second effort to mend his hold. It is based, so far as evidence goes, upon an amplification of the testimony of the witnesses heard before, with the addition thereto of the testimony of other witnesses. To put our finger upon the concrete matter upon which the testimony of these witnesses differs here from what it was before, and to clear up which the testimony of additional witnesses is offered here, requires that the nature of the invention be brought into

view, and the particular respects in which it differed from the similar preceding or contemporaneous inventions in the same field.

The state of the art was before this Court in *Western Electric Company v. Galesburg Union Telephone Company and Howard Knowles*, 144 Fed. 684, 75 C. C. A. 500. The patent involved in that suit was No. 669,708, issued March 12, 1901, to Charles E. Scribner, and the alleged infringing device was what was known as the Galesburg System, a system that embodied the invention here involved. In the opinion in that case, the essential differences between the patent of March 12, 1901, including the preceding art, and the system subsequently embodied in the Galesburg system, were carefully pointed out. "Theoretically," says the opinion, respecting the patent of March 12, 1901, and the preceding art, "an equal division of current cuts such current into halves. But practically, the current being divided, the resistance is so diminished that each line of the divided circuit gets considerably more than one-half of the current massed. The effect of this is, that there is not such a wide difference between the luminosity of the lamp fed by the current massed and the current divided, as the inventor perhaps anticipated; so that, accessory to making the signals practical, these three things at least were added: The lamp was covered with a lense, not solely for radiating the light, but to partially smother it; the uniformity of the lamps had to be maintained—that is, the lamps not only had to be uniform when put in, but replaced the moment that, through use, a difference in uniformity developed; and the batteries had to be kept at a given voltage—a variation of voltage or diminution of the flow, destroying the fine balance upon which alone the luminosity and non-luminosity of the lamps are maintained. That these defects were actual is shown by the fact that the patent in suit (the patent of March 12, 1901) has not gone into general use."

On the contrary, the Galesburg system (the system embodying the invention here involved) the opinion points out "employs the device of a signaling lamp associated with a supervisory lamp, each being on a circuit alone at times, and both upon a circuit together at times, with the result, that when each is on the circuit alone it is a signal, but when both are on the circuit at once, neither is a signal; together with the resistance coils, spring jacks, connecting plugs and the like, that mechanically bring this about."

In connection with diagrams published in the opinion, the exact operation of the Galesburg system is then pointed out, followed by a statement of the differences between it and the preceding art, including the Scribner patent of March 12, 1901, as follows:

"The patent in suit [the Scribner patent of March 12, 1901] employs a single predetermined pitch of current, as it reaches the lamps through resistance, m, and would operate under no other conditions; the appellees' system carries a current varying according to the lamps to be lighted, and would operate under no other condition. The patent in suit provides for extinguishment by an approximately equal division of the current, and looks in pursuit of this purpose to no other provision; the appellees' system provides for extinguishment of the line lamp by practically short circuiting, and the supervisory lamp by a high candle power, and would operate in no other way. The patent in suit involves the necessity of lamps of identical character—lamps so delicately

matched that in dividing the current, the flow through each lamp will be equal—and the patent in suit would operate under no other conditions; the appellees' system employs lamps so differing from each other in character, that any close balancing of the lamps is a matter that is not involved. In the patent in suit, the current must be pitched to almost an exact predetermined point—involving battery action constantly up to a certain point, and a resistance that is constant; the operation of appellees' system cannot be said to hinge in the least, upon pitch of current."

These differences we held to be fundamental. "They mark," we said, "two substantially differing lines of thought. And they have resulted in two distinct signaling systems, in the one of which the defects in the other have been escaped chiefly by avoiding all in it that was new, while readapting certain things in it that were old."

Now, the concrete question of fact in the Patent Office and in the Court of Appeals of the District of Columbia in the interference proceedings—the crux of the whole inquiry, so far as it was an inquiry of fact—was whether, in the disclosures said to have been made by Fowler in March, 1901, and said to have been contemplated in the so-called Houston system, Fowler was disclosing, as an already worked out invention, what afterward went into the Galesburg system, or whether he was disclosing only the prior art above mentioned, including the Scribner patent of March 12, 1901, with the improvements thereon, toward which he was, at that time, still groping in the dark. This question of fact was thus a question of identity—the exact identification of a concept among other concepts closely resembling it. And the way to establish such identity, was to find and set forth the ear marks that distinguished this conception, if it then existed, from the existent resembling conceptions; the chief of those ear marks being the differing voltage between the signal and the supervisory lamps in the invention here involved.

Now, there is no explanation in the record of why, knowing that he was in interference with a rival, Fowler forgot, when he made up his preliminary statement, that his patent was reduced to practice before June, 1901. He was advised then by the lawyers who are representing him now. Why was a fact, so important in an interference contest, so completely overlooked? Nor is there any explanation of why the witnesses, called in the Patent Office and before the Court of Appeals to prove disclosures in March and April, 1901, were not brought down to a satisfactory identification of the invention said to have been disclosed; for it is admitted, that in their testimony in the Patent Office and before the Court of Appeals of the District of Columbia, the identity of the invention was not, with sufficient certainty, described. But why not? The identity of the invention, alleged to have been then disclosed, was the turning point there as here—why could not the witnesses then, as now, be brought to speak with certainty upon the turning point? The issue then was as sharply drawn as the issue is now; counsel then are counsel now; and a successful outcome then was important enough to justify an expensive contest—why was the identity of the invention, the turning point in the controversy, slurred over? And how comes it that the testimony of these witnesses, at this later date, comes out with so much greater definiteness than it came out at the earlier date, when, under ordinary circumstances, the event, being

much more recent, ought to have been fresher in the witnesses' minds?

These questions are not answered in the record before us, nor are they made less pertinent by the character of the new testimony before us. The new testimony, so far as it is that of the recollection of the new witnesses, simply shows what is also new in the recollection of the old witnesses, to-wit, an attempt now to ear mark, after the lapse of five years, as belonging to the disclosures of March and April, what a few months later became established facts; testimony thus resting wholly in memory, and brought forth under circumstances showing that after repeated failures to meet the issue at this point, the strain of thus meeting it fell imperatively upon the preparation for the later hearings. Testimony, thus circumstanced, is not convincing. Besides, the testimony of these witnesses does not, even now, satisfactorily show that they comprehend the departure of the invention here involved from the prior art. And Cook, president of the Sterling Electric Company, as late as August 28, 1901, stated:

"We have not as yet got one of these boards in operation and until that time arrives, it must be considered as in the nature of an experiment."

Nor are there any contemporaneous facts or circumstances that support this new testimony. The only ones proffered are (1) an original order book in triplicate (the portion submitted being a carbon copy). The other pages of this book are gone, and the material matter is on, not a carbon copy, but a typewritten strip—the only typewritten matter in the whole book, save one, relating also to the Houston plant. Now, that is not a contemporaneous fact or circumstance; because the party to the suit (and this book has been in the possession of one of the appellees) may have himself, in view of creating this evidence, subsequently manufactured or attached it. The other (2) is an order book also, said to be a contemporaneous confirmatory circumstance, because of an addenda to an order for line signals for the Houston plant, wherein it is stated that "some additional lamps for the cord circuit will be required, but voltage is not yet determined"; showing, it is said, that there was to have been a different voltage in the supervisory from the signal lamps. But this by no means follows. The reference may have been to a number of other things besides the signal lamps. Indeed, outside the memory testimony, nothing is before us tending to establish appellee's contention.

Upon the whole case, therefore, the testimony submitted to us fails to convince us (and that must be our state of mind upon the evidence before us, before this decree can be affirmed) that there was any disclosures by Fowler prior to May 29, 1901, the date of McBerty's reduction to practice. Nor is there anything in the record showing that the time elapsing between May 29, 1901, and the application of McBerty for a patent, January 24th, 1902, is an unreasonable delay. Indeed, in the absence of anything especially spurring an inventor on, delays of that length are not unusual; and we cannot impose upon McBerty the duty of responding to a spur, of which, at that time, he had no knowledge.

The decree of the Circuit Court is reversed and the case remanded, with instructions to dismiss the bill for want of equity.

UNDERWOOD TYPEWRITER CO. v. TYPEWRITER INSPECTION CO.

SAME v. E. C. STEARNS & CO.

(Circuit Court, S. D. New York. March 7, 1910.)

1. PATENTS (§ 240*)—INFRINGEMENT—IMPROVERS—"INFRINGER."

An improver on a patented device, although his improvement may be patentable of itself, is an "infringer," if he uses the specific device of the prior patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 379; Dec. Dig. § 240.*

For other definitions, see Words and Phrases, vol. 4, p. 3594.]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—TYPEWRITERS.

The Wagner patents, No. 559,345 and No. 633,672, for typewriting machines, both relating to mechanism whereby the operator can set the machine so as to write part way only, or wholly, across the page, and on arriving at the stopping point the keys are automatically locked, and the latter also covering a device by which the operator by pressing a button can unlock the keys, if desired, for the purpose of adding one or more letters to the line, were not anticipated, and disclose invention, but are improvement patents merely, and are specific and of narrow scope. In view of such facts and of the limitations of the claims by the language employed, imposed by the Patent Office and acquiesced in to avoid references in the prior art, neither patent is infringed by the mechanism of the Schneelock patent, No. 852,400, which attains the same results but by different means.

In Equity. Suits by the Underwood Typewriter Company against the Typewriter Inspection Company and E. C. Stearns & Co., respectively. On final hearing. Decrees for defendants.

Briesen & Knauth (Arthur v. Briesen and Eugene Eble, of counsel), for complainant.

Alfred Wilkinson and Ernest W. Marshall, for defendants.

RAY, District Judge. The senior patent, No. 559,345, was issued April 28, 1896, on application filed October 4, 1894, to Franz X. Wagner, for typewriting machine. Claims 17, 18, 19, and 20 are in issue here, and read as follows:

"17. A paper-carriage and an actuating-key provided with a catch or shoulder located at the forward or power receiving portion of the key, combined with a forwardly-oscillating bar adapted to engage or lock said catch, a forwardly-oscillating actuating-arm for said bar normally free from said bar, and an actuating-shoulder for said arm, said carriage being provided with a lip adapted to engage said actuating-shoulder to actuate said arm, substantially as described.

"18. A paper-carriage and an actuating-key, combined with a bar adapted to engage or lock the key, a swinging arm having its free end placed in proximity to and normally out of contact with the bar, a bell-hammer placed in advance of the bar in the path of the free end of the arm, and a lip on the carriage for actuating the arm so as to make its free end successively strike the bell-hammer and the bar, substantially as described.

"19. A paper-carriage and an actuating-key, combined with a bar adapted to engage or lock the key, an actuating-arm for the bar, a rock-shaft for said arm, a shoulder on said rock-shaft, said carriage being provided with a lip adapted to engage the shoulder for actuating the shaft, and a bell-hammer provided with an inclined movable projection along which the arm rides in its

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

forward stroke to actuate the bell-hammer, said arm on its return stroke being made to pass under or lift the projection independently of the bell-hammer, substantially as described.

"20. A paper-carriage and an actuating-key, combined with a bar adapted to engage or lock the key, an actuating-arm for the bar, a rock-shaft for said arm, a shoulder on said rock-shaft, a lip on the carriage for engaging the shoulder, and a bell-hammer actuated by said arm, said shoulder being step-shaped so as to be intermittently actuated by the carriage-lip for separately actuating the bell-hammer and the locking-bar, substantially as described."

The junior patent, No. 633,672, was issued September 26, 1899, on application filed July 7, 1897, for typewriting machine, to John T. Underwood, assignee of Wagner. Claims 25, 27, and 28 are in issue, and read as follows:

"25. In a typewriter, the combination with a movable carriage, of a series of type-key levers each of which has a locking-catch thereon, a vibrating line-stop adapted to be vibrated by said carriage, a universal locking-bar adapted to engage the catches on the type-key levers to maintain the same against movement, intermediate mechanism between the vibrating line-stop and the universal locking-bar for automatically operating the locking-bar when the line-stop is vibrated and hand operated means for releasing the locking-bar from engagement with the type-key levers."

"27. In a typewriter, the combination with a movable carriage, of a series of type-key levers each of which has a locking-catch thereon, an adjustable vibrating line-stop adapted to be vibrated by said carriage, a spring-pressed universal locking-bar normally maintained out of the path of the locking-catches on the type-key levers, intermediate mechanism between the vibrating line-stop and the universal bar and a releasing-button connected with said universal bar to throw the same out of engagement after it has been automatically thrown into engagement by the line-stop.

"28. In a typewriter, the combination with a movable carriage, of a series of type-key levers each of which has a locking-catch thereon, a vibrating line-stop adapted to be vibrated by said carriage, bell-sounding mechanism adapted to be operated by said stop, a spring-pressed universal locking-bar normally maintained out of the path of the locking-catches on the type-key levers, intermediate mechanism between the vibrating line-stop and the universal bar to throw the same out of engagement after it has been automatically thrown into engagement by the line-stop without effecting an operation of the bell-sounding mechanism."

Claim 17 of the senior patent calls for: (1) A paper-carriage; (2) an actuating-key provided with a catch or shoulder located at the forward or power receiving portion of the key; (3) a forwardly oscillating bar adapted to engage or lock said catch; (4) a forwardly oscillating actuating-arm for said bar normally free from said bar; (5) an actuating shoulder for said arm; and (6) a lip on the carriage, adapted to engage said actuating shoulder to actuate said arm. The paper-carriage carries a lip which at a certain station of the carriage engages with the actuating-shoulder to move the same, this in turn causes an oscillation of the arm which moves a lock-bar into the catches in the power receiving portion of the keys, and this movement of the bar into the catches locks the keys. Returning the carriage causes a reverse of these movements, and the keys are unlocked. The actuating-arm is normally free from the locking-bar so that the locking-bar is not thrown into locking position the moment the actuating-arm begins to move, but at a later time, and this enables the actuating-arm to be an instrument in ringing the bell to warn the operator that the locking is about to take place and enable him to govern himself accordingly.

As I read claim 18, it is substantially the same, except that it adds the bell feature. Claim 19 has an arrangement or expedient whereby the end of the arm coacts with the bell-hammer so that the latter is raised and actuated when the arm is advancing but is not when the arm is returned. Claim 20 has a step-shaped shoulder so that it is intermittently actuated by the carriage lip for separately actuating the bell-hammer and the locking-bar. The lip on the carriage rides along the lower step of the shoulder and causes the actuating-arm to operate the bell-hammer and ring the bell, and then rides another step, causing the actuating-arm to move the locking-bar and lock the keys. The return is made without ringing the bell.

Claim 25, of the junior patent, has: (1) A movable carriage. (2) A series of type-key levers each having a locking-catch. (3) There is a universal locking-bar adapted to engage the catches on the levers and maintain the type levers against movement. (4) A vibrating line-stop adapted to be vibrated by the carriage. It comprises the lip on the carriage, the movable shoulder, the rock-bar carrying a vertically swinging arm, and other details. (5) Intermediate mechanism between the vibrating line-stop and the universal locking-bar for automatically operating the locking-bar when the line-stop is vibrated. (6) Hand operated means for releasing the locking-bar from engagement with the type-key levers.

The universal locking-bar is not to be confounded with the "universal bar" of a typewriter. The former has the hooks or catches, and its function is to lock the type keys and prevent further depression thereof and movement of the carriage, while the main office or function of the "universal bar" is to cause the escapement mechanism which advances the carriage to operate and advance the carriage one space each time a key is depressed.

I will not describe the elements of each claim, as I think it unnecessary. The mechanism of the claims of both patents is blended in the Underwood machine with some changes of detail, etc., which do not change results or the mode of operation. The claims cover an operative structure in a typewriter, or an operative added structure, whereby the operator can set the machine so as to write part way only, or wholly, across the page, and on arriving at the stopping point the keys (being then locked) are no longer depressed by striking the keys, and there is not a succession of blows struck by the type on the paper at a single point, and there is no strain on the machine. By pressing a key or knob, the keys are unlocked, so that, if it is desirable to add one, two, or three letters to the last word written, it may easily and speedily be done, and on releasing the key or knob the locking-bar resumes its locked position and retains it until the carriage is returned to its first position. Utility and novelty cannot successfully be denied. A bell is rung to warn the operator that he is about to reach the locking point, as has been stated.

I cannot doubt the validity of these patents. Consulting the prior art I do not find anticipation. Attempts had been made in this direction, but I find no proof that they had been successful. The defendants claim that their construction differs so essentially from the devices of the patents in suit, and that such patents, in view of the prior art

and the file wrapper of the senior patent, are so limited, that infringement is not established.

A patent may be limited to the specific means described. A wide or a narrow range of equivalents is allowable, depending on the case. Infringement is established when substantially the same result is accomplished by substantially the same means operating in substantially the same way.

As to the senior patent in suit, No. 559,345, the defendant says:

"As the 'actuating-arm' or the 'swinging-arm' of this patent is an element of all of the four claims at issue, and as defendant's machine has not got that element of the claims, nor any actuating-arm in the sense of this patent, we will base our defense squarely on that fact," etc.

One element of claim 17 is, as seen:

"A forwardly-oscillating actuating-arm for said bar normally free from said bar, and an actuating-shoulder for said arm, said carriage being provided with a lip adapted to engage said actuating-shoulder to actuate said arm, substantially as described."

The forwardly oscillating bar is the universal locking-bar before referred to.

The defendant claims that the Patent Office refused to allow the claim as originally presented, and that prior to and as a condition of allowance four limitations were imposed, viz: (1) The catch or shoulder located at the forward or power receiving portion of the key; (2) the fact that the locking-bar is forwardly oscillating; (3) the fact that the actuating-arm for said bar is forwardly oscillating; and (4) is normally free from said bar.

Claim 33 of the application as filed became claim 17, and read as follows:

"A paper-carriage and an actuating-key combined with a bar adapted to engage or lock the key, an actuating-arm for the bar, a rock-shaft for said arm, and a shoulder on said rock-shaft, said carriage being provided with a lip adapted to engage the shoulder for actuating the shaft, substantially as described."

In this the catch for the key was not mentioned, nor was it specified that the locking-bar oscillated forwardly to engage the keys, nor that the arm moved forwardly to push the locking-bar forward into the locking position. Neither was it mentioned that the arm was normally free from the bar. This original claim 33 was rejected on Clark, No. 500,798, of July 4, 1893, and Cress, No. 510,409, of December 12, 1893, for typewriting machines. It is self-evident that the changes made limit the claims; but I do not think the limitations go to the extent of confining the complainant to the precise and specific devices shown or to devices, arms, etc., which move precisely as indicated, so that others may use substantially the same elements, operating under and in accordance with the same laws to produce the same results, but avoid infringement if they change the form or direction of movement. However, there is no element of a pioneer invention found in the patents in suit. These patents are improvements merely in this particular branch or part of the typewriter mechanism.

In the senior patent I do not find any means provided for unlocking

the keys, when once locked, so as to permit the adding of one or two or more letters and permit the completion of a word or of a syllable at the end of a line. Means for doing this were provided in the junior patent. However, the operator could do this with the mechanism of the senior patent but only by a dilatory process, viz., by sliding or moving the cam on the rock-shaft, then adding the letters, and then re-setting the cam. I am unable to agree with the defendant's contention that it could not be done at all, and that the only remedy, in case of an indivisible word partly printed at the end of the line, was to erase it and commence the word on the new line. This, however, was a serious defect in the utility of the device of the senior patent, but did not make it inoperative.

Claims 19 and 20 of the senior patent bring in the rock-shaft, which, when rocked, moves the arm which moves the locking-bar. Rocking it in one direction causes the downwardly extending arm attached thereto to move, swing, or push forward towards the operator and push the locking-bar into locking position, while moving it in the opposite direction causes the downwardly extending arm to recede, and this allows the locking-bar to fall back out of locking position; that is, to become disengaged from the keys. A mere change or mere changes in mechanical construction which would lock the keys by a backward movement of the locking-bar and unlock by a forward movement, the downwardly extending arm being so arranged with the rock-shaft as to move correspondingly, would not, in my judgment, avoid infringement. All the elements of the combination would remain and, aside from mere direction of movement, would operate in substantially the same way to produce the same result.

If it be true that the defendant's mechanism or device, alleged to infringe, does not have the actuating-arm, arm for moving the locking-bar into locking position, or an allowable equivalent, I do not see how infringement is made out. The junior patent is a substantial duplication of the senior patent with the bell feature or element, old in the art, added. We will, therefore, ascertain, if possible, what elements are contained or found in the defendant Stearns' machine, so far as the features in question here are concerned.

It is said by the defendant Stearns & Co. that it is manufacturing, and by defendant Typewriter Inspection Company that it is selling, a machine made under and in accordance with the Schneelock patent, No. 852,400, dated April 30, 1907, and issued on application filed May 9, 1902, divided and this application filed October 9, 1902. This Schneelock patent says:

"My invention relates to the line-locking mechanism of a typewriting machine, by which the carriage may be automatically locked at any desired point, the operator is previously warned thereof, and the keys are also locked when the carriage is stopped."

The front bar of the carriage frame is provided with a groove and a rack and a top piece with a corresponding groove into which are fitted two sliding pieces. To one of these sliding pieces is hung a pawl (No. 1), and it is also provided with a spring dog held in engagement with the rack by its spring and is provided with a thumb piece for releasing it therefrom, so that said sliding piece may be locked to the

rack at any desired point. The stroke of this swinging pawl is limited by stop pins. The other sliding piece mentioned is provided with a similar spring pawl (No. 2) and a spring and thumb piece, whereby it may be locked in any desired position, and it carries also a swinging stop limited in its stroke by means of a pin engaging in its slotted end, whereby a slight movement is obtained preventing a sudden jar or rebounding when it engages with an abutment, 88, on a lever yet to be mentioned. This stop engages with said abutment and limits the movement of the carriage when it is moved back to the left. This lever is journaled to the frame and provided with two cam surfaces, or steps, and the abutment before mentioned. The first pawl (No. 1), as the carriage moves, engages with the first or lower cam face, or step, attached to the lever, and presses this end of the lever downwardly, lifting the other end and also an arm or rod attached thereto, called, in the patent, "connecting bar 89," and this operates to ring the warning bell. This pawl, as the carriage advances, next travels over the straight face or next step of the cam surface and engages with the next step, called "cam 87," and still further depresses the first end of the lever and correspondingly elevates the other end and consequently still further lifts the said "connecting bar 89." The carriage is stopped at this point as pawl (No. 1) engages with abutment 88 before mentioned, and operates on certain mechanism now to be mentioned. If defendant's machine has the "actuating-arm," or arm for moving the locking-bar into locking position, it is this "connecting bar 89" of the Schneelock patent.

The lever before mentioned, which carries the cam and abutment before mentioned on its inner end and is connected to the connecting bar 89, at its outer end, is connected by such bar to one end of the bell lever, near the bottom part of the machine, which bell lever is journaled to the frame of the machine by a screw, and carrying on its lower arm a pivoted dog so adjusted that as the said connecting arm is raised, as before mentioned, it will engage with a pin on the outer end of the bell-hammer lever, journaled, and rock it against the force of a spring, and then release it, and so ring a bell. This is done when pawl (No. 1) engages with the first step of the cam surface attached to the inner end of lever 80, before mentioned.

Coming now to the means for and mode of locking and unlocking the operating keys of the machine, we find in the specifications of the Schneelock patent the following:

"To the lower arm of bell lever, 92, is pivotally connected sliding lever, 63, so that when pawl, 78, engages with cam surface, 87, connecting rod, 89, is further raised, and pin, 62, on sliding lever, 63, is moved forward to engage with the tail, 64, pivotally supported on extension 65 at 66, and there held in position by spring, 71, limited in its movement by lug, 91, which is integral with the tail, 64. This extension is secured on rod, 68, journaled in the frame, and carrying the locking levers, 67, supporting locking rod, 70, for engagement with key-lever catches, 69, and held back by a weaker spring, 102."

We have here abundant room for the play of the imagination; but I assume that when pawl (No. 1) 78 engages with abutment 88, being on cam 87, and the outer end of lever 80 is raised so as to lift connecting bar 89 and the pin on the sliding lever is moved forward so as to

engage the tail pivotally supported on the extension and there held in position by a spring limited in its movements by a lug which is integral with the tail, and which extension is secured on a rod journaled in the frame and extending from one side of the machine to the other, and which rod carries a locking lever at each end which support a locking rod, parallel with the rod carrying the locking levers, for engagement with the catches on the key levers, and which is held back by a weaker spring, that the said rod journaled in the frame, and which carries the locking levers which support the locking rod, moves or turns backward and carries the locking rod into engagement with the hooks or catches on the key levers and so locks the keys, or that the locking levers turn on the rod. In this structure the lever, 80, journaled to the frame, carries the cam having steps, onto which the apparatus affixed to the carriage rides, thereby depressing one end of the lever and elevating the other end and drawing up a rod or arm, whereby the locking levers of the key-locking apparatus are moved so as to throw the upper or locking rod backward into the hooks and lock the keys. In the complainant's structure, there is a rod journaled in the frame which carries the cam having steps onto which the apparatus affixed to the carriage rides, whereby the cam is pressed downward, and, as the arm extending therefrom or connected thereto cannot be depressed (that is, pushed downward as it is fixed to the rod first mentioned and turns thereon) it (said arm) oscillates at its lower end (that is, moves back and forth), and, when it comes in contact therewith, pushes the locking bar or rod into locking position. The lower end of this arm is free so as to enable it to actuate the bell before actuating the locking-bar. If not attached to the rod carrying the cam, this arm would be pushed downward, and by attaching it to the lower rod of the locking frame of complainant's structure, by means of a lever, it could, on the cam structure being depressed, actuate such lever and throw the locking-bar into locking position. I fail to find any difference in principle between the two structures. There is considerable difference in the mechanism, but this is owing largely, if not entirely, to the change of location of parts and the necessary modifications and changes in mechanical structure. It should be mentioned that the junior patent of the complainant, No. 633,672, calls for "a spring-pressed universal locking-bar, normally maintained out of the path of the locking-catches," and that this feature is found in the defendant's machine.

We are brought back to the question of the limitation of complainant's claims. Is complainant limited to a locking-bar which is moved forward into locking position and to a forwardly actuating-arm for said bar which is normally free from the locking-bar?

I have examined the Williams patent, No. 16,488, of 1892, which shows that the idea of locking the keys, providing a bell, and arranging the mechanism so as to permit the addition of one or more letters at the end of a line, was old. We have also the Cress, the Clark, the Clinton and MacNamara, and Spiro patents. These, or most of them, were cited as references when the original Wagner claims were submitted and rejected. Wagner made the claims in issue, and the wording must be regarded as his. Claim 18 calls for a "swinging arm having its free end placed in proximity to and normally out of contact

with the bar" (locking-bar), and the "free end" of this "swinging arm" actuated by the lip on the carriage is to successively strike the bell-hammer placed in advance of the bar "in the path of the free end of the arm," and then the bar. It seems to me that these are words of limitation and restriction which cannot be disregarded. Their force and effect must have been appreciated by the applicants, and certainly were by the Patent Office, for it was after their insertion that the claims were allowed. They cannot be regarded as merely descriptive. The Wagners entered the field of improvement, as did Schneelock.

I think it must be considered that each improved on the prior art, and that defendants followed one line of advance in the art, while the complainant followed another. A lock rod or bar—it is immaterial what name we apply—engaging all the keys and locking them was used in 1892, as we have seen. It was actuated and put in locking position by engagement with the carriage. The bell was also an old feature, and, aside from the combination, was not patentable. The Merritt patent, applied for May 29, 1894, has a locking-bar, a bell, and hooks on the keys. It also provides for a release to permit the addition of letters at the end of a line. The Wagner junior patent was not the first to provide means for unlocking the keys so as to permit the addition of letters at the end of the line. The device of the junior patent in this respect, while, I think, patentable as an element of a combination, is clearly different from that of the defendant's device. In the one case the locking-bar is pushed back out of engagement with the hooks by main strength and held there by the hand while the additional characters are printed, while in defendant's a releasing-button operates to remove from action that part of the mechanism which presses the locking-bar into locked position so that it no longer engages to keep the locking-bar, in locking position, and, by means of a spring, the locking-bar is at once restored, on pushing the button, to its normal or unlocked position. Defendant improves, in this respect, on both the complainant's machine and the prior art. In actual construction of this feature, the complainant does not follow the Wagner patent. This fact does not show that the claim is void, but it throws light on the question of infringement. I am not able to say that the rock-shaft with its shoulder and arm extending downwardly to engage the bar adapted to engage the hooks and lock the keys, said downwardly extending and forwardly moving arm being free at its lower end so as to first ring the bell and then actuate the locking-bar as it moves forward under pressure on the shoulder of the rock-shaft, is the well-known equivalent of the above-described mechanism of the defendant's device or mechanism performing the same function, or functions; that is, the ringing of the bell and the locking of the keys. As stated, Wagner, or the Wagners, were not pioneers, but mere improvers, and improvers with several prior patents ahead of them designed to accomplish the same purpose. I cannot say that such prior patents were inoperative or void. They were far from perfect and quite inferior to the devices now in use to accomplish the results then aimed at and desirable to be attained. Self-imposed limitations cannot be disregarded. I find nothing in the specifications of the senior patent that in any way suggests a different structure. They say:

"The carriage, 21, is provided, as shown, with an index, 99, traveling over scale-plate, 100, and said carriage also has a lip, 101 (Fig. 1) which, when the carriage nears the end of its forward travel, will first press on shoulder, E, and then on the somewhat higher shoulder, E', said shoulders being formed by a step-shaped piece or lug secured to rock-shaft, 102, journaled in frame, 1. To this rock-shaft, 102, is fixed an arm, 103 (Fig. 7), normally held or swung back by spring, 104; but when the carriage has passed far enough forward for its lip, 101, to press on shoulder, E, the arm, 103, has been swung far enough forward for its free end or the pin, 105, at said end to have passed over the forward end of bell-hammer lever, 106, thus first raising said hammer and then allowing it to drop for sounding bell, 107, whereby the approach of the end of a line is announced, as known. Passing to the limit of its forward travel, the carriage will bring its lip, 101, over the higher shoulder, E', so as to rock the shaft, 102, for swinging arm, 103, farther forward into contact with lip, 108, projecting from the locking bar or rod, 109, supported on swinging arms, 110, carried by shaft, 111, supported by frame, 1. The bar, 109, being thus swung forward by the extreme forward swing of arm, 103, said bar, 109, will catch or come to rest under the hooks, 112, projecting from the type-keys 2, thereby locking said type-keys against further action until by the setting back of the carriage the shoulders, E E', with rock-shaft, 102, and arm, 103, are free to be swung back by spring, 104."

I think the claims in issue call for a forwardly swinging arm having one end free to engage and carry forward and hold the locking bar or rod under the hooks, and consequently in locking position. This is not the mode of operation of the defendant's device. I do not think the court is at liberty to rewrite the claims. We may construe the language used, but it is not admissible to so change or broaden a narrow claim written by one improver in a somewhat crowded art as to cover the claims of another patent granted another improver in the same field. Every valid patent is entitled to protection against infringement, but infringement must be proved. It is well settled that one may have an improvement on a patented device, which improvement is of itself patentable; but that such improver is not entitled to use the patented device with the improvement added. If the improver uses the specific device of the prior patent, he is an infringer. *Thomson-Houston El. Co. v. Ohio Brass Co.* (C. C.) 130 Fed. 549; *Perkins Elec. Switch Co. v. Buchanan* (C. C.) 129 Fed. 135.

So the splitting up or duplication of parts, or additions, do not avoid infringement when the patented device is used. So the fact that defendant constructs its machine in strict accordance with the Schneelock patent is no defense if infringement actually appears. It is presumed that there is a patentable difference, but it is for the court to say. Here the claims of the patents in suit are specific and narrow. The claims of the Schneelock patent are also specific and narrow. Both aimed at the same results, and both attained the results aimed at, but by different means—different combinations of mechanical appliances operating in different ways. As before said, the general principles of operation are the same. The carriage is made to ride a cam on a rock-shaft in the one case and on a cam-surface lever in the other. The object is to throw a locking rod into hooks on the keys and prevent their depression by the operator. In the one case the locking rod is pushed forward by the free end of a forwardly oscillating bar, moved, by the rocking of the rock-shaft, into engagement with such hooks. In the other case the one end of the cam-surface lever is depressed by the carriage,

thereby elevating the other end and lifting a bar, neither end of which is free, and this operates a bell-crank lever and a sliding bar to which it is attached, and thereby throws the locking rod backward into engagement with the hooks on the keys. The mechanism for unlocking operates on the same general principle in both cases, but the means employed for all this as well as for sounding the bell are very different.

In view of the prior art and the limitation of the claims by the language employed, and which limitations were imposed by the Patent Office and acquiesced in for the purpose of obtaining the patents in suit, I am constrained to hold that infringement is not established.

There will be a decree dismissing the bill, with costs.

KIMBALL et al. v. WATERS METAL CONST. CO. et al.

(Circuit Court, D. Minnesota, Fourth Division. March 8, 1910.)

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—HEATING APPARATUS.

The Smith patent, No. 665,351, for a heating apparatus having an auxiliary flue for ventilating purposes, claims 5 and 6, construed, and *held* not anticipated, valid, and infringed.

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—HEATING APPARATUS.

The Smith patent, No. 868,299, for a heating and ventilating system, construed, and *held* not anticipated, valid, and infringed by one device made and sold by defendants, but not infringed by others.

In Equity. Suit by Clement F. Kimball, trustee, C. H. Smith, Alta Smith, and Harry L. Smith, against the Waters Metal Construction Company, a firm, and James L. Waterbury. On final hearing. Decree for complainants.

Clement F. Kimball and Williamson & Merchant, for complainants.

Paul & Paul, for defendants.

WILLARD, District Judge. The First Patent to Smith, No. 665,351, January 1, 1901. Claim 5 of this patent is as follows:

"In a heating apparatus, the combination with a heater, of a main flue, an auxiliary flue having a capacity substantially that of the main flue, and having a portion extending transverse to and at an angle into the main flue and a smoke-flue entering the transverse portion of the auxiliary flue, substantially as described."

Construing this claim by itself, without reference either to the specification or the drawings, it seems clear that the language thereof does not require a structure with two elbows or bends, and that an auxiliary flue leading vertically from the floor and turning at a right angle into the chimney would be described by this claim.

McInerney, the complainants' expert, testified as follows:

"XQ. Now, you are very certain that the expression in claim 5, 'having a portion extending transverse to and at an angle into the main flue,' was not intended to limit the structure to the transverse part 7, and the part 8, at an angle from that, going into the main flue? You are clear as to that, are you? A. That seems perfectly clear to me." Complainants' Record, vol. 1. p. 136.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Carter, the defendants' expert, speaking of figure 2, of the diagrams, said, on page 116, Defendants' Record:

"The 'portion extending transverse to and at an angle into the main flue' is this portion 7, already just mentioned which leads rearwardly into the chimney at 8, as I have stated."

Although this witness repeatedly testified that claims 5 and 6 required the horizontal part 7, yet in the extract above quoted it will be seen that he defines the clause "portion extending transverse to and at an angle into the main flue" in such a way as to require only one bend.

The claims must, however, of course, be construed with reference to the specification and to the drawings. As to the drawings, while it is true that figure 1 shows two bends, it is also true that figure 2 shows only one.

Defendants rely greatly on the language of the specification to so limit these claims as to require a double elbow. They refer particularly to that part of the specification commencing with line 41, on page 1, which reads as follows:

"I have discovered that by employing an auxiliary flue of a capacity substantially that of the chimney of main flue and that by so positioning and arranging a portion of the auxiliary flue that either a horizontal current, or a current not directed upward, of air will pass through the flue and be deflected into the chimney. * * *"

And to that part commencing with line 14, on page 2, which is as follows:

"And I have found that the best results are obtained when that portion of the air-flue into which the smoke-flue discharges is arranged in either a substantially horizontal position or a position not extending upward toward the exit, and my experience has shown that a flue extending upward with a single bend into the chimney and into which the smoke-flue enters will not accomplish the same results, although I do not wish to be understood as limiting my invention to the particular construction of the elbow portion."

While it is true that the inventor, in the first part of the specification quoted, refers to "a horizontal current, or a current not directed upward," yet his attention was not called to the specific construction of the elbows until he reached the second quotation on page 2. There he took up the precise question which is now under discussion in this suit, namely, as to whether the structure should have one elbow or two.

The defendants in their brief say, on page 9, referring to this quotation:

"We understand this to mean that the patentee here refers to a structure with a single bend, such as is shown on the blueprint opposite page 6 of this brief."

Carter makes substantially the same statement on page 217 of defendants' record.

It will be observed that, in this part of the specification which the witness Carter calls a "disclaimer," the patentee does not say that the construction with one elbow will not accomplish any result. What he intended to say, and did in fact say, was that with the horizontal sec-

tion 7 better results would be accomplished. This simply means that the construction with section 7 was the preferred construction. That other constructions were not excluded is conclusively shown by the last part of the quotation, in which he says:

"I do not wish to be understood as limiting my invention to the particular construction of the elbow portion."

He says, also, on page 1, line 38, of the specification:

"I desire it understood that the invention is in no sense limited to the construction shown" in the accompanying drawings.

In order, however, to make the above reservation available, it was not only necessary that he should state it in the specification, but also that he should repeat it in the claims, and this is what he did when claims 5 and 6 were drafted. That the purpose of claims 5 and 6 was to preserve this reservation is made more apparent when the six other claims of the patent are considered; for it is said in every one of them that the horizontal portion 7 is an essential element. If the horizontal section 7 is an essential element in claims 5 and 6, it would be difficult to distinguish them from some of the other claims.

The defendants, however, say that when the claims are considered in connection with the file wrapper their construction of them must prevail.

Carter, in his testimony, on page 119, Defendants' Record, makes a quotation from the file wrapper, as follows:

"For instance, in the argument submitted under date of June 6, 1900, with reference to the then existing claim 1 of the application, I find this expression: 'Claim 1 is not met in patents cited, for they do not show means for supplying air to the main flue laterally across the exit of the smoke-flue and into the main flue in line with the smoke-flue.' 'Laterally' does not mean upwardly. No reference shows the cold air passing laterally across the exit of the smoke-flue. In Sears' the air is admitted directly to the main flue or chimney below the smoke-flue, and the current does not cross, but passes upwardly with the current from the smoke-flue. In the Fox device, the cold air is admitted directly to the smoke-pipe."

The examiner, however, was then considering, not those claims which afterwards became claims 5 and 6, but what was then claim 1, which reads, in part, as follows:

"And means for supplying air to the main flue laterally across the exit of the smoke-flue."

When the file wrapper is further considered, indications are found therein that the patentee did not then consider part 7 as an essential feature of his invention, for he says in his original specification, "for safety, to prevent the falling of sparks to the floor, I preferably provide the horizontal section 7 in the cold air pipe, in which section all sparks, etc., which would otherwise drop down the pipe, lodge temporarily." That he did not consider that the flow of the cold air current should be necessarily a lateral one is indicated in the communication of July 7, 1897, wherein he said:

"In his device he claims that the effect of bringing a large current of cold air in right angle conjunction with the current of hot air from the stove. * * *

It is true that the examiner in his communication of June 25, 1900, uses the word "across"; but the use of that word does not necessarily indicate that, if the volume of cold air had a right angle conjunction with the hot air from the smoke-flue, it would not meet the requirement of the examiner; and the fact that he afterwards allowed claims 5 and 6, which, as has been seen, when properly construed do not require a horizontal section, shows that a lateral action was not in his opinion essential.

Complainants also proved that they had in fact constructed devices with a single elbow, similar to the blueprint device in defendants' brief, with the exception that the ventilating flue extended upward instead of downward. One of such devices was put in the house of the witness Everington (Complainants' Record, vol. 1, pp. 331-339) in 1904 (Complainants' Record, vol. 1, p. 45).

Carter says (Defendants' Record, p. 155) that this device which he saw installed was similar to Exhibit 25, which is a printed circular used by complainants upon the back of their stationery, which circular has a cut showing a single elbow with the ventilating flue extending upwards.

Claim 6 provides for the same construction of the auxiliary flue as claim 5. McInerney, vol. 1, Complainants' Record, p. 136; Carter, Defendants' Record, p. 177.

Claims 5 and 6, therefore, must be construed as covering a structure with a single elbow, similar to the one upon the blueprint in defendants' brief.

Claims 5 and 6, being construed as above indicated, are they anticipated by any of the prior patents?

Before discussing this question, it is important to determine what the precise construction of the complainants' device is, under this interpretation of claims 5 and 6.

The suggestion by defendants that the smoke-pipe 6 may project into the ventilating flue is not supported by the evidence. The word "leading" in claim 6 does not indicate a projection into the auxiliary flue, any more than the same word used in the same claim indicates a projection of the auxiliary flue into the main flue or chimney. Nor does the word "entering" used in the fifth claim require the actual projection of the smoke-pipe into the part 7. This seems to be the opinion of the defendants' expert Carter, who, in discussing the difference between the Wickersham patent and the complainants' patent, says:

"Assuming therefore such a construction, in which the horizontal portion 7 is eliminated, and the dependent portion of the flue extends directly downward from the angle or elbow 8, it will be noted that this construction is precisely what the Wickersham patent shows, excepting in two matters of detail. The first of these matters of detail is that the Wickersham patent shows the flue I as extending a few inches into the foul air flue G where it enters the latter." Defendants' Record, p. 123.

On page 238 he points out again this difference between the Wickersham device and complainants' structure, stating in substance that

in the former the smoke-flue projects into the air-flue, while in the latter it does not.

It is conceded that no projection of the smoke-flue is shown in complainants' diagrams. Complainants' expert testified that the smoke-pipe was intended to stop at the line of the foul air flue. Complainants' Record, vol. 2, p. 204.

Nor is the defendants' suggestion that the smoke-pipe may be as large as or larger than the auxiliary flue sustained by the evidence. Both drawings show it to be considerably smaller, and it would seem to be absurd to make the smoke-pipe leading from the combustion chamber as large as the outside chimney. See, upon this point, the testimony of complainants' expert (volume 2, pp. 272, 273).

It is very evident that the patentee understood that his drawings called for a smoke-pipe considerably smaller than the foul air flue. This theory is supported by a reference to the file wrapper. In the patentee's communication of July 7, 1897, he says that the large cold air pipe is always arranged to form a connection with the small hot air pipe, and in the communication of July 28, 1899, he says that in the applicant's apparatus the air-pipe is of larger capacity than the smoke-pipe, and the smoke-pipe discharges into the air-pipe. In several of the claims which were presented from time to time this feature of the apparatus is pointed out.

We therefore have in the complainants' structure a smoke-pipe smaller than the air-flue, joining it, but not projecting into it, producing practically, as claimed by the complainants' expert, an enlarged chamber at the point of junction of the two flues.

The defendants have presented a great many prior patents; but no one of them shows a structure where the smoke-flue stops at the entrance of the air-flue, and where at the junction of these flues an enlarged chamber is produced by reason of the smoke-flue being smaller than the air-flue. It is admitted by the defendants' expert Carter that in the Wickersham patent there is a pipe projecting into the air-flue. Defendants' Record, pp. 123, 238.

It is apparently admitted also that in the Kosinski patent the small flue thus projects in all of the figures. Defendants' Record, pp. 164, 245. That the smoke-pipe in Fig. 4 in this patent is continued on beyond what is shown in the drawing is stated by both experts. Carter, Defendants' Record, p. 246; McInerney, Complainants' Record, vol. 2, p. 191. See, also, pp. 176, 190, 198.

While in the Maynard patent there is no projection of the smoke-flue, yet it appears from the drawing that the smoke-flue is larger than the cold air flue, and the patent itself states that:

"The cold air flue is graduated in size or made tapering in form, the smaller end entering the smoke-pipe, and the larger connecting with the room register. This is an important feature of the invention."

This device shows therefore no enlarged chamber such as is contemplated in the complainants' device.

The difference in the result produced by a structure with a projecting small flue and by a structure without one is that where the smoke-flue projects the currents of air from that flue flow in a parallel direction with the currents from the cold air flue; while, where

there is no projection, the two currents are mixed, and, as is claimed by complainants' expert, no stratification of air currents results. That this difference exists is admitted by defendants' expert on page 165 of Defendants' Record, where he says: "* * *" Also on page 166 he says: "* * *" And again on page 167 he says: "* * *"

It is therefore proven that there is a difference between the complainants' patent and the prior devices, and it was precisely on account of this difference that the patent in this suit was granted.

The defendants' expert, however, states that no different result is produced by complainants' structure from that produced by the other structures. He says repeatedly that the complainants' device amounts to nothing more than an ordinary check draft. Defendants' Record, pp. 120, 164.

On the other hand, complainants' expert states that there is a great difference between the results produced by the different devices, and that this difference is due entirely to the fact that Smith brings his cold air current at a right angle conjunction with the hot air from the stove in an enlarged chamber, thus producing a mixing of the two currents into one volume of practically equal temperature. He says further (Complainants' Record, vol. 2, p. 198): "* * *" And again he says on page 203: "* * * *" And again on page 207: "* * * *" See, also, pp. 265, 270, 273.

If the case were to be decided upon the testimony of these two experts alone, disagreeing as they do, preference should be given to McInerney. It appears that Carter had had no practical experience in the matter of heating or ventilating apparatus. Defendants' Record, p. 199. On the other hand, complainants' expert had been engaged in the heating and ventilating business to quite a considerable extent. Complainants' Record, vol. 2, p. 152.

It is proper, moreover, to refer in this connection to the commercial success of complainants' device. The patentee Smith has apparently devoted his time to the business of manufacturing and selling his device since 1900. Complainants' Record, p. 67. The Manuel-Smith Heating Company has been engaged in the business exclusively since May, 1905, and since that time it has sold 2,518 systems, and of these 1,426 were sold between May 1, 1907, and May 1, 1908. Complainants' Record, vol. 1, p. 246. Over 95 per cent. of these have gone into school buildings. Complainants' Record, vol. 1, p. 262.

The State Superintendent of Public Instruction of Minnesota accepted the Smith device as a compliance with the state regulations for the ventilation of schools. Complainants' Record, vol. 1, p. 166. He testified that it was the most efficient gravity system that he had observed. Page 170. He had no doubt that it was in use to a much greater extent in small schoolhouses in Minnesota than any other system. Page 174.

The witness Sander, county superintendent of schools for Nicollet county, testified that there were 27 Smith plants installed in his county (page 183), and that they gave general satisfaction (page 191).

Complainants' witness Race had been a county superintendent of schools, and had examined heating and ventilating devices from the Gulf of Mexico north, and east to the Atlantic Ocean. Complain-

ants' Record, vol. 2, p. 111. He testified that the Smith apparatus was the best of the gravity systems. Page 112. When he was superintendent of schools of Redwood county, Minn., there were 46 of the Smith systems in his county (page 212), and he had examined and tested 20 or 30 of those (page 213) and found them very efficient (page 214). He stated that 26 structures made after his own ideas and installed in schools he had removed apparently for the purpose of installing the Smith system. Complainants' Record, vol. 2, p. 115.

The superintendent of schools of Lac Qui Parle county, Minn., testified that there were 35 Smith plants installed in his county, and that they worked splendidly. Complainants' Record, vol. 1, p. 302.

Miss Burce, superintendent of schools, Eau Claire county, Wis., said there were 17 of the Smith plants in use in her county, and that they worked satisfactorily. Complainants' Record, vol. 1, pp. 389, 390.

There is no evidence in the case to show that any one of the devices referred to in the prior patents has ever been a commercial success, and there is no evidence to show that any one of them was ever used. The fact that the defendants are not using any of these devices, which according to their expert produce the same or even better results than the Smith device, seems to indicate that the expert is possibly mistaken in his view. As was said in the case of *Griswold v. Harker*, 62 Fed. 393, 10 C. C. A. 439, by the Circuit Court of Appeals of this circuit:

"It is not impossible that the reason why the appellees are not using the old devices they plead is that the improvements described in this patent have made them useless and unmerchable. If this is not so, they can abandon the improvements of *Selden* and *Griswold*, and go back to the devices they plead."

The conclusion therefore is that claims 5 and 6 are valid, and are not anticipated by any prior patent.

The remaining question is: Have the defendants infringed? As has been said, the patentee Smith has devoted himself to this business for seven years, and the Manuel-Smith Company has been engaged therein since 1905. They had practically no competition until 1907, when they came in competition with the defendants. Complainants' Record, pp. 57, 257. They had done a great deal of work in introducing the system into the schools of Minnesota and Wisconsin, and had spent \$20,000 in advertising. Complainants' Record, p. 277.

The defendants went into partnership some time in October or November, 1906. Defendants' Record, p. 26. They commenced to manufacture in August, 1907. Defendants' Record, pp. 24, 30. Prior to that time they had no factory of their own. Defendants' Record, p. 28. Waterbury, prior to going into partnership with the other defendant, Waterman, had seen, as he admitted, one or two Smith devices, and had tested one of them in Wisconsin in 1906.

Exhibit 12 produced by the complainants was sold by the defendants to a school district at Alden in Wisconsin in 1907, and is claimed by the complainants to be identical with the structures sold by them, omitting the horizontal portion 7.

The grounds for defendants' claim of noninfringement are two. They say that there is no evidence to show the size of the chimney or main flue in the schoolhouse at Alden, and, consequently, it does not appear that the main flue and the auxiliary flue have substantially the same capacity as required by claim 5. Even if this were admitted, the defendants could not escape claim 6, for that makes no such requirements in regard to the capacity of the two flues. There was some evidence relating to the size of the flues used in Wisconsin, and as to the size that could be supported upon a bracket. (Defendants' Record, pp. 12, 13), and also some evidence as to the size of the flues required by the complainants (Complainants' Record, vol. 1, p. 194). There was also evidence that the defendants have been, and now are, selling devices similar to the blueprint in defendants' exhibit, and that they claim the right so to do.

Under the circumstances, it must be held that there is sufficient evidence of infringement, so far as this point is concerned.

The second ground relied upon by the defendants is to my mind much more serious.

The complainants' structure provides a damper at the lower end of the auxiliary flue. The defendants have moved this damper up to the junction of the vertical section of the auxiliary flue with its horizontal section, and have hinged it upon one side. It can be closed so as to entirely shut off the air from the auxiliary or cold air flue, but it cannot be closed so as to entirely shut off the smoke and hot air gases from the stove. When it is open to its full capacity, quite a portion of such gases pass through the horizontal section of the cold air flue. The defendants have a patent for this damper, No. 878,474, issued February 4, 1908.

The essence of the complainants' patent, as has been seen, is that the cold air currents and the hot air currents meet in the enlarged chamber, where they are thoroughly mixed. It differs from the former structures in that it does not admit of any stratification of the air and heat columns. The defendants claim that their damper produces the same result as is produced in the old devices by projecting the smoke-flue into the air chamber, and, consequently, that they make no use of the essential feature of the complainants' patent. See Carter's testimony, pp. 154, 165, 173, 240, 250, 265, 266, 268. Complainants' expert testified in reference to this matter on pages 222, 232, 281, vol. 2, Complainants' Record.

There seems to be considerable force in the defendants' claim, but it is apparent that the mixing chamber referred to in McInerney's testimony is not entirely destroyed by the action of the damper. The defendants make use of the enlarged part of the complainants' device, and into this enlarged part a portion of the air from the flue enters without being at all deflected. In fact, in the defendants' patent it is stated that the currents of air and the products of combustion mingle at the conjunction of the smoke-pipe with the foul air flue, and in claim 3 it is said that a portion of the air brought up by said foul air flue is returned to the heater, while the remaining portion is mingled with the product of combustion.

The defendants should not be allowed to evade a claim of infringement by saying that, while they make use of the idea of the complainants in part, they do not use it to its fullest extent.

So far as this patent is concerned, a decree must be entered in favor of the complainant for an injunction and an accounting.

I have reached this result without taking into account the tests made by the complainants of the six devices referred to in the prior patents, and it is not necessary to consider whether or not those tests were so made as to be of any value in determining the questions here at issue. While the complainants' expert testifies that his opinion has been confirmed by the result of those tests, yet I do not understand him to say that it is founded upon the tests. He had practically stated his opinion in his former examination, which was given before the tests were made.

The Second Patent to Smith, No. 868,299, October 15, 1907. The idea of deflecting a current of cold air upwards by an inclination of the intake pipe is disclosed in the patent to Skilton, No. 460,684. See Fig. 7, where it is used in connection with a stove. The idea of deflecting it by a damper is shown in the patent to Scott, No. 585,708. The precise construction, however, shown by the patent in suit, namely, a cold air box closed at the bottom, combined with a jacket which is open at both ends, does not appear in any prior patent.

The law presumes that this patent is valid, and I am inclined to and do hold that it is so with reference to the precise construction therein, and that there is no anticipation by any prior patent.

Concerning the infringement, it appears that the defendant had been manufacturing systems with the complainants' device attached thereto prior to October 15, 1907, the date on which the patent was issued. Prior to that date they had sold one of their systems with this device thereon to a school district in the town of Alden, Wis., and this system was shipped, or a part of it, on the very day on which the patent was granted. The evidence of infringement does not, however, rest upon this one sale and shipment. The patent was issued on Tuesday, and the defendants did not hear of it until the following Sunday. They testified that they had on hand ready for shipment 15 or 20 systems in which this device appeared. Waterbury, Defendants' Record, p. 36. They were then shipping about 20 systems a day. Waterbury, p. 43. Waterman testified as to shipments after the patent was issued and before they learned of it, as follows (page 94): "I assume there may have been a very few."

The evidence is sufficient to show that the defendants, after the patent was granted, shipped and disposed of quite a number of systems containing the identical device described therein. Infringement is therefore made out.

The evidence shows that, after the defendants were informed of this patent to the complainants, they ceased selling and shipping systems containing their device, and substituted one of their own, for which they afterwards secured a patent dated November 10, 1908, and numbered 903,644.

It is not claimed by the complainants that the construction shown in Fig. 4 of this patent is an infringement of their patent. Complainants' Record, Smith, p. 6. They do claim, however, that the one in the other figures is an infringement.

The claims in the complainants' patent relied upon by them are 3, 4, 5, and 6, and each of them requires (1) a cold air intake, and (2) that the deflecting means be arranged within an air heating chamber. Complainants' Record, vol. 1, p. 145, McInerney.

These two elements, namely, the cold air intake and the heating chamber, are separate and distinct. Whether the device in defendants' patent and used by them infringes depends upon whether its damper or deflecting means is in the air heating chamber or in the intake pipe. If it is not in the air heating chamber, there is, in my opinion, no infringement. The evidence shows that no part of the deflecting means projects into the air heating chamber. Complainants' Record, vol. 2, p. 234, McInerney. It is very evident from an inspection of the drawings that this is true.

The theory of complainants (McInerney, vol. 1, p. 145; vol. 2, pp. 234, 235) that the intake pipe is an enlargement of the heating chamber cannot be sustained. McInerney apparently goes even further, and says that a mere damper in an ordinary cold air flue hinged at the bottom, and so arranged as not to project into the air heating chamber and to deflect the air upwards, would be an infringement. Volume 1, pp. 145, 146. The defendants do not infringe this second patent of the complainants by the device described in their patent No. 903,644, and now used by them.

Let a decree be entered for the complainants, with costs, that both of the patents described in the complaint are valid; that each one of them has been infringed by the defendants; ordering that an injunction issue perpetually restraining the defendants from using the device shown in the evidence and marked Exhibit 12 and directing that the case be referred to a master for an accounting. Let the decree also provide that the defendants do not infringe the second patent to Smith, No. 868,299, by the use of either of the devices described in their patent No. 903,644. If the parties cannot agree upon the terms of the decree, it will be settled by the court on notice.

VICTOR TALKING MACH. CO. et al. v. DUPLEX PHONOGRAPH CO.

(Circuit Court, W. D. Michigan, S. D. May 27, 1909.)

1. PATENTS (§ 58*)—ANTICIPATION—BURDEN OF PROOF.

On an issue as to anticipation, the burden of proof rests on the party pleading such defense, and, where the identity of methods and results in the two devices is doubtful, the doubt must be resolved in favor of the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 75; Dec. Dig. § 58.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PATENTS (§ 87*)—ABANDONMENT—EVIDENCE.

Questions relating to the actual or constructive abandonment of an invention are questions of fact; and every reasonable doubt thereon should be resolved in favor of the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 112; Dec. Dig. § 87.*]

3. PATENTS (§ 82*)—PATENTABILITY—ABANDONMENT OF INVENTION.

Pending an application for a patent, the specification of which is broad enough to warrant the making of certain claims which are not made, the applicant, instead of inserting such claims by amendment, may at his election, make them the subject of a new application, which in such case may fairly be considered a continuation of the first, and their omission therefrom will not operate as an abandonment.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 105-107; Dec. Dig. § 82.*]

4. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—TALKING MACHINES.

The Berliner patent, No. 534,543, for improvements in talking machines, claims 5 and 35, *held* valid against the claim that they were anticipated by the Edison British patent, No. 1,644, of 1878, or by any disclosures made by Bell and Tainter in connection with their application for patent No. 341,214, and the claims of prior public use and abandonment, and that claim 5 is for a function of an apparatus merely. Such claims are entitled to a construction covering the reproduction of sound by means of a vibrating stylus engaged with a laterally undulating groove of the sound record and free to be vibrated, and propelled thereby without other mechanical assistance. As so construed, such claims *held* infringed.

5. PATENTS (§ 176*)—"PROPELLED."

In a claim for a patent of an apparatus for reproducing sound consisting of a stylus shaped for engagement with a record and free to be vibrated and propelled by said record, the term "propelled" is the equivalent of "progressively fed."

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 176.*]

In Equity. Suit by the Victor Talking Machine Company and the United States Gramophone Company against the Duplex Phonograph Company. On final hearing. Decree for complainants.

Horace Pettit, for complainants.

Samuel Owen Edmonds and Dallas Boudeman, for defendant.

KNAPPEN, District Judge. The suit is upon patent No. 534,543, issued February 19, 1895, to Emil Berliner, complainants' assignor, for improvements in machines for recording and reproducing sound, called in the patent "gramophones." Claims 5 (relating to method) and 35 (relating to apparatus for reproducing sound) are alone involved here. They are as follows:

"(5) The method of reproducing sounds from a record of the same which consists in vibrating a stylus and propelling the same along the record by and in accordance with the said record, substantially as described."

"(35) In a sound reproducing apparatus consisting of a traveling tablet having a sound record formed thereon and a reproducing stylus shaped for engagement with said record and free to be vibrated and propelled by the same, substantially as described."

The defense made here is that the patent is void, first, because of anticipation (a) by Edison, (b) by Bell & Tainter; second, because of public use more than two years prior to the application for the patent;

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

third, because the claims in question cover, as alleged, nothing more than the functions of Berliner's apparatus; fourth, because of the expiration on February 11, 1899, of a Canadian patent applied for by Berliner in the name of Suess, who assigned the patent to him; and, fifth, because of the expiration of certain British, French, and German patents issued to Berliner.

The claims in suit have already been several times before the courts. In what is known as the "original case," decided in 1905 by the Circuit Court for the Southern District of New York, it was held that the Berliner patent in suit was not anticipated; that it discloses patentable invention; and that it is not invalidated by prior public use of the invention or by abandonment. *Victor Talking Machine Co. v. American Graphophone Co.* (C. C.) 140 Fed. 860. This decision of the Circuit Court was in 1906 affirmed by the Circuit Court of Appeals for the Second Circuit. 145 Fed. 350, 76 C. C. A. 180. In *Victor Talking Machine Co. v. Talk-O-Phone Co.* (C. C.) 146 Fed. 534, and in the case of *Same Complainant v. Leeds & Catlin* (C. C.) 150 Fed. 147, on motions for preliminary injunction, the patent was again held valid as against several defenses, some of which were then newly asserted, including the defense that the patent had expired with certain foreign patents. This decision was affirmed by the Court of Appeals. 148 Fed. 1022, 79 C. C. A. 536. In *Leeds & Catlin Co. v. Victor Talking Machine Co.*, 154 Fed. 58, 83 C. C. A. 170, an order of the Circuit Court adjudging the complainant guilty of contempt in violating the injunction issued under the decision last referred to was affirmed by the Circuit Court of Appeals. The two decisions of the Circuit Court of Appeals last referred to were affirmed by the Supreme Court of the United States April 19, 1909 (cases Nos. 80 and 81). 213 U. S. 301, 29 Sup. Ct. 495, 53 L. Ed. 805; *Id.*, 213 U. S. 325, 29 Sup. Ct. 503, 53 L. Ed. 816. Several other cases have been heard on motions for preliminary injunctions, based upon the decree in the original case sustaining the patent.

The defendant's contention that the patent in suit has expired by reason of the claimed expiration of the Suess Canadian patent, as well as the proposition that claim 35 is invalid, as covering merely a mechanical function, were expressly decided by the Supreme Court adversely to defendant's contention in the *Leeds & Catlin Case*, No. 80. A denial of the claim that the patent in suit expired with the other foreign patents results from that decision. The remaining defenses now urged have either expressly or by apparently necessary implication been rejected by the Circuit Court and the Circuit Court of Appeals in one or more of the cases above referred to. Those decisions, while not binding upon me, are entitled to high consideration. An examination of the record and briefs fails to bear out the proposition that the "original case" was presented upon an insufficient record and without strenuous contest.

As to the defense of anticipation: As is well known, Edison was the pioneer inventor in the art of recording and reproducing sound. His records were made by vertical vibrations, producing in a pliable material indentations (as distinguished from a groove) corresponding to the sound waves which caused the vibrations. He was followed by Bell &

Tainter, whose record consisted of a groove of even width, but of varying depth; the elevations and depressions at the bottom of the groove corresponding to the sound waves which produced them. In the reproduction of sound thus recorded both Edison and Bell & Tainter used positive mechanical means for carrying the reproducing stylus across the record (or for conveying the record past the stylus), and thus keeping the stylus in engagement with the record. In Berliner's patent the sound vibrations produce a laterally undulating spiral line or groove of even depth, the inequalities caused by and representing the sound vibrations being upon the sides of the groove, the record tablet being composed of a hard, resisting material, and taking the form of a disk. In reproducing sounds, the patent in suit dispenses with mechanical means for conveying the stylus across the record, and by the mere engagement of the reproducing stylus with the record groove, the former being by the latter vibrated laterally by its undulations, is by the record groove itself guided and propelled in accordance therewith. This constitutes the "automatic" or "feed from the record" feature, which the claims under consideration are designed to protect.

The claimed anticipation by Edison is based upon this situation: The specifications of British patent No. 1,644, issued to Edison April 24, 1878, show a figure 34, representing a disk centered upon a horizontal shaft, the disk having on each of its opposite faces, and in apparent engagement therewith, a reproducing apparatus, the separate carrying arms of the reproducers connecting with opposite sides of a block, centered on a horizontal shaft below and at right angles with the shaft carrying the record disk. The only reference in the specifications to this figure 34 is in these words:

"Figure 34 is a perspective view showing a double phonet (reproducer), there being a spiral line of indentations on each side of the revolving disk, d, one phonet coming into action as the other finishes; in this case the spirals should be in opposite directions, so that the disk continuing to revolve in the same direction moves one phonet from the center outwards, and then the other phonet is connected and moves back towards the center; this may be used as a toy."

It is this figure 34 and the description referred to which are relied upon as showing that Edison was familiar with the idea of propulsion of the reproducing stylus by and in accordance with the record. None of the claims of the patent suggest such automatic propulsion. It is by no means clear that figure 34 discloses, or is intended to disclose, a device by which the stylus and sound box shall be propelled and guided across the face of the record by the record itself, and without the use of independent mechanical means. Nor is it by any means clear that the figure discloses or is intended to disclose a record groove with undulating sides by which the stylus, through its impingement upon the sides of the groove, is vibrated and propelled. On the contrary, the record is expressly referred to as a "spiral line of indentations." The disclosure of a record automatically vibrating and propelling the stylus is to say the least vague. This same figure 34 has been so characterized by Judge Shipman in *American Graphophone Co. v. Leeds* (C. C.) 87 Fed. 873, 877. While this figure 34 was not discussed in the opinion of the court or in briefs of counsel in the "original case," the answer

set up the Edison patent in question as an anticipation; and in the Talk-O-Phone Case figure 34 was discussed in briefs of counsel. The burden is upon the defendant to show anticipation. It is not claimed that any practical use has been made of the feed from the record idea until by Berliner and his assignee, whose efforts have materially advanced the art of reproducing sound and made the feed from the record machine a great commercial success. In such circumstances, the identity of methods and results being, to say the least, doubtful, the doubt must be solved in favor of complainants. Walker on Patents (4th Ed.) § 76; Simonds Rolling Machine Co. v. Hathorn Mfg. Co., 93 Fed. 958, 36 C. C. A. 24. The conclusion reached is that the patent claims in suit were not anticipated by Edison.

In support of the alleged anticipation by Bell & Tainter, reliance is had, first, upon a paper (known as the "Volta laboratory paper") deposited by them in the Smithsonian Institute in October, 1881, nearly four years before the making of their application for United States patent No. 341,214, which was applied for June 27, 1885, and issued May 4, 1886; second, upon certain language in the specifications of that patent; and, third, the testimony of Dr. Bell taken during the litigation over the patent in suit. Neither the Volta laboratory paper nor Dr. Bell's testimony were before the court in the "original case." In the Volta laboratory paper, the invention of cutting and engraving the original record, as distinguished from indenting, was recorded; and it is also stated that the record groove might be either of the vertically undulating variety or the "wavy zigzag line of uniform depth" "in a plane parallel to the surface of the prepared substance." One of the aims of declarants was said to be "to devise a means of reproducing the sounds without touching the record, so as to avoid deterioration"; and it was stated that publication was withheld in the hope that the efforts of the inventors might result in a "more simple form of apparatus adapted for popular use."

The language of the specifications referred to is this:

"The invention consists, fourthly, in loosely mounting the reproducing style so that it can readily be guided by the record. Preferably a reproducing style, or rather what may be called the 'head' of the reproducing instrument, is mounted on a universal joint, and the style is pressed against the record by the yielding pressure of a spring or weight."

There is no suggestion in either the Volta laboratory paper or in the patent specifications or claims of propelling the stylus by means of the record. In Dr. Bell's testimony it is stated that he was aware prior to the application for the Bell & Tainter patent under consideration of the capacity of the record groove in various forms of records made by him to feed the reproducing stylus laterally across the record, but that he preferred the mechanical feed because (in substance) the automatic method required a lever so long as to make it impracticable, and that, while a short lever would follow the record to some extent, it could not be relied upon to remain in the groove. The most that can be claimed for the testimony of Dr. Bell is that Bell & Tainter knew that the stylus could be fed by the record, but did not regard such method valuable and did not use or claim it, but abandoned such partial discoveries as they had made in that regard. So far as the invention in

question may be found to have been disclosed by the patent specifications, it would seem to have been abandoned by failure to claim it. *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783. It appears that in the machines constructed according to the Bell & Tainter method the stylus would in fact follow the record for an insignificant distance without mechanical help; and it is now urged that, by lengthening the "tone arm," the same result could have been accomplished in Bell & Tainter's invention as under that of Berliner. But it is not claimed that as disclosed by the Bell & Tainter patent, or as the apparatus was actually made or constructed under that patent, the reproducing stylus was capable of being propelled across the record over its entire face. The fact that in the Bell & Tainter device the stylus would without mechanical means follow the record for an insignificant distance was purely incidental. The flexibility of adjustment of the reproducer was apparently designed only to permit the stylus by the force of gravity, to come in contact with the bottom of the record groove.

The alleged public use of the Berliner invention two years before application for the patent in suit is predicated upon this situation: On November 17, 1887, Berliner applied for patent No. 564,586, which was issued July 28, 1896. The application described the invention covered by claims 5 and 35 of the patent in suit, but the invention was not included within the claims made. On March 30, 1892, and thus while the application for the later issued patent was still pending, the application for the patent in suit was filed. On November 12, 1887, and again on August 18, 1888 (and thus after the application under which patent No. 564,586 was issued), Berliner published an article in the *Electrical World* relating to his discovery, and on May 16, 1888 (likewise after the filing of the application for the patent last mentioned), read a paper before the Franklin Institute, in which he disclosed the invention covered by claims 5 and 35 of the patent in suit, which had not yet been applied for. The invention was not publicly used (unless in the manner stated) before the issue of the patent in suit. The Circuit Court of Appeals for the Second Circuit, without passing upon the effect of the publication and lecture as a public use, held that the specifications in the patent first applied for, but subsequently issued, were broad enough to warrant the claims in question; and, as the application for such secondly issued patent was subject to amendment by adding the claims here in suit, no abandonment could be predicated on the fact that the claims were taken under a later application while the earlier was still pending, rather than by the amendment of the earlier application. 145 Fed. 351, 76 C. C. A. 181. This holding of the Circuit Court of Appeals is assailed as subversive of well-settled rules announced by authorities referred to in *Tie Plate Co. v. St. Louis Transit Co.*, 137 Fed. 80, 70 C. C. A. 1, and *Western Electric Co. v. Sperry Elec. Co.*, 58 Fed. 186, 7 C. C. A. 164, and by the case of *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952. I find nothing in either of the cases cited opposed to the decision of the Circuit Court of Appeals, and the rule announced by that court impresses me as sound. Questions relating to actual or constructive abandonment of invention are questions of fact, and every reasonable doubt relating to such questions should be solved

in favor of the patent. Walker on Patents (4th Ed.) § 108, and cases cited. In my opinion the defense under consideration is not sustained.

Is claim 5 void as covering a mere function of Berliner's apparatus? The validity of this claim turns upon the question whether it is to be construed as covering a mere function of operation of a machine, or whether, on the other hand, it is to be construed as covering the method of reproducing sound by "phonetically vibrating the stylus by the record undulations, and at the same time, by the same means, advancing or propelling a phonetically vibrated stylus across a record tablet throughout the entire length of the sound record to be produced." The more prominent decisions affecting the application of the rule of construction are cited and discussed in *Risdon Iron & Locomotive Works v. Medart*, 158 U. S. 68, 15 Sup. Ct. 745, 39 L. Ed. 899. The question presented is not free from difficulty. Taking into account the presumption of validity and the course of the prior decisions upon these claims, I am disposed to hold claim 5 valid as against the objection in question.

The question of infringement remains. In my opinion the claims of the patent in suit should be construed as covering the reproduction of sound by means of a vibrating stylus engaging with a laterally undulating groove of the sound record, and free to be vibrated and propelled thereby without other mechanical assistance. The bill in this cause was filed February 11, 1907. Until at least as late as October, 1906, defendant's machine was constructed and operated in every respect material to this case identically the same as that of complainant, and in the machine as so constructed the reproducing stylus was plainly operated "by and in accordance with the record," unaided by any other feed mechanism. The defendant's machine, as so constructed, is a clear infringement of the patent in suit. For some months before this suit was begun, defendant had been notified by complainant of its infringement, and had unsuccessfully negotiated with the latter for a license to manufacture under complainant's patent. When this suit was begun, complainant had not been advised that defendant's machines were constructed or claimed to be constructed otherwise than as above stated. It appears by the answer and proofs that about October, 1906 (which was about the time of the decision of the Circuit Court of Appeals in the *Leeds & Catlin Case*), the defendant began using, at least experimentally, near the bearing of the bracket which supports the framework carrying the horns (to which are attached the reproducer and stylus), a weak, unadjustable, spiral spring, one end being attached to the bracket and the other end to a pin projecting from the framework carrying the horns. In November, 1906, defendant applied for a patent on this device, which was refused on interference. Since January, 1907, defendant has been putting out all its machines with such coil spring attached, claiming justification therefor by license under patent No. 884,963, issued April 14, 1908, to Valiquet. It is defendant's contention that, when this spring is not used (as in complainant's device), the stylus point presses against and is carried by the outer wall of the record groove; that by the use of the spring the pressure of the stylus is taken from the outer wall, and brought against the inner wall of the groove, which is claimed by defendant to be more

regular than the outer wall, and thereby the wearing away of the record groove is prevented, the spring acting as a sort of "restrainer" upon the stylus, permitting less "wobbling" and giving "greater fidelity to the record." The defendant characterizes the pressure of this coil spring as an "elastic mechanical feed," and as positively producing a "yielding pressure propulsion," and insists that there is thus created a "variable mechanical pressure" equally distinct from the Edison mechanical feed and the Berliner automatic feed, and that, when this spring is used, the stylus is no longer propelled by the record, but is propelled solely by the spring.

I am not impressed by this contention. It is true that the effect of the attaching of this spring is to cause the sound box, when no stylus is attached, to move rapidly, but not uniformly, from the periphery of the record to and past the inner edge of the record spiral; such movement ordinarily occupying about two seconds in time; the reproduction of the record, and thus the progressive feeding of the stylus thereto, requiring usually at least as many minutes. On the other hand, if the stylus is attached to the reproducing box, the latter will not travel in the slightest degree across the record except as the record disk revolves in engagement with the stylus box; for the reason that the slight, almost hair-line roughness of the record, caused by the groove cut therein, is sufficient to overcome the effect of the spring. The testimony is in conflict as to the extent to which, during operation, the stylus is held by the spring against the inner wall of the record groove; but it satisfactorily appears that the spring does in large part at least relieve the pressure from the outer wall of the record groove, the stylus following and putting the greater pressure upon the inner wall, although in view of the diminutive size of the record groove, and the sloping walls thereof, the needle appears to be vibrated by, and to some extent to come into contact with, both sides of the record groove. The testimony indicates a possibility, by the use of defendant's spring device, of using a groove with a record on but one face. It is conceded that the untrained ear cannot distinguish between the operation of the machine with or without the spring. This is easily seen by alternately attaching and detaching the spring, which can be done readily and instantly by inexperienced fingers during the reproduction of the record, and without interference therewith. Whether the trained ear can distinguish the difference is at least doubtful. The eye, as would be expected, can detect no difference in the position of the stylus or the method of propulsion, whether the spring is off or on. Complainant's records are as well adapted to use on defendant's machines as on those of complainant, and are regularly used thereon.

Considering the evidence most favorably to defendant, can the spring in question be regarded as a mechanical feed? It must be conceded that the term "propelled," as used in the patent claims, is the equivalent of "progressively fed." The only object of such propelling is to feed the stylus to the record. It was as distinguished from the mechanical methods of Edison and of Bell & Tainter that the patent claims in question were allowed. Having in view the invention, and the purpose of propelling the stylus, it seems clear that the spring in question is not a positive mechanical feed, and that, notwithstanding

the use of the spring, the stylus in defendant's machine is still free to follow the record, and is propelled by and in accordance with the record. The stylus cannot move across the record except as the record carries it, and must entirely cease its movement when the movement of the record stops; while in a positive mechanical feed, as for example, the feed screw in the Edison phonograph, the reproducer travels uniformly and progressively across the record, even when the stylus is not in engagement therewith. I am not impressed with the suggestion that the issuing of the Valiquet patent affords any strong *prima facie* evidence of a patentable difference between the invention covered by it and that of Berliner. The specifications of Valiquet suggest that the device in question can readily be attached to existing "feed from the record" machines, and it would seem that the inventor more accurately expressed his idea of the invention (so far as the spring is concerned) in the statement that by the use of the spring the stylus was "restrained against excessive movement by said record groove." But be that as it may, and conceding, for the purposes of this opinion, that the defendant's spring may increase the efficiency of complainant's device and thus be an improvement thereon, if it does not change the principle of its operation and is founded upon the rights of invention secured by the complainant's patents, it is none the less an infringement. Walker on Patents (4th Ed.) § 367, and cases cited; Western Elec. Co. v. Larue, 139 U. S. 601, 11 Sup. Ct. 670, 35 L. Ed. 294; Duff Mfg. Co. v. Forgie (C. C.) 78 Fed. 626. It seems not unworthy of note that a tilting of the machine, and thus the application of gravity, would have the same effect as the coil spring in causing the pressure of the stylus to be relieved from the outer wall and put upon the inner wall of the record groove, and thus the stylus be "restrained against excessive movement by the record groove." It is possible that, if defendant's machine should be so constructed as to be capable of use only with the spring and with a one wall record, it might not infringe complainant's patent. On this point I express no opinion. But in my opinion, defendant's machines, as constructed and sold, and capable as they are of use both with and without the spring, and used as they are in connection with complainant's two-sided records and in the method of operation of complainant's machines protected by their patents, the defendant's machines do infringe. A like conclusion was reached, with respect to what seems a similar device, in Victor Talking Mach. Co. v. Hoschke (C. C.) 158 Fed. 309.

The complainant is entitled to the usual interlocutory decree for injunction and accounting.

WRIGHT CO. v. HERRING-CURTISS CO. et al.

(Circuit Court, W. D. New York. January 3, 1910.)

No. 400.

1. PATENTS (§§ 297, 312*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

The fact that a patent is unadjudicated will not deprive the patentee of the right to a preliminary injunction to enjoin infringement save where the prior art shows sufficient ground to doubt its validity; and on such an application evidence of public acquiescence is admissible and entitled to weight in support of the presumption of the validity of the patent and the practical utility of the device.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 481, 546; Dec. Dig. §§ 297, 312.*]

Grounds for denial of preliminary injunctions in patent infringement suits, see note to *Johnson v. Foos Mfg. Co.*, 72 C. C. A. 123.]

2. PATENTS (§ 61*)—ANTICIPATION—ABANDONED APPLICATION FOR PATENT.

An abandoned application for a patent cannot without evidence of prior invention be given weight as an anticipation of a later patent nor as a prior publication, but can only be regarded as an unsuccessful experiment.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 77; Dec. Dig. § 61.*]

3. PATENTS (§ 328*)—INFRINGEMENT—FLYING MACHINE.

The Wright patent, No. 821,393, for a flying machine, the essential feature of which is a combination of elements coacting to maintain or restore the equilibrium or lateral balance of a flying machine of the heavier than air type, was not anticipated, and discloses invention of a pioneer character, and has been so recognized and acquiesced in generally by the public, by governments, and by aeronautical societies, and is entitled to a broad and liberal construction. Also *held* infringed on a motion for a preliminary injunction.

In Equity. Suit by the Wright Company against the Herring-Curtiss Company and Glenn H. Curtiss. On motion for preliminary injunction. Motion granted.

H. A. Toulmin and Edmund Wetmore, for complainant.

Emerson R. Newell and Clifford E. Dunn, for defendants.

HAZEL, District Judge. A preliminary injunction is sought herein against the defendants, the Herring-Curtiss Company and Glenn H. Curtiss, for infringement of United States letters patent No. 821,393, granted May 22, 1906, on application filed March 23, 1903, for improvements in a flying machine to Orville Wright and Wilbur Wright, of Dayton, Ohio, and subsequently assigned to the complainant corporation. The title to the patent is not in controversy. The bill of complaint alleges that the patentees were the first inventors of what is commonly known as a heavier than air flying machine. Such machines are sustained in their aerial movements by either one or two planes or surfaces which travel through the air in a forward ascending or descending course at an angle of incidence, and may be driven or propelled by mechanical power or force of gravity. The objects of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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the inventors were to provide means for maintaining or restoring the equilibrium or lateral balance of the apparatus, to remove or repress aerial forces which tended to divert the course of the apparatus, and to provide means for guiding the machine both vertically and horizontally. The claims relied upon are the seventh, fourteenth, and fifteenth. It is sufficient to here set forth the seventh claim, which in broad terms includes both the monoplane and biplane types of apparatus.

"(7) In a flying machine, the combination with an aeroplane, and means for simultaneously moving the lateral portions thereof into different angular relations to the normal plane of the body of the aeroplane and to each other, so as to present to the atmosphere different angles of incidence of a vertical rudder, and means whereby said rudder is caused to present to the wind that side thereof nearest the side of the aeroplane having the smaller angle of incidence and offering the least resistance to the atmosphere, substantially as described."

The essential elements of such claims are an aeroplane or supporting surface, the lateral portions of which are capable of adjustment to attain different angles of incidence and a vertical rudder in the rear of the machine. Claims 14 and 15 include as elements a horizontal rudder which is positioned forward of the machine and means for raising and lowering it so as to present its upper or under side to the pressure of the wind. The questions of the scope of said claims, infringement, and the propriety of granting an injunction herein are contested by the defendants.

In a flying machine of the biplane type, with which we are here concerned, the aeroplanes are connected together by upright stanchions extending lengthwise on the extreme front and rear portions thereof, and are fastened on top and bottom of the planes by universal joints so as to permit the planes or surfaces to yield to pressure and incline upward or downward at their lateral edges or marginal extremities when the cord or rope fastened to the cradle is manipulated by the aviator. This lateral yielding, warping, or distorting of the aeroplane is the essential feature by which the equilibrium is secured. Its importance cannot be overestimated, as it is shown that long before the Wright invention a method was sought by which equilibrium in mechanical flying could be secured and maintained. Not only the conception of the idea of securing and maintaining equilibrium in the air, but the appliances—the dynamic cause to achieve the result—originated in the minds of the patentees, and took shape and form in the evidently simple method of slightly turning up and down the lateral ends or margins of the planes, thus securing different angles of incidence. The unsurmountable obstacle with which prior inventors in this art struggled for years was the precipitate unbalancing or upsetting of the apparatus and such prior flying machines were therefore incapable of flights with any appreciable degree of success. The affidavits indicate that the patentees did not use the means or identities of prior flying machines, but solved the problem of maintaining equilibrium or lateral and front and rear balance by the introduction of new and practical elements and became pioneers in the field of flying machines of the so-called heavier than air type. True, some of the ele-

ments of the claims were old and are shown in the prior gliding machines, but such machines without the combination which included a method of maintaining equilibrium or lateral balance were utter failures. Hence the prior patents and publications apparently do not anticipate the Wright patent, and the claims in controversy are entitled to a broad and liberal construction.

The Wright patent is unadjudicated, but such fact will not deprive the complainant of its right to enjoin infringement save where the prior art shows sufficient ground to doubt the validity of the patent. *Palmer v. Wilcox Mfg. Co.* (C. C.) 141 Fed. 378. But in the present case public acquiescence is claimed. It appears that machines embodying the invention in suit have made notably successful flights in France, Germany, and the United States. The first aerial flight to which the attention of the public was attracted was had at Kitty Hawk, N. C., in December, 1903, when the Wright machine using a 12 horse power motor weighing 200 pounds demonstrated its ability to maintain its balance and readily turn to the right or left and ascend or descend. The newspapers of the country heralded as marvelous the success of the patentees, and published wide that human flight had been made possible and that the patentees were the first in the annals of the world to achieve success with a heavier than air flying machine. Public recognition of their success was subsequently made by scientific institutes and academies of high repute in this country and abroad. Medals were presented to the inventors by Congress, by the republic of France and by various aeronautical societies of Europe and America. Such testimonials are entitled to weight in support of the presumption of validity and the practical utility. *National Co. v. New York Co.* (C. C.) 46 Fed. 114; *Thompson Co. v. Two Rivers* (C. C.) 63 Fed. 120. Moreover, in this connection it may be instanced as bearing upon the novelty and utility of complainant's machine that the defendant Curtiss and the affiant Herring, both officers of the defendant corporation, obtained detailed information prior to the construction of the defendant's machine, as to experiments and pressure of wind on curved and flat planes and mode of maintaining equilibrium in flights, the former through correspondence passing between the patentees and the late Lieut. Selfridge in January, 1908, and the latter from personal observation and investigation while at the camp of the patentees at Kitty Hawk, N. C., where the earlier Wright experimental flights were conducted, and subsequently both Curtiss and Herring practically admitted that in complainant's machine the problem of equilibrium appeared to have been solved. But in the answering affidavit Herring asserts that he had considered that the Wright invention was limited to the lateral warping of the planes, and not that it covered broadly the feature of lateral balancing. This brings me to the question of whether defendants' machine infringes that of complainant.

Defendants claim generally that the difference in construction of their apparatus causes the equilibrium or lateral balance to be maintained and its aerial movement secured upon an entirely different principle from that of complainant; that defendants' aeroplanes are curved, firmly attached to the stanchions and hence are incapable of twisting or turning in any direction; that the supplementary planes or so-called

rudders are secured to the forward stanchion at the extreme lateral ends of the planes and are adjusted midway between the upper and lower planes with their margins extending beyond the edges; that in moving the supplementary planes equal and uniform angles of incidence are presented as distinguished from fluctuating angles of incidence. Such claimed functional effects, however, are strongly contradicted by the expert witness for complainant. Upon this contention it is sufficient to say that the affidavits for the complainant so clearly define the principle of operation of the flying machines in question that I am reasonably satisfied that there is a variableness of the angle of incidence in the machine of defendants which is produced when a supplementary plane on one side is tilted or raised and the other simultaneously tipped or lowered. I am also satisfied that the rear rudder is turned by the operator to the side having the least angle of incidence and that such turning is done at the time the supplementary planes are raised or depressed to prevent tilting or upsetting the machine. On the papers presented I incline to the view, as already indicated, that the claims of the patent in suit should be broadly construed; and when given such construction the elements of the Wright machine are found in defendants' machine performing the same functional result. There are dissimilarities in defendants' structure—changes of form and strengthening of parts—which may be improvements, but such dissimilarities seem to me to have no bearing upon the means adopted to preserve the equilibrium, which means are the equivalent of the claims in suit and attain an identical result.

Defendants further contend that the curved or arched surfaces of the Wright aeroplanes in commercial use are departures from the patent, which describes "substantially flat surfaces," and that such a construction would be wholly impracticable. The drawing (figure 3), however, attached to the specification shows a curved line inward of the aeroplane with straight lateral edges, and considering such drawing with the terminology of the specification, the slight arching of the surfaces is not thought a material departure; at any rate the patent in issue does not belong to the class of patents which requires narrowing to the details of construction.

The Mattullath application for patent: This was an abandoned application for a flying machine filed in the patent office on January 8, 1900, and though it was declared by the inventor in the specification that he believed he had discovered a method of maintaining equilibrium in a flying machine, such application cannot be given weight on this application in the absence of satisfactory testimony of prior invention or discovery. As the record stands it can only be regarded as an unsuccessful experiment. The Corn Planter Patent, 90 U. S. 181, 23 L. Ed. 161. There are a number of adjudications called to my attention holding that an abandoned or rejected application is not a prior publication. It is not claimed that the patentees knew of its existence or had any information regarding the claimed discovery of Mattullath.

It appears that the defendant Curtiss had notice of the success of the Wright machine and that a patent had been issued in 1906. Indeed no one interfered with the rights of the patentees by constructing machines similar to theirs until in July, 1908, when Curtiss exhibited

a flying machine which he called "the Junebug." He was immediately notified by the patentees that such machine with its movable surfaces at the tips or wings infringed the patent in suit, and he replied that he did not intend to publicly exhibit the machine for profit, but merely was engaged in exhibiting it for scientific purposes as a member of the Aerial Experiment Association. To this the patentee did not object. Subsequently, however, the machine with supplementary planes placed midway between the upper and lower aeroplanes was publicly exhibited by the defendant corporation and used by Curtiss in aerial flights for prizes and emoluments. It further appears that the defendants now threaten to continue such use for gain and profit and to engage in the manufacture and sale of such infringing machine, thereby becoming an active rival of complainant in the business of constructing flying machines embodying the claims in suit; but such use of the infringing machine it is the duty of this court on the papers presented to enjoin.

The requirements in patent causes for the issuance of an injunction pendente lite—the validity of the patent, general acquiescence by the public, and infringement by the defendants—are so reasonably clear that I believe it not improbable that complainant may succeed at final hearing, and therefore, the status quo should be preserved and a preliminary injunction granted.

So ordered.

WRIGHT CO. v. PAULHAN.

(Circuit Court, S. D. New York. February 17, 1910.)

1. PATENTS (§ 177*)—CONSTRUCTION—FLYING MACHINE.

The Wright patent, No. 821,393, for a flying machine, covers a combination of elements, one purpose of which is to maintain or restore the equilibrium or lateral balance of such a machine of the heavier than air type. The machine consists of an aeroplane having two lateral wings or planes capable of being moved into different angular relations to the normal plane of the body of the aeroplane and to each other so as to present to the atmosphere different angles of incidence, in combination with a vertical rudder, and the entire combination is intended to be effective as a means whereby the rudder is caused to present to the wind that side thereof nearest the side of the aeroplane having the smaller angle of incidence to the atmosphere, thus correcting the tendency of such difference of angle to throw the machine out of lateral balance. The specification and drawings show the tiller rope of the vertical rudder attached to the warping rope which runs along the rear of the lower plane of the biplanes in such wise that when the marginal parts of the two planes are warped into different angles of incidence, the rudder is turned automatically towards the margin having the lesser angle. *Held*, that such attachment is but one of the means by which the combination may be made effective for its purpose, and that tiller ropes under the independent control of the operator are equally such a means and an obvious modification within the scope of the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 253, 254; Dec. Dig. § 177.*]

2. PATENTS (§ 235*)—INFRINGEMENT—FLYING MACHINE.

The fact that the vertical rudder of such combination when detached from the warping rope is capable of being used as a steering device, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

that it is so used in a machine not made under the patent, does not avoid infringement where it is also capable of being used and is used as a part of the patented combination for the purpose of maintaining equilibrium.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 371; Dec. Dig. § 235.*]

3. PATENTS (§ 54*)—ANTICIPATION—ABANDONED APPLICATION FOR PATENT.

An abandoned application for a patent is not an anticipation of a later patent in the absence of some showing that the later patentee borrowed ideas therefrom.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 73; Dec. Dig. § 54.*]

4. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—FLYING MACHINE.

The Wright patent, No. 821,393, for a flying machine was not anticipated, discloses a true combination of elements and patentable invention, and is a pioneer patent entitled to a liberal construction. Also held infringed on an application for a preliminary injunction.

In Equity. Suit by the Wright Company against Louis Paulhan. On motion for preliminary injunction. Motion granted.

Mr. Toulmin and P. W. Williamson, for complainant.
Clarence J. Shearn, for defendant.

HAND, District Judge. There is very little that I should wish to add to Judge Hazel's opinion in the case of Wright Co. v. Herring-Curtiss Co., 177 Fed. 257, were it not for the ardor of the defendant's counsel and their insistence that a different showing has been made here. In view of the seriousness of the contest, I feel obliged to give my own reasons for this decision.

The defendant says that he does not infringe the patent because he does not use a device which automatically always presents to the wind that side of the rudder nearer the angle of lesser incidence; and that if the patent be construed as merely a combination of a vertical rudder with a device for creating a differential in the angle of incidence of the rear marginal edges of the plane, it is not a novel discovery, but was anticipated in the art. Therefore, the first consideration must be the proper construction of the contested claims of the patent in suit.

Claim 7 is the main reliance of the complainants, and that is as follows:

"(7) In a flying-machine, the combination, with an aeroplane, and means for simultaneously moving the lateral portions thereof into different angular relations to the normal plane of the body of the aeroplane and to each other, so as to present to the atmosphere different angles of incidence, of a vertical rudder, and means whereby said rudder is caused to present to the wind that side thereof nearest the side of the aeroplane having the smaller angle of incidence and offering the least resistance to the atmosphere, substantially as described."

The specifications and diagrams upon which this claim was allowed after a pendency of three years in the Patent Office, showed the tiller ropes of the vertical rudder attached to the rope which ran along the rear of the lower plane, in such wise that, when the marginal parts of the two planes were warped as indicated, the rudder was turned towards the margin which had the lesser angle of incidence.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

Moreover, there was a constant proportion between the degree of deflection of the rudder and that of warping of the plane. The Bleriot and Farman planes, which the defendant uses, do not have the combination described, and the complainants have in fact at times abandoned it. It is therefore a very sound contention that if the connection between the tiller ropes and the warping device in a constant proportion, be an essential element in the combination patented, the planes which the defendant uses are in no sense infringements, and the case need not go into the question of the validity of the complainant's patent at all.

To an intelligent understanding of the invention and the question of how essential is the attachment of the tiller ropes to the warping rope, the method of maintaining equilibrium under the patented combination must first be set forth. Assume an aeroplane with or without dihedral sustaining surfaces, to be propelled through the air, having the combination specified, and also suppose the left wing has been accidentally depressed. That in itself will result, as all agree, in starting a revolution towards the left. This is the resultant of two motions: First, the forward motion of the plane; and, second, the motion at right angles caused by the sliding of the machine laterally in its own plane and over the successive columns of air. The resultant is precisely analogous to any planetary motion. This resultant is accentuated by the movement of the center of pressure towards the depressed lateral margin, giving a greater leverage to the propeller nearer the elevated wing. Also, the vertical rudder becomes transverse in its reaction to the lateral motion of the aeroplane, and consequently the rudder is pushed up, and by its leverage further turns the direction of the plane to the left. Thus the machine will begin to revolve to the left. Moreover, this very motion will cause the right wing to be further elevated, because of the increased drift, or head-resistance caused by its increasing speed, and the decreased drift against the left wing, caused by its diminished speed. Thus, in turn, the initial depression creates a revolution, and that, in turn, an increased depression with its corresponding acceleration of revolution, so on co-operating till the machine will swoop downwards to the left to its entire destruction.

The first part of the patented combination for correcting the depression of the left wing is to increase the angle of incidence upon the left side, so increasing that component of the drift which is opposite to the action of gravity. However, contrary to the assumptions of earlier speculators, this alone has a precisely contrary effect to what might be expected, because although the lifting component of the drift is increased, the head-resistance is much increased, and this decreases the velocity of the left wing in greater proportion than the increase in the angle of incidence tends to raise it. That revolution, already initiated by the very tilt itself, is therefore increased by the differential in the angle of incidence between the two margins. The right wing, which has thus an added velocity relatively to the left wing, will, in spite of its lesser angle of incidence, rise more rapidly than the left wing. Unless the revolution be corrected the increased

angle of incidence will therefore remain ineffectual to restore the balance, but will rather further disturb it, and it is therefore necessary that the rudder should be put over towards the right wing, thus counteracting the revolution. When this is done, the increased angle of incidence on the left wing becomes effectual and the left wing rises, so restoring the equilibrium of the plane. It is the combination of a differential in the angle of incidence with a rudder which operates against the side of lesser angle which produces this result.

Now, to come back to the connection of the tiller ropes to the warping mechanism. This is, of course, one "means whereby said rudder is caused to present to the wind that side thereof nearest the side of the aeroplane having the smaller angle of incidence, and offering the least resistance to the atmosphere." Literally considered, tiller ropes under the independent control of the operator are equally such a means. But the invention is not of a machine, it is not an invention of this means of so turning the rudder, but it is an invention of a combination of which this action of the rudder is a part. The statute authorizes such an invention, and if the combination be not a mere aggregation of old elements, as I shall try to show hereafter, then the precise means is of no consequence. In the patent in suit any skilled operator, who may serve *pro hac vice* for a "skilled mechanic," finding the automatic connection unsatisfactory, would at once disconnect it and attach the tiller ropes to a lever or to a foot pedal which he could directly control. As the examiner said in his letter of July 14, 1903, it is merely a matter of taste to attach the tiller ropes to the warping rope. The machine would be changed, but the combination would remain, because there would remain the means of causing the rudder to operate upon the side of lesser incidence. The defendant urges very vehemently that the means must be the means specified. All that the specifications need contain is so clear a description that any skilled mechanic may use the invention. Where the change is only an obvious modification of the means specified, and a modification which retains each element of the combination contributing the same effect as before, the claim is not too broad which includes the modification. Of course, were the invention an advance over a prior art which had progressed already to the combination without any automatic movement of the rudder, then the claim must have been limited to the precise specifications. This would be because only when so limited would the patent be an invention at all and the construction would be necessary *ut res valeat quam pereat*. The defendant insists that this is the case with the patent in suit, and I shall consider that contention later. Assuming for the present, however, that the patent need not be so limited to be saved, then it becomes a pioneer, and as such under the well-known rules is entitled to a broad construction. Therefore, viewed first as a combination, not a machine, and second, as a pioneer patent which advances by more than just the degree of an automatic connection, I cannot agree that it was not a fair equivalent to operate the tiller ropes independently by a mechanism under the direct control of the aviator. That connection was not essential to the three rudder system of control.

The question next arises whether the fact, which I must assume from the affidavits, that the rudder under some circumstances of aviation is turned towards that side of the drift nearer the angle of greater incidence relieves the defendant of infringement. In this connection, the distinction must be carefully observed between turning the rudder towards that side of the main longitudinal axis which is nearer the angle of lesser incidence, and presenting to the wind that side of it which is nearer that angle; the latter being the essential specified. While the two might be readily identified, a moment's consideration discloses that they will be quite different whenever the plane is itself turning in either direction. For example, if the plane is turning to the left in a circle whose radius is "r," and has itself a total length of longitudinal axis, a, then the rudder, if free, would stream at an angle to the inside of the axis whose tangent is $\frac{a}{r}$; that is $\tan. \frac{-1a}{r}$. That is to say, the sharper the turn, and the further the rudder is set aft of the plane, the more will the rudder in turning stream inward, and apparently the operator will be putting the rudder towards the angle of greater incidence, although, in fact, the rudder may be sustaining a wind pressure from the opposite side. However, I should have no right upon this motion to interpret the defendant's affidavit as limited to the phenomenon I have described, and I shall therefore assume that the rudder under his operation at times presents to the wind that side nearer the greater angle of incidence. To determine whether this indicates that the defendant does not infringe, we should look at the purposes of the invention. These are stated to be (page 1, lines 16-24):

"The objects of our invention are to provide means for maintaining or restoring the equilibrium or lateral balance of the apparatus, to provide means for guiding the machine both vertically and horizontally, and to provide a structure combining lightness, strength, convenience of construction, and certain other advantages which will hereinafter appear."

The question is not whether the defendant upon occasion may not find it proper or even essential to turn the rudder towards the greater incidence, but whether he uses the patented combination. For example, if the patent were for an automatic device, it would be no answer to say that the defendant used it only intermittently. This combination is in fact for a great part of the time used by the defendant "to maintain or restore equilibrium." If at times he avails, himself of other methods, that is nothing to the purpose, and I may disregard it.

As a method of restoring equilibrium the defendant has not shown that the rudder can be turned towards the greater angle. All he has shown is that in making a sharp turn he puts his rudder to the opposite side. During such a turn he may doubtless for a short time abandon his equilibrium, restoring it when his direction has been changed, at which time if it remains disturbed, he must restore by the use of the patented combination. In short, his evidence goes no further than to show that he may execute certain maneuvers during which he can safely for a very short period abandon the maintenance

of his equilibrium. That in no sense affects the question that to maintain or restore it he must eventually resort to the method specified.

Much discussion has arisen as to whether the defendant's rudder is not in fact a "steering device." I concede that it is when free from the warping device, at once an essential part of the combination and also a "steering device," and that the complainants in some of their machines at times use it strictly as such. It is also true that when connected to the warping ropes it could not successfully be used as a "steering device," as Toulmin says in his letter of July 11, 1904. The question is whether the combination specified is not actually used, even though the tiller ropes are detached and the rudder thus made susceptible of being used to steer as well as to maintain the equilibrium of the plane. I think it is. It is none the less the fact, when the ropes are detached that the rudder when being used to maintain or restore the equilibrium must be used in the combination as specified and precisely as specified. It does not seem to me of consequence to say that by the detachment of the ropes, it may acquire an added function and that, too, of a kind not patentable. As an illustration of my idea, suppose that there were two rudders, one with the tiller ropes fixed to the warping mechanism, and one free so as to be used simply for steering. In such a case no one could say that the addition of the second rudder would affect the combination. The infringement has simply dropped the automatically connected rudder and made the free one serve in both capacities. Is that not the adoption of an equivalent? The rudder yet remains a part of the combination with its means of being put over to the lesser angle. It has acquired by a simple suggestion to the mind of the operator an added use and a more varied power of adaptation in the combination. I should feel most unwilling in a patent of this character to construe it so narrowly as to exclude the modification from the purview of the patent. Nor yet is it of consequence that there may be other ways of maintaining equilibrium as by using the rudder alone. Any one is of course free to use such other methods.

I think there is nothing in the further objection that the Farman machine has two ailerons or flaps instead of a general helicoidal warp through the whole plane. The use of such ailerons is an obvious equivalent, and the only possible question arises from the fact that the aileron cannot be given any negative angle. However, the essential of the combination is a differential in the marginal angle, and that is as well accomplished though the lesser angle can never be less than zero, as though it could. Considering, therefore, that the complainants carefully avoided limiting themselves "to the particular description of rudder set forth," I think that the detachment of the ropes from the warping devices leaves the patent substantially the same as specified.

Having now determined that the defendant infringes, it becomes necessary to determine whether the showing upon the prior art is such as to throw any reasonable doubt as to the validity of the patent. Moreover, in this consideration is involved the question of whether this is a pioneer patent, because if the three rudder system of control

be an invention of the complainants, then they are clearly entitled to have their patent take place as a pioneer. Before, however, considering the prior art, it is necessary to determine, first, whether the patent is of a true combination or of an aggregation; and, second, whether it be merely a principle or abstract function, rather than a true invention. As to the first, there can be no doubt whatever. The three elements are combined into an effect which is absolutely different from that which any one of them produces alone. The differential of angle instead of maintaining equilibrium would upset it. The rudder bearing upon one side only would not be sufficient. I am aware that the defendant contends that he can fly by steering alone, but I do not understand that he claims that in practice this can safely be continued permanently in machines of this type. In combination their result is not the aggregate of their separate results; it is the result of their mutual and antagonistic reactions. Even under the strict rule of *Pickering v. McCullough*, 104 U. S. 318, 26 L. Ed. 749, here is fulfilled the requirement that the "old elements, all the constituents must so enter into it as that each qualifies every other; to draw an illustration from another branch of the law, they must be joint tenants of the domain of invention, seised each of every part, per my et per tout." The question as to whether the combination is not merely of a function, is likewise plain. The combination is a definite adjustment of the material parts of a machine to secure a specified result. It is not the effort to patent a certain way of operating an aeroplane as the defendant insists, because the patent demands for its fulfillment certain physical parts in combination, able to work in the way prescribed. The most plausible form of the defendant's argument is, I believe, as follows:

"Given a plane with marginal flaps or a helicoidal warp and a movable rudder, the rest is a mere way of operating the machine. The marginal warp is not patentable, nor is the vertical rudder, hence the patent must be upon the operation of the two in conjunction, and that is not a proper subject of patent under the statute."

The answer is that if the combination of elements were not new the patent would be merely upon the method of operation, but the combination is, as I have said, quite new, and the method of operating it need not be relied upon as the invention. No one before did in fact combine all these, and therefore no one gave to aviators the possibility of so operating.

Finally, therefore, the novelty of the patent arises, and this is the especial ground of the defendant's attack. I must say that I cannot agree that here there has been any acquiescence. The number of persons who can fly at all is so limited that it is not surprising that infringers have not arisen in great numbers; but, considering the possibilities it seems to me that the complainants have had an extraordinary number of contests. It is quite apparent that instead of acquiescence, they are to meet and have met with a very determined general opposition. Hence, they must show that the prior art throws no reasonable doubt upon the novelty of their invention. The defendant relies upon a number of patents and prior discoveries which I feel obliged to take up in order.

It must be observed at the outset that several of the citations are from Mr. Chanute's book, published in 1894, from which excerpts have been inserted into the moving papers. The descriptions there given are in the cases where it is relied on too inadequate to constitute valid anticipations under Barbed Wire Patent, 143 U. S. 275, 284, 12 Sup. Ct. 443, 450, 36 L. Ed. 154. It may be that upon the final hearing the defendant may be able to show these with greater detail, but when he does not show them fully enough to enable me to see that there is some reasonable ground to suppose that they were in fact anticipations, the presumption arising from the patent must prevail. It is not enough that they may have contained some undisclosed elements which might show them to be anticipations. In putting the burden of showing the prior art upon the defendant, even upon preliminary injunction, I am only following the well-settled rule in this circuit.

D'Esterno: The need of caution in regard to evidence of the kind considered in the barbed wire patent, *supra*, is well exemplified in the case of the description of this machine, as well as in that of *Le Bris*. It is impossible to say that this had in any sense the combination patented. Apparently the wings were to be fixed at a given dihedral angle and the rear parts were merely flexible. It would be most dangerous upon the meager and unsatisfactory evidence presented of what the actual machine was, to consider that it raised a reasonable doubt of an anticipation. Moreover, there is no proof that it was ever used or became more than a paper description, in which case, as I shall afterwards show, it cannot be regarded as an anticipation.

Le Bris: This is a description of the same kind which is too inadequate to understand or to give effect to. So far as one can gather the wings could be set as a whole at different angles of incidence to the wind. Here, too, there was apparently a flexible rear portion of the wings.

No one could possibly design either of these machines from the descriptions given, and it would be most extraordinary to suppose that they in any sense contained the combination of elements, worked out after much experiment by the complainants, except by a mere chance which in no sense gave them the necessary vital correlation upon which the patent depends. Moreover, it does not appear that in the case of either of these devices they were known or used in this country except as Chanute described them, and Chanute's description as a printed publication is clearly insufficient to enable any one to construct them. Thus from no point of view are they good anticipations.

Mouillard: There is a patent in this citation which is a part of the papers and which I have examined. In no one of the 19 claims is there anything which in any way even foreshadows the patent in suit. Indeed, the machine, which was a glider, had no tail whatever, and to depress the marginal edge of one wing would have only resulted in entirely disturbing the equilibrium which he might have attempted to restore. The depressing of one wing was meant only to turn the aeroplane.

Mattullath: This was an abandoned patent containing full specifications which described six lateral and supplementary planes, three on a side, which were adjustable to different angles and were to be used to promote stability. At the rear was "a rudder secured on a vertical shaft." It does not appear whether this rudder was fixed or not and the application does not include any use of the rudder to counteract the effect of the differential in the angle of incidence of the supplementary planes. The defendant's brief says that this rudder was to enable the machine "to wheel to right or left." I can find nothing of the sort in the specifications, but for the purposes of the argument I shall assume that the vertical rudder was in fact adjustable.

As an abandoned patent, it was clearly not an anticipation. *Westinghouse Air Brake Co. v. Gt. North. Ry.*, 88 Fed. 263, 31 C. C. A. 525. Dr. Zahm swears however, that Mattullath showed his designs to many persons. It is not enough to show such designs, for until the patent be embodied in some practical form, it is not an anticipation. *Ellinthorp v. Robertson*, 4 Blatch. 307, Fed. Cas. No. 4,408; *Detroit Lub. Mfg. Co. v. Renchard* (C. C.) 9 Fed. 293. At most, Mattullath's designs were purely experimental, and did not give the public that benefit to which it was entitled, if the patent in suit is to be held to be anticipated and without consideration. *Coffin v. Ogden*, 18 Wall. 120, 21 L. Ed. 821; *Allis v. Buckstaff* (C. C.) 13 Fed. 879. In the absence of some showing, which is not suggested, that the complainants borrowed any ideas from Mattullath, his discoveries must be held to be no anticipation.

Zahm: Dr. Zahm in a paper in 1894 suggested the use of slats in the wings so as to create a differential in the angle of incidence, but it was clearly only an ingenious suggestion and did not in the faintest degree show any comprehension of the complicated reactions and necessary correctives which would alone make the suggestion feasible. It was at most only a speculative suggestion never reduced to practical form, and fails as an anticipation, under the authorities mentioned under Mattullath.

Ader: The most serious attack upon the novelty of the patent in suit is raised over the machine of Charles Ader, a distinguished French engineer, a description of which is contained in *Révue de L'Aéronautique* for 1893. This being a foreign printed publication would under the statute be a valid anticipation if it foreshadowed adequately the patented invention.

Whatever may have been the merits of the machine described and actually made by Ader, it is quite clear that the patented combination was not included or understood by him. A reading of his first chapter, pages 72, 73, is enough to show that he did not regard a rudder as essential. It is not correct to say, as the complainants do, that the vertical rudder was fixed in place. The rear wheel could be moved around a vertical axis and was to be so moved to direct the machine upon the ground:

"Une quatrième à l'arrière pour diriger l'aéroplane sur l'aire. Quand l'aéroplane a un gouvernail vertical celui-ci est solidaire de la roue d'arrière et manœuvre avec elle."

The cut shows such a "gouvernail vertical," and we must assume that it was meant to be used and to be turned when the wheel turned. However, it is also equally clear that the rudder was no part of the machine. M. Ader, with the characteristic clearness of a French mind, enumerates on page 71 the four necessary primary parts of the machine: "Corps," "ailes," "force motrice," "propulseur," and these he takes up in four separate chapters. The first and shortest chapter concerns the "corps de l'aéroplane," and enumerates seven constituent parts of which the "gouvernail vertical" is not one. The only mention of it is in the sentence I have quoted in full. The whole matter may therefore be disposed of by the single consideration of whether the permissive suggestion of a rudder is to be taken as anticipating the patented combination. In so treating the defendant's contention I shall assume that the machine was not an unsuccessful experiment and that there was an adequate and detailed description of its construction, which showed that the lateral ends of the wings could be warped to different angles of incidence at the will of the operator.

The actual invention of the complainants depends, first, upon the discovery of the necessary interrelation per my et per tout, as Mr. Justice Mathews puts it in the citation quoted above, between the several parts which go to make it up. The mere coincidence of those parts by chance or as matter of taste was in no sense an anticipation of their functional correlation, in understanding which the complainants' discovery consists and with it their invention. When, appreciating this necessary co-operation of all the elements, they specified their new combination, stating the essential necessity of their union and mutual reactions as the very essence of what they claimed, they invented something new. Ader fortuitously suggested the possibility, as matter of preference, of the third element, the rudder, and so shows conclusively that he did not in the least apprehend the mutually dependent relations between wings and rudder. Thus, the patented combination is not in the least merely a new function of one possible form of Ader's apparatus, which experience might teach an aviator. If the invention be a combination at all, and not an aggregation, it is such solely by virtue of the apprehension of that vital relation of the parts, which Ader conclusively shows he did not have. Nothing than his description could more clearly show that with him the three were in merely nonfunctional aggregation; nothing can be more clear that in the patent they are understood as in inevitable combination. These are the only anticipations cited upon the defendant's brief, so that I may assume that he relies in fact upon only these, and not upon the others cited upon the argument. However, a few words will dismiss all the others in case I misunderstand his position.

Bechtel; Crepar; Johnson; Stanley; Marriott; these are all for lateral planes to dirigible balloons. The whole problem is so entirely different when suspension is effected by a reservoir containing a lighter gas than air, that there is not the least resemblance between the patents and the patent in suit. Assume the lateral balance of such a machine to be disturbed by a depression of the left side. It does not appear that an increase in the angle of incidence upon that side

would not be adequate to restore it. The resistance so created might have some effect to turn the ship in that direction, but the inertia of the body and the friction would be presumably so great that the equilibrium would be restored without any use of the rudder. Besides, the equilibrium is insured by the fact that in such machines the center of gravity is much below the center of buoyancy, as in the case of a ship in water, and the planes were designed in all cases simply to cause the ship to rise or fall.

Boswell: This is a device to be attached to a dirigible airship, consisting of a plane adjustable in all directions used in connection with a vertical rudder. It is not apparent to me how the tilting of the plane in any of the positions in which it offered no plane of incidence to the drift would cause the ship to turn in one direction or the other, nor, how, if it did, it could even then turn it, but, whatever might be its action, it was specified simply as a steering device, and it is so wholly unlike the patent in suit both in structure and operation that I can see no similarity between them.

Davidson: This is an English patent, and is not in the least like the patent in suit.

Lampson: I cannot see any relevancy in this patent.

The importance of the issues involved in this cause must be the excuse for so extended a consideration. It is of course unusual to grant a preliminary injunction before any adjudication and without any acquiescence. However, when the right is not seriously attacked, and when the infringement is clear, the court should not hesitate to interfere. From the showing made I cannot doubt that the complainants first put into any practical form the system of three-rudder control. That there may be other systems is not to the point; let the defendant use those, if he will. Nor is it necessary to conclude that the complainants were the "first to fly." Upon that I decide nothing whatever, for it is not an issue in the case. All I do say is that I cannot find that any one prior to their patent had flown with the patented system, and that the changes from the specifications which the defendant has made are no more than equivalents which do not relieve him from infringement.

It is quite clear that for the complainant's protection a writ must go *pendente lite*, because the defendant being a nonresident, who is here only transiently, there is no way in which they may insure themselves of the monopoly they have acquired except by preventing his use of it at once. I regret that they have so repeatedly seen fit to accentuate the fact that the defendant is an alien. It cannot be necessary to assert that to the determination of the rights of all persons who come before the court, that fact is totally unimportant; and, indeed, it is by no means calculated to predispose me in his favor that a citizen should believe it a consideration of importance.

The showing before Judge Hazel was substantially the same as that made here, and, as I said at the outset, I should have been disposed to say nothing upon the case except to refer to his opinion, had I not thought it fair to give to the defendant the reasons for reaching an independent conclusion in accord with his.

**GENERAL COMPRESSED AIR & VACUUM MACHINERY CO. et al.
v. AMERICAN AIR CLEANING CO.**

(Circuit Court, E. D. Wisconsin. March 2, 1910.)

1. PATENTS (§ 239*)—INFRINGEMENT—DUPLICATION OF PARTS.

The mere duplication of parts of a patented machine, although it may render it more effective in operation, does not avoid infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 378; Dec. Dig. 239.*]

2. PATENTS (§ 165*)—CONSTRUCTION—REFERENCE TO SPECIFICATION.

The use of the phrase "substantially as described" in a clause of a patent cannot import into it an element not claimed nor referred to therein.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. 165.*]

3. PATENTS (§ 328*)—INFRINGEMENT—PNEUMATIC CARPET RENOVATOR.

The Thurman patents, No. 634,042, claim 1, and No. 690,084, claims 5 and 6, relating to pneumatic carpet renovators, construed, and held infringed.

In Equity. Suit by the General Compressed Air & Vacuum Machinery Company and John S. Thurman against American Air Cleaning Company. On final hearing. Decree for complainants.

John C. Higdon and Edward E. Longan, for complainants.

Winkler, Flanders, Bottum & Fawsett, for defendant.

QUARLES, District Judge. This is a bill in equity in the usual form, alleging infringement of United States patents numbered 634,042, issued to John S. Thurman October 3, 1899, and numbered 690,084, issued to said Thurman December 31, 1901, transferred by mesne conveyances to the complainants. Prayer for an injunction and accounting. The corporate names of both litigants have been changed since their former litigation. The defendant here was practically the complainant there, and vice versa. The answer sets up several defenses, but upon final hearing it was agreed by counsel for the respective parties that the only real issue to be contested was as to infringement. Defendant claims to be the owner of United States letters patent No. 521,174, issued to William E. Nation as agent of Enoch Nation June 12, 1894, and claims that the alleged infringing device was made in strict accordance with such Nation patent. The claims alleged to have been infringed are claim 1 of No. 634,042, and claims 5 and 6 of No. 690,084. Claim 1 of No. 634,042, reads as follows:

"(1) In a renovator, the combination with a suitable casing open at its bottom, the walls of said casing extending down to engage the article to be cleaned or renovated, so that said article practically forms a bottom for the opening in the casing, of a nozzle carried by said casing and arranged to one side of said opening for discharging air under pressure at an angle, and in a definite direction through the bottom of said casing, a passage for the dust-laden air leading up from the opening in the bottom of the casing at a point opposite the nozzle, said passage communicating with a chamber in the casing, into which chamber said passage enters tangentially, and a pressure-supply pipe connected to said nozzle, substantially as described."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Claims 5 and 6 of No. 690,084 read as follows:

"(5) The combination with a pneumatic carpet-renovator having a blast-nozzle, of a pivoted handle provided with a passage for the supply of compressed air to said nozzle, and a flexible connection between said handle and said nozzle, substantially as described.

"(6) The combination with a pneumatic carpet-renovator having a blast-nozzle, of a yoke pivoted to said renovator, an operating-handle mounted upon said yoke and provided with a passage for supplying compressed air to the nozzle, and a flexible connection between said operating-handle and said nozzle, substantially as described."

These parties under different corporate names have been before this court, and Judge Baker in deciding the case, 125 Fed. 761, 60 C. C. A. 529, said:

"Nation did not disclose that his air blast would penetrate the carpet, strike the floor, and carry up through the carpet the dust on the floor and in the body of the carpet into the hood. His drawing indicates that the air rebounds from the surface of the goods to be cleaned. But if his device, without material modifications, could be made to do the work of the Thurman machine, it would be by a different mode of operation."

The Circuit Court of Appeals reversed the judgment below, and pointed out a fundamental difference in the operation of the two machines, which may be expressed by the popular terms "duster and renovator." The duster, as the term implies, deals only with liberating the dust from the surface of the material to be cleaned, and conducting the same by an air current into a bag, where the dust is strained out as the air escapes through the porous material of the bag. The renovator directs the air-blast into and through the carpet against the floor, and by a rebounding action, up through the carpet into the hood. It results, therefore, that if the alleged infringing device is made in strict accordance with the Nation patent, there is no infringement of claim 1 of No. 634,042. This would be presumptively true, because the officials of the Patent Office granted the latter patent to Thurman; but it is conclusively true in view of the doctrine laid down by the Circuit Court of Appeals. The question to be settled, therefore, would seem to be whether the defendant's device is a physical embodiment of the Nation patent.

Nation was a car cleaner. He had used the open blast nozzle which drove the dust from one part of the car to another, but did not imprison it. Nation took a distinct step in advance by application of old elements, the air-blast, the hood and the strainer. His drawings indicate a hand tool to be pushed over the cushions and upholstery by means of a rigid tube through which the compressed air entered. This small tool probably met the requirements of his situation. Thurman added certain structural features which differentiated his machine from Nation's. The air-blast was located outside of the hood, and the lip was laid on the surface of the carpet so that the blast of air must penetrate the meshes of the fabric and then rebound, passing a second time through the carpet and up into the air passage through which it passes into a receptacle at such an angle as to force open a trap and deposit the dirt particles in a chamber. This tool was called a renovator as distinguished from a mere dusting apparatus. It is easy to understand why Thurman's idea of renovation did not occur to Nation.

It was not required in the work he was doing, and there is no suggestion in his patent anywhere of Thurman's conception. Defendant's device has departed from the conception of the Nation patent in several important particulars which are not confined to mere details of construction. The hood with its neck thrust up into the bag is discarded. Instead of discharging the air-blast within the hood, air passages are substituted to conduct the dust-laden air into the chambers. Furthermore, the slip in the nozzle is located in contact with the carpet instead of some distance above it.

It is contended that the defendant employs certain features that differentiate his device from the Thurman tool. The air-blast is directed downward upon the carpet at an angle of 90 degrees, while Thurman's drawing and structure plainly indicate an angle of about 45 degrees. It seems quite immaterial which angle the defendant adopts if it does the work of the Thurman machine in substantially the same way. Thurman has not limited himself to any particular angle. While the air-blast is discharged in a downward direction, it is plain that the blast deviates from a straight line in order to send the dust-laden air up into the air passages by its rebounding force. The angle of reflection amounts to demonstration. Defendant's machine also has two slits for the escape of the compressed air, one rearward and the other forward, with two air-chambers instead of one. This feature cannot change the legal situation. If we were to concede that the machine of the defendant was better by reason of the duplication of these parts, this would not allow defendant to escape infringement, if the devices are substantially alike. *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017; See, also, *Kinloch Tel. Co. v. Western Electric Co.*, 113 Fed. 652, 51 C. C. A. 362.

We may go yet a step further. Suppose we were to concede that the double blast of the defendant's machine constituted not only infringement, but involved inventive thought; that would not relieve the defendant from infringement. An improver cannot seize upon the inventive thought of a prior inventor and escape infringement. It seems clear that the Circuit Court of Appeals has pointed the way and that there is no escape from the conclusion that the defendant infringes.

It remains to consider whether the defendant also infringes claims 5 and 6 of No. 690,084. This is a new proposition. This patent was not before the Court of Appeals, and the Nation patent is entirely silent on the subject. It is true, as claimed by the defendant, that the specification in this patent makes a certain tilting device whereby the rear end of the case may be raised from the carpet, the leading feature of the Thurman invention. It is also true that the defendant has not appropriated this feature, and probably could not in view of the arrangement of the air-blast. It is nevertheless true that this element which we have called the tilting device is not included in either claims 5 or 6, unless the same is imported into the claims by the use of the familiar formula "substantially as described." There is no merit in the contention that the court can read into claims 5 and 6 an element not claimed or referred to therein. It is familiar that such reference to specification is allowable to explain or make specific something found

in the claim; but this cannot be taken as a warrant to add anything to the claim. The claim is the measure of the grant, and the same cannot be reconstructed by the court, the only question open here being one of infringement, and the only claims under consideration being 5 and 6, the precise the only question is whether the defendant's tool embodies all the elements of the Thurman combination appearing in those two claims, co-acting in the same way to produce the same result.

We think the analysis made by complainants' counsel in their brief, on page 38, is accurate, and that there is found in the defendant's apparatus, which is clearly a pneumatic carpet renovator, the following elements: (a) The combination with a pneumatic carpet renovator having a blast nozzle, D, of (b) a pivoted handle, E, provided with a passage for the supply of compressed air to said nozzle; and (c) a flexible connection, F, between said handle and said nozzle; and, treating claim 6 separately, it appears that the defendant's apparatus has in combination the following elements: (a) The combination with a pneumatic carpet renovator having a blast nozzle, D, of (b) a yoke, D, pivoted to said renovator; (c) an operating handle, E, mounted upon said yoke, and provided with a passage for supplying compressed air to the nozzle; and (e) a flexible connection, F, between said operating handle and said nozzle. The several elements seem to be combined in the same way for the same purpose, and the two machines result from the combination of elements co-acting to produce the same results in substantially the same way. *Machine Co. v. Murphy*, 97 U. S. 120, 24 L. Ed. 935. We are admonished by the Supreme Court not to look too much to names, forms, or shapes, but to study the machine itself to determine the real principle of its operation. *Machine Co. v. Murphy*, 97 U. S. 120, 24 L. Ed. 935.

It is urged that there is another radical difference in the construction of the two machines, because defendant has not adopted the tortuous passage for the dust-laden air marked on complainants' diagram K. L. M. O., but has retained the simple bag. Unfortunately, however, for this contention, the improved feature for conducting the dust-laden air does not appear in either claim now before the court.

I am persuaded that the defendant's machine is not an embodiment of the Nation patent, but is built in accordance with the teachings of the Thurman patents. I find each of the three claims in issue infringed. Let an interlocutory decree be prepared in accordance with this opinion.

GENERAL ELECTRIC CO. v. CHICAGO FUSE WIRE & MFG. CO.

(Circuit Court, S. D. New York. February 14, 1910.)

PATENTS (§ 328*)—INFRINGEMENT—ELECTRIC SAFETY FUSE.

The Thalacker patent, No. 502,541, for an electric safety fuse consisting of a main safety fuse, an auxiliary safety fuse, and a box or casing completely enveloping the main fuse, but so constructed as to permit the condition of the auxiliary fuse to be seen, is valid and entitled to a reasonably broad construction, and is infringed by a construction in which the "condition" of the auxiliary fuse may be seen, although the fuse itself cannot.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the General Electric Company against the Chicago Fuse Wire & Manufacturing Company. On motion for preliminary injunction. Motion granted.

W. K. Richardson (A. D. Salinger, of counsel), for complainant.
V. S. Allyn, for defendant.

RAY, District Judge. The validity of claims 1, 2, and 4 of the so-called "Thalacker patent," No. 502,541, dated August 1, 1893, for electric safety fuse, have been adjudicated by the Circuit Court of Appeals in the First Circuit, opinion by Lowell, J., no dissent, handed down November 12, 1909, in General Electric Company v. Fred B. Smith, 173 Fed. 790. I am of the opinion, after considering the prior art, consisting of a large number of prior patents submitted on this motion, the affidavits in support of and in opposition to this motion, and the opinion of the court in the case referred to, that such claims of the said patent are valid. They read as follows:

"1. In an electric safety fuse, the combination of a main safety fuse, an auxiliary safety fuse, and a box or casing completely enveloping the main fuse, but so constructed as to permit the condition of the auxiliary fuse to be seen.

"2. In an electric safety fuse, the combination of a main fuse, an auxiliary fuse, and a casing completely enveloping the main fuse, but only partially enveloping the auxiliary fuse."

"4. In an electric safety fuse, the combination of a main fuse, an auxiliary fuse, overlying and underlying portions of insulating material, and an inclosing casing, said casing provided with an opening through its top portion whereby the condition of the auxiliary fuse may be observed."

In an electric safety fuse, the combination of a main safety fuse with an auxiliary fuse, or auxiliary safety fuse, and a box or casing completely enveloping the main fuse, but so constructed as to permit the auxiliary fuse to protrude therefrom itself, or by means of a connection so as to give notice of unusual disturbance by ringing a bell attached to or connected therewith, was old. The result was that, if the main fuse blew or fused, the auxiliary fuse followed suit, and warning was given by the ringing of the bell. It was desirable to have a construction where, while the main fuse was completely covered and hidden, the "condition" of the "auxiliary fuse" might "be seen," or "observed." It is obvious that the alarm or notice given by the ringing of a bell would be a temporary notice and might or might not be heard. The ringing would not be continuous. Once rung, the notice is of no further use, while, if the condition of the auxiliary fuse may be seen or observed at all times, the box or casing of the main fuse need not be disturbed. The purpose of the invention of the patent in suit was to permit, not the auxiliary fuse itself, to be seen or observed, but the "condition" of such auxiliary fuse, to "be seen" or "observed" at all times; the main fuse and auxiliary fuse being incased by a box or casing. It is not denied that it is desirable and necessary to safety that the main fuse be incased. When the main fuse is "blown," the auxiliary fuse is blown also by the excessive current which undertakes to pass through it, as the current can no longer use the main fuse. When the main fuse is blown, there is danger; an arc may be formed, etc. The utility of an auxiliary fuse or wire need not be gone into.

By leaving a small opening in the box or casing and leaving a small part of the auxiliary fuse exposed to sight, its condition at all times can be seen and the condition of the main fuse known; that is, correctly inferred. The great purpose to be served is to completely hide or pack the main fuse and the greater portion of the auxiliary fuse, but, in some way, to enable its "condition" to be seen, and to provide means whereby these results shall be obtained.

In the case referred to (*General Electric Company v. Smith*), the auxiliary fuse or a connecting wire was carried into or through a small quantity of paste contained in or at a small opening in the box or casing, and when the main fuse blew the current was carried into the small wire, and the heat generated by the resistance burned or colored the paste and as a result the "condition" of the auxiliary fuse was "seen" or "observed," and that of the main fuse known. No part of the auxiliary fuse or wire was actually "seen." But its "condition" was seen, observed, made known, by the burned or discolored condition of the paste. That is, the actual condition of the auxiliary fuse in that construction is made known to the eye by the action of light transmitted from the burned or discolored surface in contact with and burned or discolored by the blowing out of such auxiliary fuse. We see, not the fuse, but its "condition," by the evidence it gives or condition it produces in that substance which is connected to or with it as a part thereof. This was held an infringement for the reason that the "condition" was seen.

I am of opinion the claims in issue are entitled to a construction broad enough to cover the device of the paste construction. If narrowed to a construction where the auxiliary fuse or the wire substitute must be actually seen, infringement would be easy, and the value of the patent destroyed. The claims in issue use no language requiring or compelling such a narrow construction. The condition of the auxiliary fuse is seen, known, made manifest, by the condition of the fuse or wire itself, if actually exposed, or by that of the paste or other material immediately surrounding that part of the wire or fuse not hidden by the box or casing, when that part is covered by paste or some other material. The language of the claims, evidently, was carefully selected with a view to prevent infringements such as have been mentioned. The language of the specifications is somewhat narrower. They say, after describing the prior art and the objections to be overcome:

"In other constructions the fusible strips have been inclosed in a suitable tube or box, which arrangement obviated the objections stated, but was not suitable for use, as the condition of the fuse could not easily be observed. In order to make a safety fuse which shall have none of the faults mentioned, I combine with a strip of fusible metal, completely inclosed in a nonconducting box or case, an auxiliary fusible strip so located and connected as to be seen at all times, and which will be **destroyed** when the main fuse, which is out of sight, is 'blown.'"

After describing the main fuse, box, etc., he says:

"10 and 10a are thin strips of wood, vulcanite, indurated paper or similar material: one of which is placed over and the other under the main fusible strip, 5, so as to, in connection with the main strip, completely fill the cavity of the inclosing case. Arranged over the portion, 10, is what I term the auxiliary fusible strip, 11, which may be made of any suitable material which

will fuse at the same temperature as the main strip, or be fused when the main strip is fused; a thin sheet of tin foil I find answers the purpose as well as anything else. A part of this strip, it will be observed, lies under and across the opening, 9, in the upper portion, 8, of the case, and can be seen plainly through the opening. * * * The operation of my improved fuse is readily understood. When the main fuse is blown, the auxiliary fuse is likewise blown; the main fuse, however, being completely incased within the protecting cover, the material of which it is made cannot scatter, nor can an arc be formed, and the action of the fuse is no longer affected by variation in temperature. At the same time, the condition of the main fuse will always be indicated by the condition of the auxiliary fuse as seen through the opening in the casing."

It is quite clear that Thalacker had in mind an opening in the tube, case, or box containing both the main and the auxiliary fuse with some portion of the auxiliary fuse exposed to view through that opening; but it is evident that he had in mind the possibility and probability that this part of the auxiliary fuse might be covered or hidden from actual view or sight by some covering, and that this would be immaterial so long as the "condition" of the auxiliary fuse could be observed or seen. Hence he claims a construction where the "condition," not the auxiliary fuse itself, may be seen. I think a strip of paper or other material connected with the auxiliary fuse so as to be acted upon by it is to be considered a part thereof.

The alleged infringing device, "Complainant's Exhibit, Broadhurst Exhibit, Defendant's Fuse," and "Complainant's Exhibit, Broadhurst Exhibit, Defendant's Exhibit cut open," show the case, the main fuse, and the auxiliary fuse, consisting of a small wire which passes through a small aperture in the case and at a little distance re-enters the case. The exposed portion or end of this wire or auxiliary fuse is covered with a paper, and when the main fuse is blown the excess current is carried to the surface, and this paper covering is burned or discolored, and thus the "condition" of the auxiliary fuse is "seen" or "observed" or known, and the condition of the main fuse is also necessarily disclosed.

I am of the opinion that infringement is not avoided by bringing the auxiliary fuse or wire to the surface of the casing and covering it with a thin paper, or with wax or with material of any kind, which on the passage of an abnormal current which blows the main fuse so acts upon the auxiliary as to cause it to make its condition and that of the main fuse known by burning or discoloring the covering. This covering in this construction is in fact made a part of the auxiliary fuse and makes its condition "seen" by the eye. And it is immaterial that the auxiliary is not a fuse strictly speaking. It carries current and by its resistance generates heat and burns or discolors the attached paper, or wax, or whatever is used as a covering, and thus indicates to the eye the blown condition of both the auxiliary and the main safety fuse. This is not an improved construction, but merely a changed construction, which in one sense avoids the specific wording of the specifications of the patent in suit, but not its spirit or true meaning. While Thalacker was not a pioneer in the art, he was a pioneer in the sense that he was first to present an electric safety fuse of this particular type, and is entitled to a reasonably broad construction. It was unnecessary

to say that, if the auxiliary fuse was brought to the surface of the casing and covered with a paper so as to show itself and exhibit its condition to the eye there, it was within his claim, or that, if so brought to the surface and connected with a paste or paper so as to exhibit its true condition to the eye through that medium, it was still, as so located and connected, within his invention and claims. In short, it was not necessary to state that mere changes of constructions were included.

It is unnecessary to say that changes of form or construction which produce no new or material change in mode of operation or practical results will not avoid infringement. As the Circuit Court of Appeals, First Circuit, has sustained the patent in suit and held a substantially similar structure to be an infringement, I am constrained to grant the motion for a preliminary injunction.

So ordered.

ROBERTSON v. UNION POTTERIES CO.

(District Court, W. D. Pennsylvania. April 11, 1909.)

BANKRUPTCY (§ 72*) — INVOLUNTARY BANKRUPTCY — WHO MAY BE ADJUDGED BANKRUPT—MANUFACTURING AND TRADING CORPORATION.

Where a corporation is organized to manufacture and trade in crockery, and engages in the business, it is liable to be adjudged a bankrupt, though it has ceased to operate before the commencement of the proceedings, and before many of its obligations were incurred.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 17; Dec. Dig. § 72.*

What persons are subject to bankruptcy law, see note to *Mattoon Nat. Bank v. First Nat. Bank*, 42 C. C. A. 4.]

Proceeding by one Robertson against the Union Potteries Company. Heard on exceptions to the report and opinion of William R. Blair, referee in bankruptcy, acting as special master, on the petition for adjudication. Exceptions sustained.

Clarence Burleigh, O. S. Richardson, and Albert York Smith, for plaintiff.

Weil & Throp, for defendant.

ORR, District Judge. The main question in this case is whether or not the Union Potteries Company can be adjudged bankrupt. It is insisted upon by the petitioning creditors that it is a corporation engaged principally in manufacturing, trading, or mercantile pursuits. The charter of the corporation was granted by the state of New Jersey in 1901, and sets forth the object to be to manufacture, buy, sell, trade, and deal in any and every kind of crockery, etc., and "in furtherance, and not in limitation, of the general powers conferred by the laws of the state of New Jersey," it is expressly provided that the company should have many other powers. To go into details further with respect to the charter is unnecessary. The corporation had an office in Jersey City, solely for the purpose of complying with the laws of the

*For other cases see same topic & § NUMBER in Dec. & Am. Dig., 1907 to date, & Rep'r Indexes

state of New Jersey. It had its principal office in the city of Pittsburgh, in this district.

The evidence is that the corporation was engaged in the manufacture of pottery until early in the year 1904, at which time its factories were destroyed by fire, and that subsequently it rebuilt for a new corporation the same potteries. How the title passed from the old corporation to the new one does not appear; but it does appear that in consideration of the rebuilding of the potteries for the new company, or for the transfer of the properties by the old to the new company, the old company received stock in quite a large amount in said new company. In order to comply with the laws of Pennsylvania, the Union Potteries Company filed a statement under its seal in the office of the Secretary of the Commonwealth of Pennsylvania under date of the 29th day of March, 1904, in which it stated:

"The object of said corporation or company is the manufacture and sale of pottery."

From that date down to 1908, long after the petition had been filed in this court, that declaration remained unchanged in the office of the Secretary of the Commonwealth. Because of the requirements of the Pennsylvania statute of April 22, 1874 (P. L. 108), it was a continuing declaration by the corporation of the purpose of its existence. I am of the opinion that because the said corporation was principally engaged in manufacturing, and because of the continuing declaration that manufacturing was its object, it cannot now defeat the petition in bankruptcy by alleging that it has ceased to be a manufacturing corporation.

In *Re Moench & Sons Co.*, 12 Am. Bankr. Rep. 240, 130 Fed. 685, 66 C. C. A. 37, receivers of a corporation were appointed in March, 1903. In the following May a petition was presented to have the corporation adjudicated a bankrupt. This petition was resisted on the ground that the corporation had ceased to do business on the day the receivers were appointed. Judge Lacombe, for the appellate court, says:

"No case is cited in support of this proposition, and in the absence of authority we should be unwilling to hold that a corporation could thus easily avoid the operation of the bankruptcy act by making a general assignment, or by securing the appointment of receivers, or by ceasing to do any business before its creditors filed a petition against it."

Whether it is three months, as in the case just cited, or a longer period, in which the corporation ceased to carry on a manufacturing business, is immaterial, provided at one time it was chiefly engaged in manufacturing. Many of the cases cited in support of the report of the master are not applicable, for the reason that the corporation never had been at any stage in its history principally engaged in manufacturing, trading, or mercantile pursuits. This phase of the case is well considered in *Tiffany v. La Plume Condensed Milk Co.* (D. C.) 15 Am. Bankr. Rep. 413, 141 Fed. 444, on page 447, by Judge Archbald, as follows:

"Closely in point is *In re White Mountain Paper Co.* (D. C.) 11 Am. Bankr. Rep. 491, 127 Fed. 180, where a corporation, organized under the laws of New

Jersey, for the purpose of manufacturing pulp, acquired land and erected a plant in New Hampshire for the purpose of engaging in that business, but became involved before any direct manufacturing was done. In holding it liable to proceedings in bankruptcy, notwithstanding the latter circumstance, it is said by Aldrich, District Judge: 'The question * * * does not depend upon * * * whether the corporation was at the particular time of the petition actually engaged in * * * the process of manufacturing * * * pursuits was used for the purpose of describing the kind of a corporation which may be put into bankruptcy, and that it was not intended that the operation of the bankruptcy law upon a corporation of a kind within the meaning of the statute should depend upon the question whether it was actually engaged in manufacturing at the particular time when the petition was filed.' This case was affirmed on appeal (11 Am. Bankr. Rep. 633, 127 Fed. 643, 62 C. C. A. 369) upon the somewhat narrower ground that, in the opinion of the court, manufacturing, under the evidence, had in fact begun, although only in its earlier stages—a view which, while it may not adopt, does not detract from, that expressed by the lower court."

It is true that whether a corporation is within the act does not depend upon the authority given it by its charter, and if a corporation be authorized to engage in manufacture and never does so, or prepares to do so, it would not be within the statute; but the cases all seem to me to hold that, where the corporation has engaged chiefly in manufacturing, it may be proceeded against in bankruptcy, regardless of the period of time between its cessation of operation and the filing of the creditors' petition, and I am of the opinion that the claims of the petitioning creditors need not have arisen during the period in which the corporation was so engaged. In that I believe it differs from a natural person, whose activities may change at his will; whereas the activities of the corporation are and must necessarily be controlled by its charter.

I have not considered the exceptions to the referee's report in detail, for I have not thought it necessary to do so in view of the conclusions I have reached. So far as they immediately relate to the position I have herein outlined, they are sustained.

UNITED STATES v. GALLANT.

(District Court, W. D. Michigan, S. D. March 1, 1910.)

INTERNAL REVENUE (§ 40*)—STAMPS—FAILURE TO OBLITERATE—OFFENSES—INTENT.

A conviction may be had, under Rev. St. § 3324 (U. S. Comp. St. 1901, p. 2168), making it a felony to empty a cask of distilled spirits without then and there effacing and obliterating the stamps, marks, and brands thereon, though defendant's act was inadvertent and negligent, and did not involve actual felonious intent.

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. § 40.*]

Louis Gallant was indicted for emptying a cask containing distilled spirits without effacing the stamps, marks, and brands, and moves to quash the indictment. Denied.

Geo. G. Covell, Dist. Atty., for the United States.

Richard G. Newnham, for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

DENISON, District Judge. This is a prosecution under section 3324 of the Revised Statutes (U. S. Comp. St. 1901, p. 2168); and it is alleged that, at the time of emptying a cask containing distilled spirits, the respondent "then and there unlawfully did fail to efface and obliterate the said stamp, marks, and brands." A motion is made to quash the indictment, because it does not otherwise allege a specific wrongful intent; and it is conceded by the district attorney that the evidence will not clearly show any such intent, and will not distinctly, if at all, contradict the respondent's assertion that the failure to efface the stamp was merely careless or inadvertent; and it is further agreed that this motion may be treated as if such situation was fully stated in the indictment, or as if the question arose, and the facts appeared, upon a motion in arrest, after verdict.

In support of the motion, it is urged that an offense, under this section, is a felony, and that a felony necessarily involves an actual felonious intent. Some general statements from text-books and decisions are cited in support of that proposition, but none seems to require comment, excepting *U. S. v. Smith* (D. C.) 27 Fed. 854. This was a prosecution under section 3296, which, like section 3324, makes no express reference to the intent or purpose accompanying the act. It has reference, however, to a positive act, and there may be a distinction between an act of commission, which may or may not be done with intent to defraud the revenue, and an act of omission, against which a specific penalty is pronounced, and which may be in violation of the law merely because the omission exists, and without regard to the actual intent. This distinction seems to be recognized by the same judge who wrote the opinion in *U. S. v. Smith*, because in *U. S. v. Buchanan* (D. C.) 9 Fed. 689, considering section 3324, he holds that the respondent may be guilty, through the act of an agent, in omitting to destroy the stamp, although in such case there would be no specific criminal intent by the respondent.

In so far as *U. S. v. Smith* may support the conclusion that a purpose to defraud the government is an essential ingredient in the offense defined by section 3324, it does not commend itself to my judgment. *Felton v. U. S.*, 96 U. S. 699, 24 L. Ed. 875, and *Potter v. U. S.*, 155 U. S. 438, 15 Sup. Ct. 144, 39 L. Ed. 214, refer to instances where the willfulness of the act was, by the statute, made an ingredient in the offense.

There is a familiar line of cases, under laws relating to taxation and police regulation, in which it is well settled that the offense consists in the act itself, wholly without regard to the intent—as, for example, prohibitions in the liquor laws against keeping a saloon open, excepting at permitted times. It does not seem that this rule should be changed because only in a given case the stated penalty makes the offense a felony. That is a consideration for the Legislature.

The conclusion that an express criminal intent is not, under such a statute, vital to the offense, seems to be well supported by decisions in the federal courts. In *U. S. v. Buchanan* (D. C.) 9 Fed. 689, such rule is applied to this very statute; and to the same effect is *U. S. v. Adler and Forst*, Fed. Cas. No. 14,424. The same holding is made by Mr.

Justice Miller, in *U. S. v. Ulrici*, 3 Dill. 532, Fed. Cas. No. 16,594. In *U. S. v. Thomson* (D. C.) 12 Fed. 245, the rule is stated that negligence may be equivalent to a criminal intent, and is applied to the provisions requiring a ship's master not to take on more than a certain number of passengers, and to deliver a correct passenger list. In *U. S. v. Bayaud*, 16 Fed. 383, which was an indictment under, or dependent upon, section 3324, it was distinctly held by Judges Wallace, Benedict, and Brown that neither an intent to defraud the United States, nor any other particular intent, was made, by the statute, an ingredient of the offense (though this case reserves the question whether the general felonious intent was necessary). In *U. S. v. Spiegel*, 116 U. S. 276, 6 Sup. Ct. 587, 29 L. Ed. 664, Mr. Justice Matthews declared that the statute was violated, if the failure to destroy the stamp was "by neglect or otherwise" (though this was dictum, so far as concerns its application to the present case). In *U. S. v. Liquor Dealers' Supply Co.* (D. C.) 156 Fed. 219, it was held that the shipping of liquors under a name other than the proper name was, in itself, a violation of section 3449 (page 2277), without regard to whether it was done with fraudulent intent or any particular intent. In *U. S. v. Guthrie* (D. C.) 171 Fed. 528, where the question was of reusing a package without destroying the stamp previously affixed, it was expressly held that this reuse need not be knowing and willful, and that the offense was complete when the bottle was reused without, in fact, destroying the stamp. The question of criminal intent, under the revenue laws, is considered, also, in *U. S. v. Staats*, 8 How. 41, 12 L. Ed. 979; *Kaufmann v. U. S.*, 113 Fed. 919, 51 C. C. A. 549; *U. S. v. Stowell*, 133 U. S. 12, 10 Sup. Ct. 244, 33 L. Ed. 555; *Felsenheld v. U. S.*, 186 U. S. 126, 22 Sup. Ct. 740, 46 L. Ed. 1085; *U. S. v. Barnhardt*, Fed. Cas. No. 14,526; *U. S. v. Davis*, Fed. Cas. No. 14,928; *U. S. v. Dobbs*, Fed. Cas. No. 14,972; *U. S. v. Jacoby*, Fed. Cas. No. 15,462; *U. S. v. Torge*, Fed. Cas. No. 16,533.

It is possible that there might be a failure to remove the stamp, which failure would be so far the result of accident that it would not be such an omission as the statute contemplates; but the present case presents only a question of negligence or carelessness.

It is urged that every presumption should be against a construction which makes it imperative that a conviction for felony should follow an inadvertence. If this view was to receive consideration, it might be neutralized by the well-established practice of the revenue department to compromise all cases of that kind.

My conclusion is that the offense is complete without the presence of any deliberate purpose to violate the law. The motion is overruled, and the jury will be instructed accordingly.

In re IRWIN et al.

(District Court, W. D. Pennsylvania. May, 1909.)

1. BANKRUPTCY (§ 32*)—SCHEDULES—AMENDMENT.

Where, after the bankrupts and their trustees were discharged, the bankrupts, acting in good faith, assisted by their counsel, found additional assets of which they had hitherto been ignorant, resulting in a credit to the estate of each of about \$2,000, the bankrupts, not having received the full amount of their exemptions under the state statute, were each entitled within a reasonable time to leave to amend his schedule of exempt property, and to an allowance out of the fund so obtained of an amount necessary to complete the exemption.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 31-33; Dec. Dig. § 32.*]

2. BANKRUPTCY (§ 22*)—PROCEEDINGS—EQUITY PRACTICE.

Proceedings in bankruptcy are governed by the rules of practice in equity, where the acts of Congress and the general orders are silent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 11; Dec. Dig. § 22.*]

3. BANKRUPTCY (§ 399*)—EXEMPTIONS—DENIAL.

It is only for gross fault on the part of a bankrupt that a claim to exemptions should be disallowed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 669; Dec. Dig. § 399.*]

4. BANKRUPTCY (§ 482*)—ATTORNEY FOR BANKRUPT—FEES.

Where, after the discharge of certain bankrupts and their trustee, their attorney, as the result of considerable effort in examining records, etc., and the accounts relating to the estate of the bankrupts' father, and certain titles to mortgaged property, discovered additional assets amounting to \$2,000 to the credit of the estate of each of the bankrupts, an allowance to the attorney of \$37.50 for fees was inadequate, and should be increased to \$100 in each estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874-876, 897; Dec. Dig. § 482.*]

In the matter of the bankruptcy of George B. and James Stuart Irwin. On certified questions by the referee on petitions of the bankrupts for leave to amend schedules of exempt property and for a balance of exemption, and on petition of the bankrupts' attorneys for attorney's fees. Granted.

For opinion in Circuit Court of Appeals, modifying the order in this case, see 174 Fed. 642.

Albert York Smith, for A. H. Rowand.

Charles A. Wood, for trustee.

ORR, District Judge. Upon the argument of these questions it was admitted by all the counsel that each of said bankrupts was acting in entire good faith. This is an important fact to be borne in mind. On January 14, 1908, the bankrupts filed a voluntary petition, and each claimed certain exemptions out of his individual assets. The assets, exclusive of wearing apparel, claimed by James Stuart Irwin, fell short of the exemption allowed by the statute of Pennsylvania by \$158. Those claimed by George Bruce Irwin fell short by \$205. Matters were so proceeded with that the bankrupts were discharged on April 23, 1908, and their trustee was discharged on October 2, 1908.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Subsequently, about November 7, 1908, through the instrumentality of the bankrupts, by the assistance of their counsel, A. H. Rowand, Esq., it was found that there were additional assets of which the bankrupts had hitherto been ignorant. These consisted of two mortgages, made years before to secure dower of their stepmother, and lately payable to the bankrupts by reason of her recent death. Thereupon the trustee was reinstated. By the collection of the mortgage debts there is to the credit of the estate of each bankrupt in the hands of the trustee about \$2,000. Each of the bankrupts within a reasonable time thereafter presented his application to the referee for an allowance out of said fund to an amount necessary to make up the full amount of the exemption as allowed by the statute of Pennsylvania, and for leave to amend his schedule of exempt property in that regard.

I am of opinion that the referee was in error in refusing such applications. Amendments for proper reasons are contemplated by the general orders in bankruptcy. There is nothing to prevent a bankrupt who has been discharged from having the record amended in a proper case. Proceedings in bankruptcy are governed by the rules and practice in equity, where the acts of Congress and the general orders are silent. All the equities are in favor of the claim, and justify a reversal of the referee. It must be for some gross fault that a claim to exemption should be disallowed. *In re Tollett*, 5 Am. Bankr. Rep. 404, 106 Fed. 866, 46 C. C. A. 11, 54 L. R. A. 222; *In re Falconer*, 6 Am. Bankr. Rep. 557, 110 Fed. 111, 49 C. C. A. 50; *In re Burke*, 14 Am. Bankr. Rep. 31, 134 Fed. 562, 67 C. C. A. 486.

The amendments are allowed, and the balances claimed by the bankrupts, respectively, should be paid to them.

In the matter of the petition for allowance to the attorney for the bankrupts for services in examining records, etc., resulting in complete information with respect to the said mortgages, and leading to their collection by the trustee, I am constrained to increase the amount allowed by the referee. The value to the estate was not slight. The time spent in the examination of the accounts and records relating to the estate of John M. Irwin, the father of the bankrupts, must have been considerable, not to speak of the examination of the titles to the mortgaged premises, to find the debtors upon whom demand for payment should be made.

I believe that from each estate Mr. Rowand should receive the sum of \$100, which shall include the \$37.50 allowed him by the referee.

Let the several orders be drawn in accordance with this opinion.

GREEN et al. v. MINZENSHEIMER.

(Circuit Court, S. D. New York. March 19, 1909.)

COPYRIGHTS (§ 66*)—"INFRINGEMENT"—WHAT CONSTITUTES—TEMPORARY INJUNCTION.

The singing of a single verse and chorus of a copyrighted song, without musical accompaniment, in imitation of the voice, postures, and mannerisms of another, is not an "infringement," against which a temporary injunction will issue.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 66.*

For other definitions, see Words and Phrases, vol. 4, pp. 3590-3594.

Infringement of copyright by use of extracts and quotations, see note to G. & C. Marriam Co. v. United Dictionary Co., 76 C. C. A, 475.]

In Equity. Suit by Irene Franklin Green and another against Belle Blanch Minzensheimer. On motion for injunction restraining defendant from producing upon the stage a copyrighted musical composition. Denied.

Nathan Burkan, for complainants.

August Dreyer, for defendant.

COXE, Circuit Judge. The foundation of the motion appears to be a copyright upon the musical composition "Redhead." It appears that one Leo Feist is the owner of the copyright upon the musical composition. He, however, is not a party to this action. It is alleged that the complainants have reserved to themselves the dramatic right in "Redhead." The defendant is charged with infringement because she imitates the voice, postures and mannerisms of the complainant Irene Franklin Green by singing one verse and the chorus of "Redhead." She does this without musical accompaniment of any kind, prefacing her singing by the announcement that she will give "a suggestion of Irene Franklin," which is the stage name of Irene Franklin Green. It is not easy to see how the defendant infringes the copyright of a musical composition not owned by the complainants by a performance in which no music is used, especially as the court is not informed what the defendant does, except in the most general way. If, as the affidavits seem to show, the short performance by the defendant in which she imitates several well-known popular singers, the complainant among the rest, derives its popularity from the mimicry and cleverness in which she reproduces the mannerisms of these popular favorites, I am unable to see how the case can be distinguished from Bloom & Hamlin v. Nixon (C. C.) 125 Fed. 977. It is enough for the present to say that, upon the papers submitted to me, there is too much doubt to warrant the issuing of a preliminary injunction. The motion is denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GREEN et al. v. LUBY.

(Circuit Court, S. D. New York. December 21, 1909.)

1. COPYRIGHTS (§ 7*)—SUBJECTS—CLASSIFICATION—"DRAMATICO-MUSICAL COMPOSITION."

A sketch, consisting of a series of recitations and songs, with a very little dialogue and action, and with scenery, and lights thrown upon the singer, is a dramatico-musical composition, within the provisions of the copyright law.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 7.*]

For other definitions, see Words and Phrases, vol. 3, p. 2198.]

2. COPYRIGHTS (§ 7*)—VALIDITY—CLASSIFICATION.

Under Copyright Law (Act March 4, 1909, c. 320, 35 Stat. 1076 [U. S. Comp. St. Supp. 1909, p. 1291]) § 5, providing that an error in classification shall not invalidate a copyright, the classification of a dramatico-musical composition as a dramatic composition does not affect the validity of the copyright.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 7.*]

3. COPYRIGHTS (§ 42*)—NATURE—RIGHTS ACQUIRED.

Under Copyright Law (Act March 4, 1909, c. 320, 35 Stat. 1075 [U. S. Comp. St. Supp. 1909, p. 1289]) § 1, subd. "d," giving the holder of a copyright the exclusive right to perform or represent the copyrighted work publicly if a drama, and subdivision "e," giving the exclusive right to perform the copyrighted work publicly for profit if it be a musical composition, the holder of the copyright of a song constituting a part of a dramatic sketch, and those claiming under him, have the exclusive right to publicly present it.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 42.*]

4. COPYRIGHTS (§ 66*)—INFRINGEMENT—WHAT CONSTITUTES.

Where one sings an entire copyrighted song with musical accompaniment, she is guilty of infringement, though she purports merely to mimic another.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 66.*]

In Equity. Suit by Irene Franklin Green and others against Edna Luby. Heard on motion for temporary injunction. Granted.

Nathan Burkan, for complainants.

Max D. Josephson, for defendant.

NOYES, Circuit Judge. This is an application for a preliminary injunction to restrain the defendant from publicly singing an alleged copyrighted song entitled "I'm a Bringing up the Family," which song, it is alleged, was written as a number or part of a copyrighted dramatic sketch entitled "The Queen of the Vaudeville."

The defendant contends, in the first place, that the sketch "The Queen of the Vaudeville" is a musical composition, and not a dramatic composition, within the meaning of the copyright law of 1909 (Act March 4, 1909, c. 320, 35 Stat. 1075 [U. S. Comp. St. Supp. 1909, p. 1289]). There is much force in this contention. The work is essentially a series of recitations and songs to be recited or sung by the same person dressed in different costumes. The action and dialogue in addition thereto are hardly sufficient to make a dramatic composition. Still the work is something more than a mere musical composi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion. The singer dresses in costumes to represent the different characters. There is a very little dialogue or "patter"—the latter being, apparently, the professional term. There is also a very little action. The singer gets out of a cradle. There is scenery, and lights are thrown upon the singer. I think the sketch may fairly be classified as a "dramatico-musical composition" within the meaning of the copyright act.

But the fact that the sketch was improperly classified as a dramatic composition in taking out the copyright would not affect its validity. The copyright law expressly provides (section 5) that an error in classification shall not invalidate or impair a copyright. Moreover, the particular song in question—a number of the sketch—was copyrighted by the complainant Feist as a musical composition before the copyright of the sketch, and I do not understand that any question is raised as to the validity of such copyright.

Regarding, then, the sketch as a dramatic composition, the complainants have the exclusive right to publicly present it. Subdivision "d" of section 1 of the copyright law gives the exclusive right "to perform or represent the copyrighted work publicly if a drama." And, regarding the song as a musical composition, the complainants have the exclusive right to publicly perform it. Subdivision "e" of said section gives the exclusive right "to perform the copyrighted work publicly for profit, if it be a musical composition." It is not disputed that the complainants Green have the right to produce the song under the copyright to the complainant Feist.

The next question is one of infringement. The defendant admits that she sings the copyrighted song with musical accompaniment, but she says that she does so merely to mimic the complainant Irene Franklin Green. She contends that she gives impersonations of various singers, including said complainant, and, as incidental to such impersonations, sings the songs they are accustomed to sing. The mimicry is said to be the important thing; the particular song, the mere incident. But I am not satisfied that, in order to imitate a singer, it is necessary to sing the whole of a copyrighted song. "The mannerisms of the artist impersonated," to use the language of the defendant's brief, may be shown without words. And if some words are absolutely necessary, still a whole song is hardly required. And if a whole song is required, it is not too much to say that the imitator should select for impersonation a singer singing something else than a copyrighted song.

Bloom v. Nixon (C. C.) 125 Fed. 977, is distinguishable in that in that case the chorus only of the copyrighted song was sung. *Green v. Minzensheimer* (decided by this court March 19, 1909) 177 Fed. 286, is distinguishable in that in that case the defendant imitated the singer without musical accompaniment, and the testimony as to just what she did was not clear.

A preliminary injunction may issue as prayed for, upon the filing by the complainants of a bond, with sufficient surety, in the sum of \$2,000, conditioned that the complainants pay all damages sustained by the defendant, in case it be held that the complainants are not entitled to an injunction in the final decree.

ROYAL UNION MUT. LIFE INS. CO. v. WYNN et al

WYNN v. ROYAL UNION MUT. LIFE INS. CO.

(Circuit Court, N. D. Georgia. February 11, 1910.)

No. 61.

1. EQUITY (§ 195*)—CROSS-BILL—DETERMINATION OF CONTROVERSY.

Where, pending suit by an insurance company to cancel a policy for misrepresentation, the insured died, and by supplemental bill the beneficiary was restrained from bringing any action on the policy, his right to recover thereon was proper matter for a cross-bill in order that the court having taken jurisdiction for one purpose might determine the whole matter.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 446-449; Dec. Dig. § 195.*]

2. INSURANCE (§ 125*)—POLICY—CONSTRUCTION—WHAT LAW GOVERNS.

A bill to set aside a life insurance contract made in Georgia, insuring the life of a resident of that state, and a cross-bill to recover the proceeds of the policy, must be determined in accordance with the law of that state.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 173-175; Dec. Dig. § 125.*]

What law governs insurance policies, see notes to *Corley v. Travelers' Protective Ass'n*, 46 C. C. A. 287; *Globe & Rutgers Fire Ins. Co. of New York v. David Moffat Co.*, 83 C. C. A. 100.]

3. INSURANCE (§ 297*)—LIFE POLICY—MISREPRESENTATIONS.

Where insured was not an excessive drinker, and his death was not caused by his use of intoxicants, his misstatement of the kind or quantity of liquors consumed daily, or his failure to state certain facts with reference thereto not material to the risk, was no defense to the policy, nor ground for voiding it, under Civ. Code Ga. 1895, §§ 2097-2099, 2101, regulating the effect of concealment and misrepresentations in an application for insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 676; Dec. Dig. § 297.*]

Bill by the Royal Union Mutual Life Insurance Company against David Wynn, Jr., and another, and cross-bill by Thomas W. Wynn against the insurance company. On report of a special master and exceptions thereto. Exceptions overruled, and decree in accordance with the report.

Goetchins & Chappel, for Insurance Company.

Wimbish, Watkins & Ellis, T. T. Miller, and E. J. Wynn, for David Wynn and others.

NEWMAN, District Judge. The record in this case shows that on August 17, 1905, the Royal Union Mutual Life Insurance Company (hereinafter called the "insurance company") filed in this court its bill of complaint against David Wynn, Jr., and Thomas W. Wynn, alleging, in substance: That it is a corporation, citizen, and resident of the state of Iowa, and defendants are citizens and residents of Muscogee county, Ga. That complainant company was organized and incorporated for the purpose, among other things, of making assurance upon the lives of individuals upon the mutual plan, with power, under its

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

articles of incorporation, to make all necessary and proper contracts, and especially to do the acts and make the contract herein set forth. That on or about the 1st day of July, 1898, the defendant David Wynn, Jr., made application in writing to the insurance company for a policy of insurance in the amount of \$5,000, and nominated Thomas W. Wynn, his brother, as beneficiary therein. That on or about the said date, said David Wynn, Jr., was medically examined, such examination having been reduced to writing and when signed by the said David Wynn, Jr., all in pursuance of the custom and rule of all life insurance companies, for the purpose of protecting themselves from fraud, and to require that not only the applicant make and sign the written application for such insurance, in which they shall state all matters and answer all questions asked by the insurer, relating in any way to their health, insurance history, family history, insurability, and probable longevity, but that they shall also be examined by some regular physician, who shall write down the answers to all questions relating to the health, life, habits, conditions, family history, insurability, and probable longevity of the applicant, and that the questions so asked and answered shall be signed by the applicant, and the physician to certify to the insurer the result of his examination. That in pursuance of such application and medical examination, and relying upon the truth and accuracy of the statements therein contained, the insurance company, on July 1, 1898, issued to the said David Wynn, Jr., a policy of insurance, insuring his life in the sum of \$5,000, for the benefit of Thomas W. Wynn. A copy of the policy is attached.

The bill then alleges certain facts with reference to the representations made by Wynn as to his physical condition and the diseases he had had, as to which there is no serious insistence here, as I understand it, and there certainly could not very well be such insistence under the facts. It is then alleged that David Wynn, Jr., represented his practice as to the use of spirits, wines, malt liquors, or other alcoholic beverages, was that he used only a few drinks of beer daily, one or two glasses of beer at morning lunch, and the same at evening lunch, and some days none at all, while in truth and in fact he was in the habit of drinking both beer and whisky, and these in large and immoderate quantities and to excess; and that, in truth and in fact, he admitted in writing over his own signature, in an application made for the purpose of procuring insurance in the Mutual Life Insurance Company of Kentucky, on or about the 16th day of July, 1898, that his habit was to drink three ounces of whisky daily, and in addition to this to take one glass of beer daily; that all of these statements were false, and made fraudulently for the purpose of procuring the policy of insurance from the insurance company; and that these false answers and representations were upon matters material to the risk to be assumed by the insurance company, and if truthful disclosures had been made by the said David Wynn, Jr., as to them, no policy of insurance would have been issued to him.

They allege that, relying upon the truth of Wynn's statements in this respect, the policy was issued. It is then alleged that prior to the first anniversary of the policy, and before the second premium thereon

was due, the insurance company, from information given to it, had reason to believe, and believing, that David Wynn, Jr., had falsely represented in the application and medical examination as to his daily habit in the use of intoxicants and as to his health record, as soon as it learned of the same, made tender to David Wynn, Jr., of the full amount of the first annual premium, \$109.55, and demanded the surrender of the policy; that Wynn refused to accept the tender or to deliver to it the policy, and the insurance company thereupon paid into court the sum of \$109.55, for the purpose of keeping its said tender good; that David Wynn, Jr., and Thomas W. Wynn have failed and refused to surrender the policy and claim it is in full force and effect. The insurance company then said it had no remedy at law, and prayed a decree of the court that the policy be canceled, annulled, and held for naught.

The defendants filed a general demurrer to the bill, and on the same day the defendants filed a general answer, in which they admitted the application for insurance, the medical examination, the issuance of the policy and the correctness of the copy attached to the pleadings. The answer otherwise denied all of the material allegations of the bill, as to any false and fraudulent representations made by David Wynn, Jr.

Subsequently, on December 5, 1905, the complainant filed its replication and certain exceptions to the defendant's answer. On the 31st of January 1906, the complainant filed an amendment to its original bill, in which it alleged that on the 29th day of November, 1905, subsequent to the filing of the original bill, David Wynn, Jr., died, intestate, and that there was no administration on his estate, nor was there likely to be; that the other defendant, Thomas W. Wynn, being the beneficiary of the policy, was the only one interested therein or in the matters and things complained of therein. Certain other matters in the amendment are not material here. The amendment contained a prayer for an injunction against Thomas W. Wynn, enjoining him from suing on the policy of insurance and from assigning or transferring the policy until such time as the court might hear and determine the question of granting a permanent injunction, and until the further order of the court. The amendment was allowed by the court, and an order was made that Thomas W. Wynn be restrained, until the further order of the court, from suing on the policy.

On the 5th day of March, 1906, the defendant Thomas W. Wynn filed his answer, and the defendant admitted the statements made as to the death of David W. Wynn, Jr., intestate, and the lack of administration on his estate, and that he (Thomas W. Wynn) was his beneficiary under the policy set forth in the original bill.

On the 31st day of March, 1906, the complainant renewed its replication of the original answer and extended the same to the amended bill.

On the 7th day of May, Thomas W. Wynn filed a motion to dismiss the bill for certain reasons therein set forth.

Various orders were entered, hearings had, exceptions answered, and motions to dismiss taken up at different times, but no disposition

appears to have been made of the same, and the case was continued from time to time.

On the 24th of October, 1908, Thomas W. Wynn, the surviving defendant in the original bill, filed his motion to allow him to file a cross-bill, alleging that he was enjoined from suing on the policy of insurance described in the pleadings in the case, and that he believed he had a good cause of action on the insurance policy, and that the original complainant in the cause was a nonresident of the state of Georgia, and was represented by counsel throughout the case, and moved the court for an order allowing the filing of the cross-bill and for substitute service on the insurance company. On the same day Thomas W. Wynn filed his cross-bill. In the cross-bill he went into the facts of the case somewhat and set up his rights under the policy and that by reason of the injunction he could not sue at law, and concluded with a prayer for a decree in his favor for the amount of the policy. An order was made by the court allowing the filing of the cross-bill.

A demurrer was filed by the insurance company to this cross-bill on the ground that the matter set up in the cross-bill was not germane to the original bill, and the relief sought could not be had by a cross-bill, and prayed that the cross-bill be dismissed. On the same day it filed its answer to the cross-bill, reaffirming the allegations and averments contained in the original bill and the amendment thereto.

The whole case, by consent of all parties, was referred to a special master to report upon the issues of law and fact involved. No ruling had been made when the case went to the master on the demurrer to the cross-bill. The report of the master has been filed, finding in favor of Thomas W. Wynn, and that he have a decree against the insurance company for the amount of the policy. The finding is this:

"The master concludes, and so reports to the court, that Thomas W. Wynn, the cross-complainant, is entitled to have entered a decree in his favor against the defendant, the Royal Union Mutual Life Insurance Company, for the sum of \$5,000, less the sum of \$766.85, the same being the aggregate amount of the premiums due on said policy from and after the 1st day of July, 1898, up to the date of the death of said David Wynn, Jr., together with interest on said sum, at the rate of 7 per cent. per annum, from the 16th day of March, 1906, and all costs of court laid out and expended herein."

Exceptions have been filed to the report of the master by the insurance company, and it was on these exceptions that the present hearing was held.

The first question for determination is whether it is a case for a cross-bill. The master, who had this question before him as a part of the reference, holds that it was a proper case for a cross-bill, and cites *Meissner v. Buek* (C. C.) 28 Fed. 161; *Carnochan v. Christie*, 11 Wheat. 467, 6 L. Ed. 516; *Craig v. Dorr*, 145 Fed. 307, 76 C. C. A. 559; *Brooks v. Laurent*, 98 Fed. 647, 39 C. C. A. 201; *Mercantile Trust Company v. Atlantic & Pacific Railroad Company* (C. C.) 70 Fed. 518.

The special master correctly found that this was a proper case for a cross-bill. It was the only way that the controversy could be ended in this litigation, and their rights finally determined. It was the right

of the surviving defendant and beneficiary in the policy to have a final determination of the matter. The only ground which could be urged against the right to file this cross-bill would be that it sets up a claim as to which the beneficiary had a complete and ample remedy at law. The authorities do not sustain this position.

In *Weathersbee v. American Freehold Land Mortgage Co.* (C. C.) 77 Fed. 523, Judge Simonton says this, which is pertinent here:

"The grounds of demurrer are, in substance, that the cross-bill sets up a legal demand, and seeks, at the hands of the court, relief for which there is a plain, adequate, and complete remedy at law; and also that the relief demanded cannot be given, or the prayer entertained, until the defendant (complainant in the cross-bill) offers to pay the sum admitted to be due. In equity a defendant can pray nothing in his answer except to be dismissed by the court. If he has any relief to pray, he must do so by cross-bill. The cross-bill is not a new suit. It is merely auxiliary—a dependency upon, a part of, the original suit. It is brought in order to obtain full relief to all parties; and it is specially a mode of defense in the cause. *Field v. Schieffelin*, 7 Johns. Ch. [N. Y.] 252 [11 Am. Dec. 441]. The defendant may rely on matters purely legal, provided they be connected with the matters of the bill, for his defense, and by his cross-bill require the plaintiff to answer thereto. 2 Daniel, Ch. Prac. (Perkins' 3d Am. Ed.) 1650. This author, a recognized authority, at page 1653, says: 'But a cross-bill is considered a mode of defense or a proceeding to obtain a complete determination of a matter already in litigation in the court. The plaintiff in the cross-bill is not, at least as against the plaintiff in the original bill, obliged to show any ground of equity to support the jurisdiction of the court.' But the subject-matter of the cross-bill bill must be essentially connected with that of the original bill, and not extraneous thereto. The distinction is clearly shown by Judge Wallace in *Lautz v. Gordon* [C. C.] 28 Fed. 264."

In *Springfield Milling Co. v. Barnard & Leas Manufacturing Co.*, 81 Fed. 261, 26 C. C. A. 389, Circuit Judge Sanborn, speaking for the Circuit Court of Appeals for the Eighth Circuit, uses this language in reference to a cross-bill:

"The office of a cross-bill is either to warrant the grant of affirmative relief to the defendant in the original suit, to obtain a discovery in aid of the defense in that suit, to enable the defendant to interpose a more complete defense than that which he could present by answer, or to obtain full relief to all parties, and a complete determination of all controversies which arise out of the matters charged in the original bill. The fact that the cross-bill fairly tends to accomplish either of these purposes is generally a sufficient ground for its interposition. It must seek equitable relief; but, subject to this qualification, a complainant who has brought a defendant into a court of equity in order to subject him to an adjudication of his rights in a certain subject-matter, cannot be heard to say that there is no equity in a cross-bill which seeks an adjudication of all the rights of the parties to the original suit in the same subject-matter. The issues raised by the cross-bill must be so closely connected with the cause of action in the original suit that the cross-bill is a mere auxiliary or dependency upon the original suit; but, subject to this qualification, new facts and new issues may properly be presented by a cross-bill"—citing *Story*, Eq. Pl. §§ 398, 399; 1 *Beach*, Mod. Eq. Prac. §§ 433, 435; *Carnochan v. Christie*, 11 Wheat. 446, 6 L. Ed. 516; *Cross v. De Valle*, 1 Wall. 5, 17 L. Ed. 515; *Ayres v. Carver*, 17 How. 591, 595, 15 L. Ed. 179; *Meissner v. Buek* (C. C.) 28 Fed. 161, 163; *Chicago, M. & St. P. Ry. Co. v. Third Nat. Bank*, 134 U. S. 276, 10 Sup. Ct. 550, 33 L. Ed. 900; *Davis v. Christian Union*, 100 Ill. 313; *Cartwright v. Clark*, 4 Metc. (Mass.) 104; *Derby v. Gage*, 38 Ill. 27; *French v. Griffin*, 18 N. J. Eq. 279; *Graham v. Berryman*, 19 N. J. Eq. 29; *Wickliffe v. Clay*, 1 Dana (Ky.) 585, 589; *Allen v. Roll*, 25 N. J. Eq. 164; *King v. Insurance Co.*, 45 Ind. 43.

And further along in the opinion, Judge Sanborn says (page 265 of 81 Fed., page 394 of 26 C. C. A.):

"It is the province and duty of a court of equity, which has properly acquired jurisdiction of a subject-matter for a necessary purpose, to proceed and do final and complete justice between the parties, where it can be done in that court as well as by proceedings at law."

In *Ex parte Railroad Company*, 95 U. S. 221, 24 L. Ed. 355, Chief Justice Waite, speaking for the court, says:

"A cross-bill must grow out of the matters alleged in the original bill, and is used to bring the whole dispute before the court, so that there may be a complete decree touching the subject-matter of the action"—citing 2 Daniell, Ch. 1548.

In the present case the court has properly acquired jurisdiction of the subject-matter of the controversy, by the original bill of the insurance company, and the cross-bill of Thomas W. Wynn, seeking a decree in his favor for the amount of the insurance policy, in the event the defense in the original bill should be sustained, makes, in my judgment, under all the authorities and in accordance with equity practice, a proper case for a cross-bill.

The important matter for determination in this case is as to the drinking habits of the assured, and as to his statements, in reference thereto, made to the physician who examined him for this company, contrasted with the statements subsequently made to the physician examining him for a policy in the Kentucky company, and considering, in the same connection, all the testimony before the master on the subject.

A part of the report of the special master, dealing with this subject, is as follows:

"With reference to the habits of David Wynn, Jr., and as to his practice as regards the use of spirits, malt liquors, wines, or other alcoholic beverages, it appears that he represented to said company at the time of his application for said policy, in and by said medical examination, that he used only a few drinks of beer daily, i. e., one or two glasses of beer at morning lunch, and same at evening lunch, and some days none at all. It appears from the medical examination dated July 16, 1898, which was made by E. H. Sims, for the Mutual Life Insurance Company of Kentucky, that David Wynn, Jr., stated in answer to the question as to what was his present indulgence, and whether used daily or not, he answered that he used daily three ounces of whisky and one glass of beer.

"It does not appear that David Wynn, Jr., signed this statement, but Dr. Sims testifies that David Wynn, Jr., stated these facts in answer to the questions propounded to him by Dr. Sims, in this medical examination, and from the evidence of Dr. Sims it appears that he put the answer down with reference to whisky, as an approximation; that the said David Wynn, Jr., did not say in so many words, 'three ounces a day,' but that Dr. Sims put that amount down as an approximation of what Wynn said he used, and Dr. Sims stated that three ounces would be six tablespoonfuls. Dr. Sims also stated that when he examined David Wynn, Jr., on July 16, 1898, he had the appearance of being a man who drank steadily, but it also appears from the cross-examination of Dr. Sims that this appearance might have resulted from conditions occurring after July 1, 1898, and it further appears that Dr. Sims advised the risk, at the time.

"All of the witnesses who testified with reference to the habits of the assured, with reference to drinking, say that he did not drink to excess. * * *

The doctor more familiar with the assured states that his drinking habit did not affect the risk, and that he was a first-class risk at the time the policy was written. On the blank for the medical examination showing printed instructions to the medical examiner, it appears that the standard fixed by the company was an allowance of three ounces of ardent spirits daily. * * * There was no evidence to show that David Wynn, Jr., drank more than that amount.

"The evidence as to the cause of the death of the assured seems to establish the fact that the death of the assured was not caused from excessive drinking. Two of the physicians testified to this effect. The evidence as to the cause of his death seems to establish the fact that the assured died with gastroenteritis, an inflammation of the stomach and bowels. The insurance company attempted to show that this disease was probably accelerated or caused by excessive drinking. However, in the opinion of the master the evidence does not bear out this theory.

"The master, therefore, concludes and makes the finding of fact that David Wynn, Jr., died from gastroenteritis, an inflammation of the stomach and bowels, and that this disease was not caused from excessive drinking. The master further finds that David Wynn, Jr., at the time of making application for the policy involved in this case, did drink alcoholic and malt liquors to some extent, but that the evidence is insufficient to establish the fact that this drinking habit was to such an extent or excess as to be material to the risk or to enhance the risk undertaken and assumed by the insurance company; although the evidence shows that Wynn drank more whisky than he represented.

"The master further finds that David Wynn, Jr., must have known at the time that he made the representations in reference to his drinking habit that the same were untrue; and the master further finds that the insurance company had no notice or knowledge, at the time of the issuance of the policy sued on, that David Wynn, Jr., used any alcoholic beverages whatever, except beer.

"The master finds, and so reports to the court the finding, that David Wynn, Jr., did misstate or misrepresent the extent of his drinking habit at the time of his application for this policy; it appearing from the application that he represented that he drank beer, a few drinks daily, one or two glasses at the morning lunch, and same at evening lunch, and some days none at all, and the evidence shows that he drank beer and also whisky. However, the master further finds that the drinking habit of David Wynn, Jr., was not of such a character or extent as to be material or to enhance the risk undertaken and assumed by the insurance company. The master further finds, and so reports to the court, that there was no such variation in the representations as to his drinking habit made by David Wynn, Jr., in his application for the insurance or in the medical examination from what was the actual truth, as to his drinking habit, by which the nature, extent, or character of the risk undertaken and assumed by the insurance company was changed or enhanced."

The insurance company, as stated, depends mainly here, to sustain the falsity of the statements made by the assured to this company, as to his drinking habits, on different statements made by him to the physician examining him a few weeks afterwards, for insurance in another company. On this subsequent examination he stated to the examining physician, Dr. Sims, that he did drink some whisky, and Dr. Sims approximated what he stated, as being three ounces per day; three ounces being, according to the physician's statement, six tablespoonfuls. The special master is of opinion, and so reports, that the drinking of this amount of whisky per day would not have been regarded as material if the same had been stated by the assured at the time he made his application in this company and in his answers to the medical examiner.

The special master's conclusions of law are as follows:

"The master finds and reports to the court the following conclusions of law in this case:

"The master finds that the law of Georgia controls in the construction of the contract of insurance which is sought to be set aside by the complainant and which is sought to be recovered by the cross-complainant. See *Fidelity Mutual Life Insurance Company v. Jeffords*, 107 Fed. 402 [46 C. C. A. 377, 53 L. R. A. 193]; *Equitable Life v. Pettus*, 140 U. S. 226 [11 Sup. Ct. 822, 35 L. Ed. 497].

"The following sections of the Civil Code of Georgia are applicable in this case:

"Sec. 2097. Application. Good Faith. Every application for insurance must be made in the utmost good faith, and the representations contained in such application are considered as covenanted to be true by the applicant. Any variation by which the nature, or extent or character of the risk is changed, will void the policy.'

"Sec. 2099. Concealment. A failure to state a material fact, if not done fraudulently, does not void, but the willful concealment of such a fact, which would enhance the risk, will void the policy.'

"Sec. 2098. Effect of Misrepresentations. Any verbal or written representations of facts by the insured to induce the acceptance of the risk, if material, must be true, or the policy is void. If, however, the party has no knowledge, but states on the representations of others bona fide, and so informs the insurer, the falsity of the information does not void the policy.'

"Sec. 2101. Willful misrepresentation by the assured or his agent, as to the interest of the assured, or as to other insurance, or as to any other material inquiry made, will void the policy.'

"These principles are made applicable to both life and fire insurance. Civ. Code Ga. § 2117. See, also, *Mobile Fire Insurance Company v. Coleman*, 58 Ga. 251, 256; *Insurance Company v. Miller*, 58 Ga. 420; *Fidelity Mutual Life Insurance Co. v. Jeffords* (C. C. A. this Circuit) 107 Fed. 402 [46 C. C. A. 377, 53 L. R. A. 193].

"In *Travelers' Insurance Co. v. Sheppard*, 85 Ga. 758 [12 S. E. 21], Judge Bleckley says: 'We think it follows that, in making a prima facie case for recovery, the action is to be treated as founded on so much of the contract as is set forth in the policy, leaving stipulations, warranties, and conditions expressed only in the application to be brought to the notice of the court defensively by the company.' See, also, *O'Connell v. Supreme Conclave*, 102 Ga. 147 [28 S. E. 282, 66 Am. St. Rep. 159], which holds that the burden is on the company to satisfy the jury, by a fair and reasonable preponderance of the evidence, that O'Connell made false and fraudulent representations regarding his age, for the purpose of inducing the defendant to issue him the certificate.

"Under the authorities above cited, the master is of the opinion that in order for the complainant to be entitled to a decree avoiding, setting aside, and canceling the policy referred to in this case, on account of misrepresentations, it is incumbent upon it to show by a preponderance of evidence that the deceased made in his application for the insurance or in the medical examination certain representations or statements; that these representations or statements were false at the time they were made; that the falsity of the same was known to the insured at the time the representations were made (or that he stated them recklessly without knowledge); that they were made with a view of procuring the insurance; that the company had no notice of the falsity of said statements or representations; that the company acted upon these statements and representations to its injury; that these representations or statements were as to matters material to the risk, or amounted to variations by which the nature or extent or character of the risk was changed or enhanced.

"When the above state of facts appears, then the law will conclusively presume an intent to deceive, and a case of actual fraud will be made out, although the insured may not have really intended to prejudice the rights of the company. *Northwestern Life Insurance Company v. Montgomery*, 116 Ga. 799 [43 S. E. 79].

"In the opinion of the master, the effect of misrepresentations is so definitely settled by statute in Georgia that this case is relieved from any uncertainty that might arise from the distinction between 'representations' and 'warranties.' Be that as it may, the policy in this case does not by express terms provide that it will be void, if the representations are untrue; and the representations made by David Wynn, Jr., are not denominated as 'warranties' in the policy; therefore there can be no question but that the Code sections cited control the effect of these representations. *O'Connell v. Supreme Conclave*, 102 Ga. 144 [28 S. E. 282, 66 Am. St. Rep. 159].

"The master further is of the opinion that in order for the complainant to be entitled to a decree, avoiding, setting aside, and canceling the policy, on account of concealment, it is incumbent upon it to show by a preponderance of evidence that the deceased failed to state or willfully concealed a material fact, in his application for the policy, or in the medical examination; that he knew of the facts so concealed, at the time of making the application; that they were concealed for the purpose of procuring the insurance; that the company had no knowledge of the concealed facts, at the time of the issuance of the policy; that the facts failed to be stated or willfully concealed enhanced or increased the risk undertaken or assumed by the insurance company.

"Counsel on both sides are practically agreed as to the legal principles governing this case, except that the insurance company's counsel cite the following cases which seem to conflict to some extent with the Georgia law, to wit:

"*Standard Life & Accident Ins. Co., v. Sale*, 121 Fed. 664 [57 C. C. A. 418, 61 L. R. A. 337]. In this case the representations were made a part of the policy, by express terms, and it was provided therein that, if any of said statements were untrue in any respect, the policy should be null and void.

"*Webb et al. v. Security Mutual Life Insurance Co.*, 126 Fed. 635 [61 C. C. A. 383]. In this case, the application was made a part of the policy, and it was expressly provided that all of the statements therein made should be deemed material, and that the policy should be void, if any statements were not full and complete, or were untrue.

"*Brignac et al. v. Pacific Mutual Insurance Co.* [112 La. 574, 36 South. 595], 66 L. R. A. 322, seems to go further than any of these cases and to hold any matter that is specifically inquired about material as a matter of law, though the matter may not have been really material to the risk in the particular case; although, even in this case, it was held that 'the mere fact itself that an application for insurance may be annexed to and made a part of the policy of insurance does not carry with it necessarily, as a consequence, that all the statements and declarations contained therein should be held to be "warranties," though the failure so to annex the application and make it a part of the policy would leave them to be dealt with as "representations."'

"Counsel for Thomas W. Wynn contended in this case that the medical examination was not made a part of the policy. The master disagrees with this contention, and construes the language at the bottom of the policy, 'the benefits, agreements and provisions written and printed in the following pages are a part of this contract as fully as if they were recited over the signatures hereto affixed,' to mean that the application and also the medical examination, which are in fact attached to the policy, to be a part of the contract; but the master holds that the statements and representations contained in the application and in the medical examination are to be treated as 'representations,' and not as 'warranties.'

"The master is of the opinion that the above-stated decisions cited by counsel for the insurance company are easily distinguishable from the case at bar, and that the Georgia law is not so strict as the principle decided in the *Brignac Case*, which holds that the more specific inquiry in the application or in the medical examination of itself makes the representation material.

"The master finds that if the evidence in regard to any one or more of the alleged misrepresentations or willful concealments be sufficiently strong to justify a finding that the risk was increased or enhanced, the insurance company would be entitled to the decree prayed for.

"It therefore follows, from the foregoing findings of fact and conclusions of law, the representations with regard to the assured's health record having

been found to have been true—that is, the evidence having failed to show that they were willfully false—and it having been found that the evidence with reference to representations in regard to the drink habit fails to sufficiently establish one of the most important requisites of the Georgia law, to wit, that the alleged misrepresentations or concealments were of such a nature as to increase or enhance the risk, or to be material to the risk assumed, the master concludes, and so reports to the court, that the complainant, the Royal Union Mutual Life Insurance Company, is not entitled to a decree, canceling, annulling, and directing the surrender of the policy of insurance issued by it to David Wynn, Jr., wherein Thomas W. Wynn, was the beneficiary, the same being for the sum of \$5,000, and dated July 1, 1898, as set forth and described in the pleadings in this cause; but the master holds that said policy is now of full force and effect and is a legal, valid, and binding contract, upon the part of the parties thereto; and the surviving defendant in the original bill is entitled to a decree denying the relief prayed for in said original bill of complaint and amendment thereto, and for all costs of court laid out and expended.

"The master further concludes, and so reports to the court, that Thomas W. Wynn, the cross-complainant, is entitled to have entered a decree in his favor against the cross-defendant, the Royal Union Mutual Life Insurance Company, for the sum of \$5,000, less the sum of \$766.85, the same being the aggregate amount of the premiums due on said policy from and after the 1st day of July, 1898, up to the date of the death of said David Wynn, Jr., together with interest on said sum, at the rate of 7 per cent. per annum, from the 16th day of March, 1906, and all costs of court laid out and expended herein.

"There was no evidence showing the exact date that the Royal Union Mutual Life Insurance Company received the proofs of death. There were no formal proofs made out. The letter of the beneficiary giving notice was dated January 13, 1906. The same was acknowledged on the 22d day of January, 1906. The master, therefore, concludes that the time that it would take a letter to reach the insurance company from Columbus, Ga., mailed on the 13th day of January, added to the 13th, would be the time nearest the exact time, in the absence of proof to the contrary; and that interest would run after the expiration of 60 days from that date."

In view of the finding of fact by the special master to the effect that the statement made by the assured (or, rather, his failure to state certain facts) are not material to the risk, that the assured was not an excessive drinker, and that his death was not caused by the drinking habit, this conclusion of law, applied to the facts of the case, appear to me to be sound.

The conclusions of fact, therefore, stated by the master, being supported by the evidence, and his legal conclusions being correct, the exceptions to the report of the master must be overruled, and the same confirmed.

A decree may be taken in accordance therewith in favor of Thomas W. Wynn, for the amount of the policy and interest thereon, as stated by the special master.

In re PERLHEFTER et al.

(District Court, S. D. New York. March 24, 1910.)

1. BANKRUPTCY (§ 58*)—PAYMENTS—PREFERENCES.

Where a bank held the note of a firm for \$5,000, given March 19, 1908, and renewed twice thereafter, and on September 16th following the continuing member paid the bank on the note \$1,109.32 after the retirement of his partner and when the firm was hopelessly insolvent, and six days thereafter a petition in bankruptcy was filed against them, such payment was preferential.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 58*.]

2. BANKRUPTCY (§ 58*)—ACTS OF BANKRUPTCY—DISCLOSURE.

A preferential payment by a bankrupt while insolvent, first disclosed at the reference before the master some seven months after its occurrence, was unavailable as an act of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 58*.]

3. BANKRUPTCY (§ 58*)—ACTS OF BANKRUPTCY—PREFERENCES.

A bank having agreed to finance a purchase of shoes for the bankrupts, they executed their note for \$20,000, agreeing to pay H., the bank's agent through whom the transaction was accomplished, \$1,000 as guaranteed profits on the transaction. By August 20, 1908, the firm, which was then insolvent, had paid the note by depositing the proceeds of the sale of the shoes, and on September 16th paid H. \$200 and gave him four notes for \$200 each in settlement of the amount due him, and on September 22d bankruptcy proceedings were instituted against them. *Held*, that the payment to H. constituted an attempted preference and was an act of bankruptcy, though made out of the firm's account in the bank, notwithstanding the agreement between the firm and the bank that the proceeds of the sale of the shoes deposited should not be withdrawn until the bank was repaid in full.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 58*.]

4. BANKRUPTCY (§ 58*)—PAYMENTS BY BANKRUPT—PREFERENCES.

Where a bank agreed to finance a purchase of shoes by the bankrupts, the bank paying the price and delivering the shoes to the bankrupts for sale, they depositing the proceeds without authority to withdraw the same until the bank was paid, deposits of such proceeds within four months prior to bankruptcy did not constitute preferences.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 58*.]

5. CHATTEL MORTGAGES (§§ 8, 190*)—MORTGAGOR'S POWER OF SALE—PROCEEDS.

Where a bank furnished the money with which to purchase a consignment of shoes by the bankrupts, under an agreement that the shoes should be delivered to the bankrupts for resale but should remain the property of the bank, and that the proceeds should be deposited in the bank to the credit of the account until the bank's claim was paid, the transaction was not a pledge, but in the nature of a chattel mortgage, which was not invalidated under the New York state law because of the bankrupt's right to sell the property; they having agreed to pay the proceeds to the bank.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 20-22, 407-416; Dec. Dig. §§ 8, 190*.]

6. BANKRUPTCY (§ 58*)—PREFERENCES—PAYMENTS IN COURSE OF BUSINESS.

Payments made by the bankrupts to advertising agents in the nature of payments made to keep the bankrupts in business, not larger than payments which the firm had been previously making, could not be regarded as preferential, nor as constituting acts of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 58*.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep.'s Indexes

7. BANKRUPTCY (§ 84*)—ACTS OF BANKRUPTCY—OCCURRENCE—TIME—AMENDED PETITION.

Withdrawals of money by partners from a firm not pleaded in an original bankruptcy petition were unavailable as acts of bankruptcy, where they occurred more than four months prior to the filing of an amended petition pleading them.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 84.*]

8. BANKRUPTCY (§ 57*)—ACTS OF PARTNERS—WITHDRAWAL OF FIRM FUNDS.

Where a partner of an insolvent withdrew from the firm's bank account \$1,090 by a check which he had once deposited to his personal account in another bank, and thereupon drew a larger check on that bank and deposited it to the firm's account in its bank, the transaction did not constitute a withdrawal of firm funds nor an act of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 57.*]

9. PARTNERSHIP (§ 183*)—INSOLVENCY—FIRM ASSETS.

Where a firm is insolvent, all its assets are held in trust for its creditors, and no transfer from one party to another can affect their rights.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 319-336, 348; Dec. Dig. § 183.*]

10. DOWER (§ 17*)—PROPERTY SUBJECT—FIRM PARTNERSHIP PROPERTY.

Real estate belonging to a firm is not subject to the dower of the continuing partner's widow until after firm creditors have been paid.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 62; Dec. Dig. § 17.*]

What estates are subject to dower, see note to *Black v. Elkhorn Mining Co.*, 3 C. C. A. 316.]

11. BANKRUPTCY (§ 58*)—PARTNER'S INTEREST—SALE—ACTS OF BANKRUPTCY.

A transfer of a partner's interest in an insolvent firm to the continuing partner for his note for \$200, the transaction amounting merely to a formal way of retiring, the partner's interest, which was of no value, was not a fraud on the individual partner's creditors and did not constitute an individual act of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 58.*]

12. BANKRUPTCY (§ 58*)—ACTS OF BANKRUPTCY—PARTNERS.

A continuing partner's preference of firm creditors by the payment of firm assets, the firm being insolvent, was not a fraud on the partner's individual creditors and did not constitute an individual act of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 58.*]

13. BANKRUPTCY (§ 69*)—PARTNERSHIP—ADJUDICATION AFTER DISSOLUTION.

Under Bankruptcy Act July 1, 1898, c. 541, § 5a, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3424), authorizing adjudication against a firm, after dissolution and until final liquidation a firm may be declared a bankrupt separately from its individual partners as though it were an independent, legal person.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 69.*]

14. BANKRUPTCY (§ 69*)—PARTNERSHIP—INSOLVENCY OF PARTNERS.

A partnership may not be declared a bankrupt unless all of the partners are insolvent.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 69.*]

15. BANKRUPTCY (§ 69*)—PARTNERSHIP—INDIVIDUAL CREDITORS—RIGHT TO OBJECT.

Since it seems the individual estate of a partner will be administered in bankruptcy proceedings against the firm even without his adjudication, his creditors are entitled to object to an adjudication against the firm; but, where an individual creditor so intervenes, his rights are precisely those of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 69.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

16. BANKRUPTCY (§ 91*)—INDIVIDUAL PARTNER—FAILURE TO APPEAR.

Where an individual creditor of a partner appeared and opposed an adjudication against him, but he failed to appear and produce his books and submit to an examination, required by Bankruptcy Act July 1, 1898, c. 541, § 3d, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3422), it would be presumed that he was insolvent.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 91.*]

In the matter of bankruptcy proceedings against John R. Perlhefter and Barnett Shatz, individually and as composing the firm of Perlhefter & Shatz. On motion to confirm a master's report, adjudging the firm and individual partners bankrupts. Confirmed as to the firm and as to Shatz individually, and denied as to Perlhefter individually.

This case comes up upon motion to confirm the report of the special master, to whom was referred the petition to adjudicate the respondents bankrupts, both individually and as constituting the firm of Perlhefter & Shatz. The petition was brought by the Broadway Trust Company, and the Twenty-Third Ward Bank of the City of New York, on the 22d day of September 1908. Subsequently, on the 21st day of October, 1908, Henry Klinger intervened as a party petitioner. An amendment was filed on October 22, 1908, after demurrer sustained to the first petition. The respondent Perlhefter has defaulted and the respondent Shatz has answered. However, one Grace C. Whitehall, an individual judgment creditor of Perlhefter, has intervened and answered as permitted by the statute.

The firm did business as auctioneers in the city of New York, and in the spring of 1908 entered into a contract for the purchase of 40,000 pairs of shoes from the Vaughn Monnig Shoe Company of St. Louis. In order to procure the purchase price for these shoes, they entered into a contract with the Fourteenth Street Bank, in which they agreed to open an account with the bank, into which the bank was to deposit the sum of \$20,000, for which they were to give their note in the sum of \$20,000. They likewise agreed that the bill of lading for the shoes should be given to the bank, and that the bank should charge to the account the purchase price of the shoes, should deliver to them possession, retaining title in itself, and that they should sell them and deposit the proceeds into the bank account, over which they should have no control till the bank was repaid in full. Instead of being made formally with the bank, the contract was made with one Heidelberg, as agent of the bank, and they agreed that Heidelberg should have \$1,000, in addition as profits upon the transaction, which profits they guaranteed to him. The shoes were shipped and taken possession of by the alleged bankrupts, the bank paid the purchase price to the sellers out of the account in the name of the bankrupts in their bank, and took their note for \$20,000. Subsequently, and on June 22d, the alleged bankrupts paid upon this note sufficient to reduce it to \$17,085, and renewed the note for that sum, as the bank had agreed in the contract. From that date, June 22d, until August 20, 1908, the firm paid \$17,085, with interest, or, in other words, completed payments on the note; all these payments being out of the proceeds from the sale of the shoes, and made by depositing several sums in the deposit as prescribed in the contract. On September 16th the firm likewise paid to Heidelberg \$200 and gave him four notes of \$200 each to make up the balance of his \$1,000 profits. On July 20, 1909, Perlhefter made a deed of all his interest in the firm to Shatz and has disappeared since that time. He was served by publication. He received for his part of the interest in the firm Shatz's note for \$272.66 at one year. Shatz conducted the business after the conveyance of Perlhefter until the filing of the petition against him on September 22, 1908, and on September 16, 1908, paid \$1,109.32, upon a note of \$5,000 to the Fourteenth Street Bank. The master has found the firm insolvent on July 20, 1908, and thereafter. Other facts are stated in the opinion.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Ira Leo Bamberger and Sidney Lowenthal, for petitioning creditors.
Henry A. Rubino, for intervening creditor.
Sternberg, Jacobson & Pollock (Henry W. Pollock, of counsel),
for bankrupts.

HAND, District Judge (after stating the facts as above). I think that the payment to Heidelberg of \$200 in September, 1908, was a preferential payment; the firm being at that time concededly insolvent. It is said that the payment is so small that it cannot be inferred that there was any intention to prefer one creditor over the other. The size of the payment makes no difference if the requisite intent existed, but it does make a difference in determining whether or not the intent did exist. The circumstances of this payment, however, were such as lead me to agree with the master that in spite of its size the bankrupt must have intended to prefer Heidelberg. It was a part of his effort to pay Heidelberg the sum of \$1,000, which the firm had guaranteed him under the contract; that guaranty constituting an obligation to pay which was a preference when the firm was insolvent. This Shatz tried to do by paying \$200 in cash and the balance in four notes of \$200 each. It was part, therefore, of an effort to pay him the full \$1,000 and the intent of the payment of the \$200 must be governed by the purpose of which the cash payment was a part. At the time the firm was hopelessly insolvent, as Shatz knew. It had obligations of over \$23,000 and assets which could not have been worth more than \$10,000. Indeed, when the receiver took possession six days thereafter, he got assets which realized scarcely more than half that sum. Besides Shatz's other payment on the same day is very significant. The Fourteenth Street Bank held a firm note for \$5,000, given March 19, 1908 and renewed twice thereafter, and on the 16th of September, 1908, Shatz paid to the bank, on this note, \$1,109.32. That this payment was preferential within section 3a2, the master finds, and I agree with him. Though it cannot be used in this proceeding as an act of bankruptcy, under the rule in *Re Haff*, 136 Fed. 78, 68 C. C. A. 646, having been first brought out at the reference before the master, some seven months after its occurrence, yet it quite plainly evinces Shatz's partiality toward the Fourteenth Street Bank, and confirms me in my decision that, by the payment of \$200 to Heidelberg, the bank's agent, Shatz intended to prefer him over other firm creditors. Together these two payments constituted over one-fifth of the assets which he then had, and the conclusion is inevitable that he intended to prefer the bank.

Two objections are urged: First, that the payment was made out of the account in the Fourteenth Street Bank and, therefore, under the case of *New York County Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, could not be a preference, and, the other, that the payment was in pursuance of a lien created under an agreement between the bank and the firm. As to the first objection, it is sufficient to say that *New York County Bank v. Massey*, supra, went upon the very theory that the deposit in the bank did not diminish the estate of the depositor, for he had a corresponding property in his

claim against the bank. Although the bank has a right upon his insolvency to set off one against the other, that is one thing, and it is another by his voluntary act to lose his control over his deposit and assign it to the bank. By that act he not only parts with his money, but parts with the corresponding obligation, and forever after puts the property out of his power.

So far as concerns the claim of a lien antedating four months and by virtue of the agreement of January 31, 1908, it is enough to say that the bank account was empty in August, and that the sum of \$200, as well as the sum of \$1,109, both drawn out by check on September 16, 1908, had been deposited within four months. It is not necessary, in that view of the situation, to determine whether the deposit created a lien or not, or at what time the bank obtained a proprietary interest in the money paid over. It certainly had no interest in the money four months previously. In all cases in which an agreement in equity antedating four months has been held valid, it affected some specific property, or at least property which had been substituted for other specific property, and which was in existence when a contract was made. A bank account is no such property except in so far as by the agreement it must be kept at a given sum. Therefore, I agree with the master that this is a sufficient act of bankruptcy on the part of the firm to justify an adjudication, provided the partners were insolvent—a matter with which I shall deal later.

I agree also with the master that the larger payments to the bank made in accordance with the contract and during the months of July and August are not preferences within the statute. This raises the question of whether the bank had in fact a valid lien upon the shoes and of the profits in the hands of the firm, under the cases of *Humphrey v. Tatman*, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956, *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, and *Sexton v. Kessler & Co.*, 172 Fed. 545, 97 C. C. A. 161. The contract between the bank and the firm attempted to preserve a lien upon the shoes and their proceeds, although they were to go into the possession of the firm itself. If that lien was not invalidated under any statute of the state of New York, the payments were not preferences; and the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) will not affect them. This is the precise effect of the decisions above cited. At common law the possession of the mortgagor did not invalidate the mortgage, and in this case it is quite obvious that the contract was in the nature of mortgage, and not of pledge, for title was reserved to the bank. The only statute of the state of New York which affects the validity of such a mortgage is that relating to chattel mortgages, and there is no claim that this contract was filed as a chattel mortgage. Had the contract been one by which the firm was to retain possession of the shoes until it had paid the bank's advances upon the bills of lading, the mortgage would have been good, under the well-settled law of the state of New York. *Farmers' & Mechanics' Bank v. Logan*, 74 N. Y. 568; *Moors v. Kidder*, 106 N. Y. 32, 12 N. E. 818; *Drexel v. Pease*, 133 N. Y. 129, 30 N. E. 732; *Charavay & Bodvin v. York Silk Com-*

pany (C. C.) 170 Fed. 819. In none of these cases, however, had the mortgagor power to sell the goods; but in each he was to retain them in his possession until the advances upon them had been paid, or at least he was to substitute their equivalent in goods in their place, if they were sold.

However, it is equally well settled under the law of the state of New York that, though a chattel mortgage which has been filed is void in the case the mortgagor has the right to sell the goods and dispose of the profits himself (*Skilton v. Codrington*, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885) *Southard v. Benner*, 72 N. Y. 424; *Mandeville v. Avery*, 124 N. Y. 376, 26 N. E. 951, 21 Am. St. Rep. 678; *Hangen v. Hachemeister*, 114 N. Y. 566, 21 N. E. 1046, 5 L. R. A. 137, 11 Am. St. Rep. 691; yet, if the mortgagor agrees to pay the proceeds upon the mortgage, the lien is not invalid (*Conkling v. Shelley*, 28 N. Y. 360, 84 Am. Dec. 348). Under the contract in question although the firm was to have the right to sell the goods, it undertook to deposit all the proceeds in the bank account, and it bound itself not to withdraw any moneys from that account until the bank had paid itself in full. Thus the lien was valid, and the master was right in refusing to find these payments to constitute preferential payments. All the other acts of bankruptcy which the master has found except one were not set up in the petition, and it is too late now to allow any of them by amendment. *In re Haff*, 136 Fed. 78, 68 C. C. A. 646.

In regard to the payments to Carpenter & Corcoran, advertising agents, I agree with the master that the circumstances under which they were made precluded the idea that they were intended preferentially. They come within that class of payments which must be made in order to keep the bankrupts in business, and, as they were no larger than the payments which the firm had been making in the past, they cannot be made the basis of an act of bankruptcy.

The petition also alleges that Perlhefter withdrew certain sums of money from the firm, \$4,111.64 of which was in the year 1908. It is sufficient, in regard to this, to say that the account shows that all these withdrawals were more than four months prior to the amended petition, and that the original petition did not set them up. The next act of bankruptcy alleged is the withdrawal by Perlhefter from the firm of \$1,090 on July 13, 1908; but this check was at once deposited in his personal account in the Twenty-Third Ward Bank, and a check upon that bank for \$1,250 was at once withdrawn and deposited in the firm account in the Fourteenth Street Bank. I agree with the master that there is no inference of a withdrawal to be taken from this of the firm funds by Perlhefter.

The remaining act of bankruptcy alleged is Perlhefter's conveyance to Shatz of his interest in the firm on July 20, 1908. As to this, I cannot quite agree with the master that it affected the rights of any of the firm creditors. The firm being at that time insolvent, as the master finds and as I agree, all the firm assets were held in trust for the creditors (*Case v. Beauregard*, 99 U. S. 119, 25 L. Ed. 370), and no transfer from one party to the other could affect their rights. Even

the firm realty on Winona street was not subject to the dower of Shatz's wife until after this trust had been executed and the firm creditors paid. *Greenwood v. Marvin*, 111 N. Y. 423, 19 N. E. 228. It might, however, have been a transfer in fraud of Perlhefter's individual creditors, and as such it must be considered. This would depend: First, upon whether Perlhefter supposed that there was any real value in his interest in the firm on dissolution; and, second, whether he supposed Shatz's note had any value. If he supposed he had an interest in the firm, and that Shatz's note was valueless, it would have been a fraudulent transfer. If he supposed that Shatz's note had value, the circumstance of its disappearance might be sufficient to indicate that he was concealing his property. However, in view of all the circumstances, I cannot find that he concealed or transferred his individual assets with intent to defraud his individual creditors. It seems to me most likely that the whole matter was at most merely a formal way of his retiring and leaving the firm, and I do not believe that either party thought that Perlhefter's interest in the firm had any value at all.

Shatz committed no separate act of bankruptcy. His preference of firm creditors by the payment of firm assets did not affect his individual creditors, because the firm was insolvent, and no surplus could ever have come to the individual creditors in any event; but as I understand the ruling of the majority in *Re Meyer*, 98 Fed. 976, 39 C. C. A. 368, it is an individual act of bankruptcy if a partner as such is the author of the firm's act of bankruptcy, even though the act does not affect his individual assets. In view of the joint administration of the individual assets in any case along with the firm assets, the matter is nearly academic; but it will have some substantial results if Shatz ever applies for a discharge.

Two questions remain: First, whether the absence of Perlhefter and his failure to produce his books threw upon his intervening individual creditor the burden of proving insolvency; and, second, whether acts of bankruptcy committed by Shatz after the retirement of Perlhefter from the firm are acts of bankruptcy of the firm. Upon the second question, after *In re Meyer*, 98 Fed. 976, 39 C. C. A. 368, *In re Grant* (D. C.) 106 Fed. 496, *In re Kersten* (D. C.) 110 Fed. 929, *In re Mercur*, 122 Fed. 384, 58 C. C. A. 472, and *Mills v. Fisher*, 159 Fed. 897, 87 C. C. A. 77, there can be no further doubt but that the firm may be put in bankruptcy separately and as though it was an independent legal person. The statute (section 5a) specifically provides for adjudication after dissolution and until final liquidation.

Upon the first point it must be first observed that all the partners must be found insolvent. *Vaccaro v. Security Bank*, 103 Fed. 436, 43 C. C. A. 279; *Tumlin v. Bryan*, 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960. Moreover, since the individual estate of Perlhefter will be administered even without his adjudication under *In re Meyer*, *supra*, his creditor may have the same right to object as though the question were of individual adjudication. On the other hand, however, I think that, even if the facts are not strictly in point the reasoning of *In re West*, 108 Fed. 940, 48 C. C. A. 155, controls

this case. It is quite true that there solvency was an affirmative defense, while here it was a necessary allegation of the petition; but I do not believe that Congress meant an intervening creditor to be in a better position to combat adjudication than the bankrupt was, or that the petitioner's case was to become more difficult if a bankrupt absconded than if he stayed and fought. There is every reason to construe the act as putting the intervener in precisely the same position as the bankrupt, and no reason to the contrary.

Therefore, section 3d applies, and Perlhefter must be presumed insolvent.

In this case there are all the elements necessary for an adjudication against the firm, and Shatz, and I agree with the master that an adjudication should enter against them. I cannot, however, find any acts of bankruptcy by Perlhefter, individually, and therefore I do not confirm the recommendation of the master's report as to him individually. Let an adjudication be entered against the firm and Shatz individually, upon amending the petition so as to set up the payments to Heidelberg as a preference, not a transfer. I do not understand *In re Haff*, supra, to prevent an amendment by which the characterization may be changed of a transaction substantially set forth in the petition. I will allow an amendment, therefore, in that respect.

The intervening creditor has attempted to prevent the adjudication of the firm, and in that she has been unsuccessful. She has been successful, however, in preserving her judgment from discharge because Perlhefter is not adjudicated, and I do not think I should put costs upon her, even though I suspect that her motive was solely to prevent the firm adjudication. Against the bankrupts, however, and the estate, costs should be taxed.

WASHINGTON, A. & MT. V. RY. CO. v. REAL ESTATE TRUST CO.
OF PHILADELPHIA.

(Circuit Court, E. D. Pennsylvania. February 4, 1910.)

No. 36.

1. BANKS AND BANKING (§ 315*)—OFFICERS OF DIFFERENT COMPANIES—UNLAWFUL ACTS—NOTICE.

There being no objection to the president of a trust company becoming financially interested in and an officer of other enterprises, the fact that complainant railroad company knew that one of its officers was also president of defendant trust company did not charge complainant with knowledge of such officer's dishonesty in the manipulation of complainant's bonds in the hands of the trust company, as trustee, nor did it show that complainant expected to obtain any unlawful advantage from such officer's official connection with the trust company.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1219-1221; Dec. Dig. § 315.*]

2. BONDS (§ 130*)—NEGOTIABILITY—INNOCENT HOLDER—BURDEN OF PROOF.

Corporate bonds payable to bearer being negotiable, if permitted by the maker to pass into the hands of an innocent holder without notice and for value before maturity, after being paid would constitute a liability on the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

maker, but, on proof of their fraudulent use, the burden would be shifted to the holder to establish good faith in the purchase, involving not only proof of lack of notice but of payment of a valuable consideration.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 222; Dec. Dig. § 130.*]

3. BANKS AND BANKING (§ 315*)—LIABILITY FOR FRAUDULENT ACTS OF OFFICERS—RATIFICATION.

Where defendant trust company, through the intervention and fraud of its president, who was acting as the mutual agent of both defendant and complainant, received complainant's bonds, and defendant's president used the bonds as collateral for defalcations covered by loans to fictitious persons, defendant was not entitled to avail itself of the result of its president's fraud without responsibility therefor, and was therefore bound to return the bonds.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1219-1221; Dec. Dig. § 315.*]

4. PRINCIPAL AND AGENT (§ 181*)—FRAUD OF AGENT—NOTICE TO PRINCIPAL.

The rule that notice to an agent is not notice to the principal where the agent is acting in fraud of the principal, applies to certain wanton torts or wrongs committed by the agent, but not to a case where the principal acquired possession of bonds through its agent's fraudulent use of the power vested in him, in which case defendant could not hold the bonds without ratifying the acts and authority of the agent who transferred them.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 690; Dec. Dig. § 181.*]

5. BANKS AND BANKING (§ 315*)—TRUST COMPANIES—ACTS OF OFFICERS—MISAPPROPRIATION OF BONDS.

Where certain bonds of a corporation were placed in the possession of defendant trust company, as trustee, to be certified as called for, the fact that they were left in defendant's possession after the mortgage securing them had been satisfied, and that defendant's president, by virtue of his office, certified the bonds and used them as collateral to cover his own defalcations, did not entitle defendant to claim any rights under the bonds as against complainant.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1218; Dec. Dig. § 315.*]

Bill by the Washington, Alexandria & Mt. Vernon Railway Company against the Real Estate Trust Company of Philadelphia. Decree for complainant.

Wm. B. Bodine, Jr., George Wharton Pepper, and R. Walton Moore, for complainant. George H. Earle, Jr., Joseph de F. Junkin, and John G. Johnson, for defendant.

HOLLAND, District Judge. This is a bill in equity instituted by the Washington, Alexandria & Mt. Vernon Railway Company to compel the defendant to deliver up to it for cancellation \$48,000 par value of one lot of its bonds out of an issue of \$200,000, secured by a mortgage dated July 1, 1892, which was satisfied of record by the trustees thereof on or about September 16, 1895, which bonds had been paid off by the complainant and never thereafter reissued by it, and also \$50,000 par value of another lot of \$750,000 of its bonds, secured by a mortgage dated August 1, 1895. Of this latter amount, the \$50,000 in question had never been issued by the complainant company. The mortgage securing these bonds was duly satisfied of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

record by the trustees on March 25, 1905. Both these lots of bonds, it is alleged in the bill, were used in fraud of the complainant by Frank K. Hipple, who was president of the defendant company, and who assigned the same as collateral for loans which he, representing the company, made in fact to himself, and that, for this reason, the complainant is in no respect estopped to deny liability upon the bonds. The defendant, in its answer, while not denying that the \$48,000 lot had been paid off and that the \$50,000 had not been regularly issued, insists that as the complainant company negligently permitted Hipple to have these securities, negotiable and valid upon their face, in his possession, it is liable for their par value and interest.

The bill, as amended, is an elaborate statement of the facts, nearly all of which are either established by the proofs or admitted by defendant. The latter states, in its brief, that "there is substantially no disputed questions of fact in the cause. The divergence of position and opinion arises from the inferences and conclusions of fact and law, to be drawn from such facts as the plaintiff has submitted, or which its witnesses have admitted." This is one of the questions, the solution of which is difficult, because the individual who committed the fraud was the implicitly trusted agent of both the complainant and the defendant. He fraudulently used the property of the complainant without its knowledge, but which was in his possession, because of the trust and confidence it placed in him, as collateral, to cover up an embezzlement of defendant's funds committed by him in the capacity of the latter's trusted agent, and, in the transaction, which was a fraud upon both, he was the sole actor. Which must suffer the loss, under the circumstances, is the question to be determined. From the bill as amended, and the answer, together with the testimony and the statements and admissions in the briefs, the following facts are clearly established:

The Real Estate Trust Company is a corporation of the state of Pennsylvania, doing business as a trust company in Philadelphia. The Washington, Alexandria & Mt. Vernon Railway Company is a Virginia corporation, organized for the purpose of conducting a railway to be constructed between Washington and Mt. Vernon, with lateral branches. A separate corporation was organized, known as the Mt. Vernon Construction Company, for the purpose of constructing the complainant's railway. The stockholders and officers of both the railway and the construction company were practically the same, and the four controlling men in both were James S. Swartz, Frank K. Hipple, David C. Leech, and G. E. Abbott. Hipple was, during all this time, president of the trust company, with practically absolute control of the same both in its management and the loaning of its funds, and was, at the same time, a director of the construction company from 1892 to 1906, and secretary of the railway company from 1903 down to August 24, 1906, the date of his death (with the exception of the year 1905). James S. Swartz was a director of the construction company and its secretary from 1893 to 1903, inclusive, with the exception of the year 1894, its treasurer from 1895 to 1903, and its president from 1903 to date. He was also a director of the rail-

way company and its vice president in 1892 and 1904. He was the active financial man of both the construction and the complainant company who sought advice in these matters from Hipple. The latter secured whatever loans were made by the trust company to the construction company. Swartz was the active man in securing many of the loans from other institutions for the construction company. In June, 1892, the construction company agreed with the complainant to build a line of railway for it between Alexandria and Mt. Vernon for \$200,000 of complainant's bonds, together with certain stock, and on July 2, 1892, the complainant executed and issued 400 bonds of par value of \$500 each, aggregating \$200,000, payable on the 1st day of July, 1912, and to secure the payment of these bonds executed and delivered to James S. Swartz and Frank K. Hipple as trustees a mortgage or deed of trust conveying all the property of the complainant as security for the bonds, the principal and interest of which were made payable at the office of the trust company. These bonds were delivered to the construction company in payment for the construction of the road, and on November 1, 1892, the construction company borrowed of the trust company \$40,000 on a note, secured by \$48,000 of these bonds as collateral. In the summer of 1895 no interest having been paid on the bonds, and in order to provide for the payment for additional work, a new mortgage was to be executed for a larger amount, and Swartz, representing the construction company and the complainant, arranged with Hipple, as president of the trust company, that the latter should act as trustee in the new mortgage, and make a new loan to the construction company of \$66,000, to be secured by \$75,000 of the new bonds, provided the existing loan of \$200,000 should be paid off out of the new issue.

Under date of August 1, 1895, the railway company executed and delivered to the defendant, to be certified when called for by the complainant's directors, 750 bonds of the par value of \$1,000, each numbered from 1 to 750, both inclusive, aggregating \$750,000 at par, and payable on the 1st day of October, 1925, with interest at 5%, payable semiannually, at the office of the defendant. To secure payment of these bonds a mortgage or deed of trust was executed and delivered to the defendant as trustee. The mortgage of 1895 recited that the bonds thereby secured were executed and delivered, inter alia, in order to make provision for the retirement of the \$200,000 of bonds issued in 1892; and the mortgage further provided that the said bonds should not be binding upon the complainant until certified by the defendant as trustee, and that the complainant should deliver all of said bonds to defendant, and the defendant should certify and countersign said bonds and deliver them to the complainant when and as directed so to do by the latter's board of directors. The board of directors of the railway company directed the defendant as trustee to certify and countersign \$700,000 of the said bonds, and to deliver them to the railway company. This direction was complied with by the trust company as trustee in the mortgage, but it was never directed by the railway company to certify the remaining \$50,000 of the 1895 bonds remaining in its possession. Hipple, however, as president of

the latter company, without the knowledge of either complainant or the defendant, certified the \$50,000 of bonds as president of the defendant company, which made it the act of the defendant company, and then used these bonds for the purpose of defrauding the latter. Hipple retained possession of the \$48,000 of bonds of the 1892 issue after the bonds of 1895 had been substituted for the increased loan made by the trust company to the construction company, and Swartz, the other trustee, retained possession of the remainder of the bonds. At this time Swartz and Hipple were both directors of the railway company, and Hipple was its secretary, and both trustees in the 1892 mortgage. No other officer of the complainant company made any inquiry or effort to secure a destruction of these bonds. After the trustees had certified to their payment and released the mortgage of record, the matter was left with Hipple and Swartz. Hipple retained bonds to the amount of \$48,000, and the others were in the possession of Swartz. On July 1, 1892, and for a long time prior to that date and during the period between this date and that of his death on August 24, 1906, Hipple was president of the defendant company. During all of this period he, as president, was authorized by the defendant to transact its business between the meetings of the board, and in particular to make loans of the trust company's funds to such persons and upon such security as Hipple was pleased to accept. He was trusted to the extent of absolute control over its funds to loan to whom he pleased, and his reports as to the loans he had made, with the collateral, were accepted without question or examination by the board. This entire absence of the board's supervision of Hipple's doings as the trust company's president enabled him during this period to manipulate the accounts and to embezzle over \$3,500,000. On the 20th day of November, 1902, in order to continue the concealment of a prior misuse by him of the defendant's money, fraudulently and without knowledge or permission of any officer or person connected with the complainant company, Hipple used the \$48,000 of the 1892 bonds in his possession as part collateral for a note of "J. W. Schwartz, a myth or a man of straw," upon which, acting for defendant company, he made a pretended loan, with this collateral attached, and deposited the note in the loan department of the trust company as one of its assets. On December 23, 1904, at an interval between boards, he induced W. H. Whiteside, a clerk of no property, to sign a note for \$45,000. Hipple then, without being requested by complainant and without authority from the trust company, as its president certified the remaining \$50,000 of bonds in the possession of the trust company as trustee, and without knowledge of either complainant or defendant used them as collateral for the Whiteside note, and as president of the trust company accepted them as a loan and used the proceeds to cover up a previous defalcation of his. Neither of these fraudulent transactions in which the railway company's bonds were used as collateral was known to either the railway company or the trust company until Hipple committed suicide on the 24th day of August, 1906.

It is conceded that as at present viewed in the business world there

is no objection to the president of a trust company becoming financially interested and an officer of other enterprises. Outside of the fact of his connection with these corporations, there is no evidence to support the former receiver of the defendant company's assumption that complainant knew or ought to have known of Hipple's dishonesty, or that the complainant expected to obtain any unlawful advantage from Hipple's connection with the trust company as its president. There is no proof whatever to support the contention that the complainant company, or any of its officers, did anything wrong, or had any knowledge whatever of Hipple's wrongdoing. He was one of the prominent men in banking circles in the city and was trusted by everybody. There was no suspicion whatever of his fraudulent transactions, and both the complainant and the defendant placed implicit confidence in everything he said and did, and it was because he was implicitly trusted that he was enabled to use the railway company's securities, without its knowledge, for the purpose of covering up his embezzlement of the funds of the trust company, but this was done without the knowledge or authority of either. Hipple acted in fraud of both parties. The remedy urged by the complainant in its bill is that the trust company be directed to deliver up the bonds for cancellation because of the fraudulent transfer by Hipple which was made with notice and without consideration.

As to the \$48,000, the evidence shows that these bonds had been paid off and never reissued by the railway company. They were left in the possession of Hipple who had been the trustee in the mortgage and was at the time the secretary of the complainant company, but he was without any authority to reissue them. The bonds were regular upon their face and had not yet matured. If, under the circumstances, they had been passed to an innocent third party without notice and for value, it is conceded the complainant would be liable, but if transferred to a party with notice of the fact that they were no longer subsisting obligations of the complainant company, the holder would be estopped from insisting upon their payment. It is true they would pass from hand to hand like a bank note, but they are more like a note drawn to bearer and paid before maturity. Being negotiable, if it should by any neglect of the maker be permitted to pass into the hands of an innocent third party without notice and for value before maturity, there would be a liability on the part of the maker, but in that case, upon proof of the fraudulent use of the note, the burden of proof would be shifted to the holder to establish good faith in the purchase of the same, which involves the proof of a lack of notice and the payment of a valuable consideration. The same would be true in regard to these bonds, being no longer a subsisting obligation. Having clearly established that the transfer to the defendant company was a fraud upon the complainant, the burden is shifted to the defendant to establish that it took these bonds without notice and for a valuable consideration, and, as we have already stated, it has failed to establish either.

There is no evidence whatever to show that the complainant company had knowledge or ought to have had knowledge of Hipple's

irregularities, or that they employed him with a view of "giving a sop to the watchdog" of the defendant, without its knowledge, for the purpose of some financial advantage, and the cases cited in support of a liability on the part of the complainant, under such circumstances, have no application to the facts of this case unless the mere fact of Hipple's financial interest in the complainant company is to be held in law as establishing such a proposition. Nor is there any proof whatever of the fact that any officer or officers in the defendant company were deceived by Hipple in the transfer of the bonds to the defendant company. He acted as the authorized agent of the defendant company in the transfer of these bonds to it. It is not a case where the fraudulent agent, being the agent of both, was on one side of the transaction representing himself in the fraudulent use of the complainant's securities without notice to the defendant, and deceiving other officers of the defendant company authorized to act, and inducing them to accept these securities, and the cases cited in support of complainant's liability upon such a state of facts have no application in this case. The facts here bring this within that class of cases in which one principal, the trust company, receives through the intervention and the wrongful act of a mutual agent (Hipple) the property of the other principal, the complainant; the mutual agent acting for and in fraud of both. In such case, the party receiving the property of the other is chargeable with a knowledge of the wrong, which was possessed by the mutual agent. Or, to state the proposition shortly, one may not avail himself of the results of his agent's fraud without responsibility for the fraud. *Bank v. Munger*, 95 Fed. 87, 36 C. C. A. 659; *Leather Mfg. Co. v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811; *Loring v. Brodie*, 134 Mass. 453; *Atlantic Mills v. Indian Orchard Mills*, 147 Mass. 268, 17 N. E. 496, 9 Am. St. Rep. 698; *Atlantic Bank v. Merchants' Bank*, 10 Gray (Mass.) 532; *Millward-Cliff Cracker Co.'s Estate*, 161 Pa. 157, 28 Atl. 1072; *Bank v. New Milford*, 36 Conn. 93.

The principal found in many of the text-books and in some decisions that notice to the agent is not notice to the principal, where the agent is acting in fraud of the principal, must be held to apply to certain wanton torts or wrongs committed by the agent, in which case the principal is relieved. Or, where the mutual agent in the particular case is acting on the one side with other officers of one of his principals and succeeds in deceiving them, in such case his knowledge could not be held to be the knowledge of the principal deceived; but where, as in this case, the defendant company came into possession of the bonds through Hipple's fraudulent use of the power vested in him, the latter cannot claim to hold the bonds without ratifying the acts and authority of Hipple who transferred them to it. There may be exceptions to the general rule, but each case of this sort depends on its own peculiar facts, as was said in *Lyndon Mills Co. v. Lyndon Institution*, 63 Vt. 581, 22 Atl. 575, 25 Am. St. Rep. 783.

In the case at bar there is nothing in the conduct of the officers of the trust company as compared with those of the complainant company to entitle the defendant to be exempt from the general rule of

agency. The facts of the case clearly show that the officers of the defendant company were to blame for the result of Hipple's fraudulent transactions, and it should, in this case, stand the loss.

As to the \$50,000 of bonds, we find as a fact that they were placed in the possession of the defendant company to be certified when called for, and although they were left in the possession of the defendant company after the mortgage had been satisfied, they were not a perfected obligation of the complainant company which could have been sold without the defendant's certificate. This certificate was executed on the part of the defendant fraudulently, of course, by its own president, and as a result of this fraudulent execution of the certificates, the bonds became, upon their face, a valid, subsisting, negotiable obligation, and, in the hands of third parties, would have been valid against the complainant company, but, even in that case, the complainant company would have had a right of action against the defendant for a fraudulent and illegal certification of these bonds, and the latter could not have pleaded the fraudulent act of its president. It would have been bound to answer in damages.

The defendant's right to retain this \$50,000 of bonds has much less merit in it than in its claim to the \$48,000, because these bonds were not a subsisting, negotiable obligation left in the hands of Hipple, they were bonds not legally completed as an obligation of the complainant company and left in the possession of the defendant. The defendant, through its negligence, permitted its president to certify and to perfect these obligations as an unmatured, subsisting, negotiable obligation of the complainant, and then, through the same negligence, permitted him (its president) to assign them to it as collateral security to cover a former embezzlement. It was fraudulently made to perfect these obligations through its agent acting for it, and by his further fraud it came into their possession. Under the authorities above stated, it is bound by his knowledge of their fraudulent certification and their fraudulent use.

The prayer of the complainant in its bill for a decree requiring the defendant company to deliver up these obligations for cancellation should be granted. Counsel is requested to draw a decree in accordance with this opinion and submit to the court.

UNITED STATES v. JOHNSON.

(District Court, W. D. Missouri, W. D. January 8, 1910.)

DRUGGISTS (§ 5*)—FOOD AND DRUGS ACT—CONSTRUCTION—"MISBRANDING."

The purpose of Food and Drugs Act, June 30, 1906, c. 3915, 34 Stat. 769 (U. S. Comp. St. Supp. 1909, p. 1187), was to protect the public health against adulterated, poisonous, and deleterious food and drugs, and in view of such purpose under section 8, which defines "misbranding" as including articles of food or drugs "the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular," a medicinal preparation cannot be said to be mis-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

branded and its sale or shipment in interstate commerce a criminal offense under the act merely because of a misrepresentation on the label as to its curative effect.

[Ed. Note.—For other cases, see Druggists, Dec. Dig. § 5.*]

Criminal prosecution by the United States against O. A. Johnson. On motion to quash indictment. Motion sustained.

A. S. Van Valkenburg, U. S. Atty., for the Government.
Harkless & Histed, for defendant.

PHILIPS, District Judge. The defendant has filed motion to quash the indictment, for the principal reason that it does not disclose an indictable offense. It is predicated of what is known as the "Pure Food and Drug Act," entitled "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes." Approved June 30, 1906. Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1187). It contains six counts.

The first count, in substance, charges that the defendant shipped from one state to another certain articles designated as "Cancerine Tablets," "Antiseptic Tablets," "Blood Purifier," "Special No. 4," "Cancerine No. 17," "Cancerine No. 1," which constituted "Dr. Johnson's Mild Combination Treatment for Cancer." It charges that they were misbranded within the meaning of the act aforesaid, in that the broken packages, etc., of "Cancerine Tablets" were labeled and branded as follows, to wit: "Complies with the Food and Drug Act, June 30, 1906. Cancerine Tablets. Take two tablets in water every three hours during the day. Do not take more than four doses in twenty-four hours. Prepared for and distributed by Dr. O. A. Johnson, 1233 Grand Ave., Kansas City, Mo."—which said label or brand is alleged to be false and misleading, in that it bears the name "Cancerine Tablets," which statement, regarding such articles and substances contained therein, is false and misleading, in that it implies that said tablets will cure, and are effective in bringing about the cure of, cancer, which was untrue, and that they were worthless and ineffective for such purpose.

The second count is predicated of packages containing "Blood Purifier," which were misbranded within the meaning of said act, in that they were labeled:

"Guaranteed under the Pure Food and Drug Act, June 30, 1906, Serial No. 18131. Contains not more than 20 per cent. alcohol. Dr. Johnson's Mild Combination Treatment for Cancer. Blood Purifier. This is an effective Tonic and Alterative. It enters the circulation at once, utterly destroying and removing impurities from the blood and entire system. Acts on the Bowels, Kidneys and Skin, eliminating poisons from the system, and when taken in connection with the Mild Combination Treatment gives splendid results in the treatment of cancer and other malignant diseases."

This was followed with directions how to take the remedy. The charge is then made that said label was false and misleading, in that it bears false statement that said drug is a part of the treatment for can-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cer, etc., whereby it held out and falsely claimed that said drug is efficacious in the treatment of cancer, etc., when in truth and fact the drug contained in said packages is worthless and ineffective for such purpose.

The third count is predicated of packages under the name of "Blood Purifier," and is in effect the same as the preceding shipment, only to a different party.

The fourth count is predicated of packages and bottles under the name of "Special No. 4" with the label "Dr. Johnson's Mild Combination Treatment for Cancer. Special No. 4," with directions as to how it was to be applied and used, and its effect. This label is charged to be false and misleading, in that it would not accomplish the results stated.

The fifth count is predicated of shipments of boxes, etc., containing "Cancerine No. 17," with directions as to how the same should be applied and used. The indictment charges that these were false and misleading, in that said drug was offered as part of the treatment for cancer, holding out and representing that said drug will cure, and is effective in bringing about the cure of, cancer, when, in fact and in truth, it was not effective for such purpose.

The sixth count is predicated of a shipment of box or carton called "Cancerine No. 1," which is alleged to be misbranded within the meaning of the act, in that the label contained the following: "Dr. Johnson's Mild Combination Treatment for Cancer, Tumor and Other Chronic Diseases. Cancerine No. 1"—with directions as to how the same should be applied and used. Said label or brand is alleged to be false and misleading, in that it bears thereon the name "Cancerine No. 1," statements regarding such articles and substances contained therein which are false and misleading, in that said drug was represented as part of the treatment for cancer, and that it would cure, and is effective in bringing about the cure of, cancer, etc., when, in truth and fact, it is wholly worthless and ineffective for the purposes recommended.

From which it is apparent that no charge is preferred by the indictment that the drug or medicine was adulterated, or that it contained anything that was poisonous or deleterious, or that it contained less than what was represented, or that in any respect there was any misbranding as to the contents and composition thereof. The substantive charge is that the articles manufactured and shipped by the defendant are and were inefficacious in producing the cures and remedies indicated by the label. The question, therefore, to be decided is whether this presents an indictable offense within the provisions of the pure food and drug act.

The very title of the act indicates its scope and purport. Its underlying purpose was to protect the public health against imposition upon the users of food, drugs, and medicines which were adulterated, misbranded, poisonous, or deleterious. To this end, the first section of the act makes it unlawful and an indictable offense "for any person to manufacture * * * any article of food or drug which is adulterated or misbranded, within the meaning of the act." The second section forbids the introduction into any state, etc., or from any

foreign country, or shipment to any foreign country, of any article of food or drug which is adulterated or misbranded within the meaning of the act, etc. The third section directs that the Secretary of the Treasury, of Agriculture, and of Commerce and Labor, shall make uniform rules and regulations for carrying out the provisions of the act. The fourth section declares that the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such bureau, "for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this act." Section 5 declares the duty of district attorneys, to whom the Secretary of Agriculture shall report any violation of this act. Section 6 declares that the term "drug," as used in the act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or animal. Section 7 then specifies when an article shall be deemed to be adulterated. In case of drugs, if it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopœia or National Formulary: "Provided, that no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary," or if its strength or purity fall below the standard under which it is sold, or any substance has been substituted wholly or in part for the article, or any valuable constituent of the article has been wholly or in part abstracted, or if it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed, or if it contain any added poisonous or other added deleterious ingredient which may render such articles injurious to health (with a certain provision), or if it consist in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, etc. Section 8 is as follows:

"That the term 'misbranded', as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the state, territory, or country in which it is manufactured or produced."

It is conceded that the indictment is predicated of the words contained in the foregoing section 8:

"The package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular."

In other words, the contention is that the label on the bottle or container, as to the curative or remedial effect of the contents, is a mis-

branding within the meaning of the statute, if, in fact, the prescription be ineffectual for the purpose indicated. This, it seems to me, is an entire misconception of the term "misbranding" as used in the act. The language, "the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular," must be read and interpreted so as to have regard to its context, and is to be restrained by the subject-matter of the act.

Having regard to the intendment of the whole act, which is to protect the public health against adulterated, poisonous, and deleterious food, drugs, etc., the labeling or branding of the bottle or container, as to the quantity or composition of "the ingredients or substances contained therein which shall be false or misleading," by no possible construction can be extended to an inquiry as to whether or not the prescription be efficacious or worthless to effect the remedy claimed for it. Premitting any expression of opinion as to how far Congress may go in the direction claimed under this indictment, it is sufficient to say that this legislation, predicated of the commerce clause of the federal Constitution, it must be conceded, presses the power of the general government close to the confines of limitation. In the debates in Congress, when this measure was under consideration, it was never sought to be justified except on the ground of protecting the public health, as it might be affected by interstate shipments of food, drugs, etc. At no time was it asserted or pretended that it was proposed to reach the matter of holding the manufacturers and vendors of prescriptive or patented medicines, multitudinous and multiform as they are, to criminal liability for misstatements as to the curative or remedial effects of the prescription, which would necessarily depend upon the opinions of contending experts and the users of the nostrums. As this is a criminal statute, creating a new offense, it must be strictly construed and applied. It must be restrained to its expressed, reasonable intendment; otherwise, the courts, by mere construction, may extend its operation far beyond the legislative intent. If it had been the mind of Congress to make it an indictable offense for such manufacturers and vendors by their labels or brandings on bottles and packages to mislead the buyers as to the curative or healing properties of the drugs, as to the mere matter of commendation, apt words, both in the title and body of the act, could and should have been easily employed to indicate such purpose, and not leave it to the courts by strained construction to read it into the statute.

The motion to quash is sustained.

OREGON R. & NAVIGATION CO. v. CAMPBELL et al.

(Circuit Court, D. Oregon. February 21, 1910.)

No. 3,308.

1. PLEADING (§ 8*)—CONCLUSIONS.

In a suit by a railroad company to enjoin the enforcement of a state railroad commission order fixing rates to be charged, an allegation that the class rates undertaken to be established by such pretended order by its terms applies to all the freight mentioned in the second paragraph of the amended complaint, to wit, freight from Portland to points in Oregon east of The Dalles originating from points out of the state, etc., was but a conclusion; since whether such rates so apply depends on whether the freight specified constitutes interstate or intrastate commerce.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 8.*]

2. CARRIERS (§ 10*)—FREIGHT RATES—REGULATION—STATE COMMISSION—ORDERS.

An order of a state railroad commission regulating freight rates should be interpreted to apply only to intrastate commerce, under the rule that a statute should be so construed as to render it not subject to an objection that would be fatal to its validity, if possible.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 10.*]

3. CARRIERS (§ 18*)—FREIGHT RATES—REGULATION—INTERSTATE OR INTRASTATE COMMERCE.

Whether certain character of freight constitutes intrastate commerce, and is therefore subject to rates prescribed by a state railroad commission, or is interstate commerce, and therefore not so subject, should be settled in a proceeding with reference to a particular shipment of a particular commodity as it arises, and not by a suit to have the commission's order set aside as beyond its jurisdiction.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 18.*]

In Equity. Suit by the Oregon Railroad & Navigation Company against Thomas K. Campbell and others. On demurrer to amended bill for preliminary injunction. Sustained.

See, also, 173 Fed. 957.

W. W. Cotton, for complainant.

A. M. Crawford and Teal, Minor & Winfree, for defendants.

WOLVERTON, District Judge. The complainant now files an amendment to its bill of complaint, to which the defendants have interposed a demurrer. By the second paragraph it is alleged:

"That of the freight carried, and which will hereafter be carried, from Portland to points on your orator's lines in Oregon east of The Dalles under the class rates established and fixed by tariff No. L—525, at least 40 per cent. thereof originates out of the state of Oregon, has been, is, and will be shipped from Portland to points on your orator's lines east of The Dalles in the same packages in which it was originally shipped from the point of origin outside of the state of Oregon to Portland, and without coming to rest within the state of Oregon, and without becoming part of the traffic of the state of Oregon, and at least 20 per cent. of the freight carried, and which will hereafter be carried, from Portland on your orator's lines in Oregon east of The Dalles under the class rates established and fixed by tariff No. L—525 is, has been, and will be shipped from Portland to points on your orator's lines in Oregon east of The Dalles by carriers and persons bringing the same to Portland from points without the state of Oregon with the intention of immediately

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rev'r Indexes

and without delay shipping the same over the lines of your orator from Portland to points in Oregon east of The Dalles, and that the same has been, is, and will be so brought into the state of Oregon, and so immediately shipped over the lines of your orator from Portland to points in Oregon east of The Dalles, and that the class rates undertaken to be established by the said pretended order of the said Railroad Commission of Oregon by its terms applies to all of the freight mentioned in this amendment."

The purpose of the paragraph is to show that by the order the State Railroad Commission has exceeded its powers, and has undertaken to regulate the rates of freight upon the transportation of interstate as well as intrastate commerce. The last clause above quoted, "And that the class rates undertaken to be established by the said pretended order of the said Railroad Commission of Oregon by its terms applies to all of the freight mentioned in this amendment," is but a conclusion. Whether the rates prescribed so apply depends upon whether the freight specified falls within the category of interstate or intrastate commerce. If within the former, the order as I have heretofore interpreted it applies. If within the latter, it does not.

This brings the discussion back again to the proper interpretation of the order. I have heretofore interpreted the rate there fixed as applying, and intended by the State Railroad Commission to apply, to intrastate traffic only. The interpretation given by the Supreme Court to the employer's liability act (Act June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1909, p. 1148]) in *The Employers' Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, and that given to an order of the Secretary of Agriculture fixing a quarantine line running east and west dividing the state of Tennessee for the protection of stock from infectious diseases in *Illinois Central Railroad v. McKendree*, 203 U. S. 514, 27 Sup. Ct. 153, 51 L. Ed. 298, it is argued, is opposed to the interpretation given the present order. I am unable, however, to concur in that view. In each of those cases the language employed, in the former by the act and in the latter by the order, is so broad as to include by all reasonable intendment all commerce, whether state or interstate. So it was held that the act in the one case was unconstitutional, and the order in the other beyond the authority of the Secretary of Agriculture to make.

While the order here is possibly susceptible of two constructions, yet, under the rule that a statute should be upheld against an objection that it is inimical to the Constitution wherever it can be done without doing violence to the terms of the act, it seems it should be sustained. The interpretation of the order, though not a statute, should be governed by the rule. Such was the application of it in the case last cited. The rule is clearly stated and reaffirmed in *El Paso & N. R. Co. v. Gutierrez*, 215 U. S. 87, 30 Sup. Ct. 21, 54 L. Ed. —, which contains a further interpretation of the employer's liability act, upholding it in part.

The order here requires the complainant to cease and desist from charging any higher rates within the state for the transportation of merchandise and other commodities from the city of Portland to points on the defendant (complainant here) company's main, branch, leased, or otherwise controlled railroad lines within the state of Oregon. This

clause was incorrectly quoted in the main opinion as reading "between the city of Portland," etc. When we say from the city of Portland, it is reasonable to suppose that the commission intended to cover commerce originating in Portland, and thus the order is even strengthened above the form as quoted in the main opinion.

This is not a case involving a divisibility of the statute or order, so that one part of it may stand and the other fall. Nor does the order here require the reading of any words into it, so as to make it operative within the state only. The order is single, as its true intentment was, and is to affect such traffic as originates within the state, or is property local to the state, and is carried to other points in the state, or, to be more exact, as originates in Portland, or is local thereto, and is carried from Portland to points upon the complainant's lines east of The Dalles. The pleadings in the case before the commission, and its findings, as well as the order itself, all seem to indicate this, and hence the authorities cited in complainant's written brief do not apply.

I see nothing in the further argument or in the cases cited to disturb the view which I formerly entertained of the order. Paragraph 3 of the amended complaint is practically a reiteration of what was contained in the original bill by pleading a conclusion that the rates undertaken to be prescribed by the State Railroad Commission are unjust and unreasonable for the services contemplated to be performed. Hence the amendment could not be sustained, if the original bill could not.

It still does not seem to me that this is the proper proceeding in which to determine the question, attempted to be presented, as to whether goods shipped into Portland from outside the state in original packages, and sooner or later shipped out again to the interior of the state in the same unbroken packages, would constitute interstate commerce. This might depend upon how the goods were treated and considered while in Portland, or upon other conditions that are not made to appear either by the original bill or by the amendment. If the order be valid, as it is held to be, then all shipments or commerce which are intrastate in character must be controlled by the order; all that are not are not affected by it. If question arises as to any particular shipment or any particular commodity to be moved, or in process of transportation, it might be settled by carrying the matter to the commission; or, if the commission unlawfully exacts the state rate upon interstate traffic, I see no reason why it may not be enjoined in any court of competent jurisdiction. These special cases must necessarily be determined as they arise, as it is impossible, by a general decree, to determine in advance what specific commodities and the transportation thereof constitute interstate and what intrastate commerce.

The demurrer to the amended bill will be sustained, and the suit dismissed.

UNITED STATES v. STONE, SAND & GRAVEL CO. et al.

(Circuit Court of Appeals, Fifth Circuit. March 29, 1910.)

No. 1,893.

1. UNITED STATES (§ 67*)—PUBLIC IMPROVEMENTS—CONTRACTORS—BOND—ACTION.

A petition, alleging the advertising for bids for the improvement of certain public waterways, the execution of a contract on the bid of the S. Company for the performance of the work, the execution of a bond by defendant surety company to secure performance, the S. Company's failure to commence the work within the time prescribed, the granting of additional time by the government, its refusal to grant a second extension, the S. Company's failure to commence work within the time as extended, the cancellation of the contract, and the performance of the work under a subsequent contract with another at a higher price, stated a cause of action both against the S. Company and the surety.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*]

2. UNITED STATES (§ 67*)—PUBLIC WORK—CONTRACTS—ANNULMENT.

Where, after a contractor with the United States for a public waterways improvement failed to begin the work within the time fixed as extended, the government canceled a contract and entered into a subsequent similar contract with another contractor at a higher price, who completed the work at a higher cost, the cancellation of the original contract did not release the contractor or his surety from liability for the loss sustained.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*]

3. UNITED STATES (§ 67*)—PUBLIC IMPROVEMENTS—CONTRACT—CANCELLATION—DAMAGES.

Where, after the termination of a contract for public improvement by the United States for contractor's failure to commence work within the time fixed as extended, the government entered into another contract with another to complete the work at a higher cost, and such contracts were substantially similar, the second contract was competent evidence of damages for the default of the original contractor and his surety.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*]

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Action by the United States against the Stone, Sand & Gravel Company and others. Judgment for defendants, and plaintiff brings error. Reversed, with directions.

Charlton R. Beattie, U. S. Atty., and W. J. Waguespack, Asst. U. S. Atty. (Chapman W. Maupin, of counsel), for the United States.

Thomas W. Bullitt (Howe, Fenner, Spencer & Cocke, of counsel), for defendant in error American Surety Co.

T. M. & J. D. Miller, for defendant in error Stone, Sand & Gravel Co.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

McCORMICK, Circuit Judge. In March, 1899, and for some time previous to that date, the government of the United States was engaged in the work of restoring the harbor at Vicksburg, Miss., and caused the following notice to be duly published:

"U. S. Engineer Office, Vicksburg, Miss., March 2, 1899.

"Sealed proposals for excavating 7,500,000 cubic yards of earth, more or less, along route for diverting mouth of Yazoo river, near Vicksburg, Miss., under continuous contract, will be received here until 3 o'clock p. m., April 5, 1899. Information furnished on application. J. H. Willard, Maj. Engrs."

Ample written specifications were prepared, copies of which were furnished applicants. The object of the work was to give a new mouth or outlet for the various streams forming the Yazoo System of the Mississippi river, which shall be navigable at all seasons of the year, and at the same time to restore the harbor at Vicksburg, Miss. These specifications showed that the project authorized by Congress contemplates excavating about 7,500,000 cubic yards of earth, more or less, along the route selected from the junction of Yazoo river proper with a former bend of Mississippi river (A. D. 1797-1808), about 9.8 miles above present entrance of the Yazoo into the Mississippi, and following the "wrong end of Old river," cutting through a neck of low land from Old river to Lake Centennial, thence across Lake Centennial around the head of De Soto Island, and down the former channel of Mississippi river (1876) in front of the city of Vicksburg to deep water in the bend of Mississippi river at Kleinston Landing. The length of the proposed route is as follows: (Giving detail of total mileage aggregating 9.31 miles).

For this work, the defendant the Stone, Sand & Gravel Company (which we will call the "contractor company") submitted its bid, as follows:

"New Orleans, La., April 3, 1899.

"To Major J. H. Willard, Corps of Engineers, U. S. Army, Vicksburg, Miss. —Sir: In accordance with your advertisement and specifications of March 2, 1899, inviting proposals for diverting mouth of Yazoo river, Miss., and subject to all the conditions and requirements thereof, copies of both of which are hereto attached, and, so far as they relate to this proposal, are made a part of it, we (or I) propose to furnish the necessary plant and to excavate 7,500,000 cubic yards of earth, more or less, along the route selected and to deposit the material so excavated at places approved by the engineer officer in charge at eight and forty-nine one hundred cents (8.49 cts.) per cubic yard, measured in place; to begin active operations within six months after notice of award of contract, with sufficient force and plant for an output of not less than 260,000 cubic yards per month, which shall be increased within six months from date of beginning to give an output of not less than three hundred and thirty thousand cubic yards of excavation per month, unless the work is interfered with or stopped by floods, storms, epidemics, or other causes beyond control."

Accompanying this proposal there was filed a guaranty obligation signed by the contractor company and by the American Surety Company (which we will call the "surety"), in these words:

"We, Stone, Sand & Gravel Company of New Orleans, in the county of Orleans and state of Louisiana, and American Surety Company, of New York, in the county of Kings, and state of New York, hereby undertake that if the bid of Stone, Sand & Gravel Company herewith accompanying, dated April 3, 1899, for excavation for diverting mouth of Yazoo river, Miss., be accepted

within sixty days from the date of the opening of proposals therefor, the said bidder, Stone, Sand & Gravel Company, will, within ten (10) days after notice of such acceptance, enter into a contract with the proper officer of the United States to do the work required, at the prices offered by said bid and in accordance with the terms and conditions of the advertisement and specifications inviting said proposals, and will give bond with good and sufficient sureties for the faithful and proper fulfillment of such contract. And we bind ourselves, our heirs, executors and administrators, jointly and severally, to pay the United States, in case the said bidder shall fail to enter into such contract or give such bond within ten (10) days after said notice of acceptance, the difference in money between the amount of the bid of said bidder on the articles or services so accepted and the amount for which the proper officer of the United States may contract with another party to furnish said articles and services, if the latter be in excess of the former."

The bid of the contractor company was accepted, and the contract between it and the government was entered into on the 14th of June, 1899, in which there were, among others, these provisions:

"That the contractor company shall commence active operation under this contract on or before the 5th day of December, 1899, with sufficient force and plant for an output each calendar month of not less than two hundred and sixty thousand (260,000) cubic yards per month, which shall be increased on or before the 5th day of June, 1900, with sufficient force and plant for an output each calendar month of not less than three hundred and thirty thousand (330,000) cubic yards per month; provided, however, that if work shall commence before the date first above written in this paragraph the plant first put in operation shall have an assured capacity of not less than sixty-five thousand (65,000) cubic yards each calendar month, until December 5, 1899, and work shall not begin with less output. * * * That if, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then in either case, the party of the first part, or his successor, legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part (the contractor company); and, upon the giving of such notice, all money or reserve percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States: Provided, however, that if the party (or parties) of the second part shall by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract, such additional time may in writing be allowed him or them for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon. * * * It is further understood and agreed that in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, that all sums due and percentage retained shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing said contract,

in excess of the price herein stipulated to be paid to the party of the second part for completing the same."

The defendants gave their bond in the sum of \$75,000, conditioned that:

"If the above bounden Stone, Sand & Gravel Company shall and will, in all respects, duly and fully observe and perform all and singular the covenants, conditions and agreements in and by the said contract agreed and covenanted by said Stone, Sand & Gravel Company, to be observed and performed according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same, and shall promptly make full payments to all persons supplying it labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise, to remain in full force and virtue."

It is averred in the petition that, after the execution of the contract, the contractor company did apply to the government for an extension of time; that this extension was asked for on account of the inability of the company, without fault of its own and for causes contemplated by the contract, to commence the work within the time provided in said contract; and that the time was extended to January 24, 1900.

Upon the failure of the contractor company to prosecute the work within the term of the extension granted, the Chief of Engineers of the United States army did, on the 25th day of January, 1900, recommend that the contract be annulled and the work readvertised and relet. This recommendation was approved by the Secretary of War, and the contract was annulled, and notice was given to the contractor company and to the surety. After advertisement, and in accordance with law, the government contracted with the Atlantic, Gulf & Pacific Company, of New York, for the purpose of prosecuting and completing the work, under which contract (hereinafter called the "new contract") the work was prosecuted and completed at a cost to the United States of \$228,201.91 in excess of the amount that the same work would have cost under the contract with the Stone, Sand & Gravel Company (which we will hereinafter call the "original contract").

To recover this amount this suit is brought, with prayer for judgment against both the defendants in solido in the sum of \$75,000, and against the Stone, Sand & Gravel Company and its receivers in the further sum of \$153,201.91.

The defendants answered, in substance, that, by the annulment of the contract, it, in respect to all rights and obligations of either and both parties thereto, became extinguished, and all liability on their part thereon ceased; and the surety specially pleaded that the extension of time granted to its codefendant was granted without the surety's knowledge, consent, or approval; that the terms and conditions of the new contract differed from those contained in the original contract, by which changes in terms and conditions the United States abandoned the original contract, and the surety was thereby released from obligation on its bond; and, further, that the new contract, so changed, forms no basis for measuring damages for the breach of the original contract. The surety's answer closes with the averment that the terms of the new contract had a tendency to cause bidders for the work under

it to ask a higher price upon the work to be done than would have been asked if the work had been let under the terms of the original contract; and the new contract forms no proper measure by which to estimate or calculate damages for the nonperformance of the original contract.

The action was tried in the Circuit Court before a jury. The record shows that, at the conclusion of the hearing of the evidence, the United States attorney moved the court to direct a verdict in favor of the government; and the counsel for the defendants moved the court to direct a verdict in favor of the defendants. After hearing the argument of the counsel on these motions, the court refused the motion of the United States attorney, and granted the motion of the counsel for the defendants; and, on the verdict so returned, gave judgment for both defendants.

The plaintiff assigns that the court erred: (1) In refusing to grant her motion; and (2) in directing a verdict against her.

The defendants contend: (1) That the petition does not state a cause of action against either of them; (2) that the annulment of the original contract released both of the defendants; (3) that the extension of time was such an alteration in the terms of the contract that the surety was released; and that the new contract differs so materially from the original contract that it forms no proper measure of damages for the default of the original contractor, and in effect operates a discharge of the original contract.

The first point is obviously not well taken. The others we group, and address to them some observations on the dealings between the parties.

The first step in the negotiations between the plaintiff and the defendants was the advertisement from the engineer's office for sealed proposals for excavating along the proposed route under continuous contract. Information furnished on application. That information showed the object of the work, the extent of it, and full particulars touching it. There is no question that the information was fully given and explained to the contractor company before it made its proposal for doing the work. The proposal was made in accordance with the advertisement and with the specifications, copies of both of which were attached to the proposal. The guaranty bond required, and given, bound both of the defendants to pay to the United States, "in case the bidder failed to enter into such a contract as is proposed and give the required bond, the difference in money between the amount of its bid and the amount for which the United States may contract with another party to furnish the articles and service, if the latter amount be in excess of the former." In satisfaction of this guaranty obligation, the contract was entered into by the Stone, Sand & Gravel Company, and the bond required was given by it and the surety. This constituted the continuous contract under which the service was to be performed. The contract shows that the parties contemplated that the contracting company might, by causes beyond its control and by no fault of it, be prevented from commencing or completing the work at the time agreed upon, and provided that such additional time might be allowed it for the commencement or completion thereof as, in the

judgment of the named officer of the government or of his successor, should be just and reasonable. Under this provision, which expressed in advance the consent of the surety, the first extension applied for was so far granted as to fix the time for beginning active operations under the contract at January 24, 1900. An application for a further extension was refused. The contract was duly annulled for failure to commence active operations under it within the time specified. Some preliminary experimental work had been done to the value, at the contract prices, of \$6,206.69, which the defendants claim became forfeited to the plaintiff and extinguished all liability on the part of the defendants. This effort to split the contract into sections of liability, and wrest the meaning of the words "annul" and "forfeiture" from the signification which the whole dealings of the parties show should be given to them, does violence to the plain intent of the parties. The work was important in its magnitude and in the benefit it promised; it was of public interest that it should be done within a reasonable time, and be of efficient and lasting quality. It was in contemplation of the parties that the contractor might be unable to perform the work in the manner and in the time specified; and to prevent its being obstructed and delayed by the inability of the contractor to proceed arising out of causes within the control of an efficient contractor, provision for clearing the way of the government to do this work by such other means as it might be able to employ was made; and the word "annul," used in reference to that situation, should not be given a technical or narrow meaning, or be allowed to embarrass the administration of justice in dealing with conditions which call for only the application of the plainest common sense. Likewise, in reference to the word "forfeiture," we see nothing here to justify us in construing the provision in which that word is used to mean liquidated damages. To the contrary, it seems clear to us that in contemplation of the parties it signified a penalty to be looked to for the satisfaction pro tanto of such damage as might actually be incurred.

With reference to the new contract, no recovery is sought on it in this action. And it is not apparent to us how the so-called "substitutions" complained of can or could in any case affect the rights or liabilities of the defendants under the original contract.

We have read and compared the two contracts in question with studious care, and conclude that the defense attempted to be built on any variance in their wording is highly artificial and without substance. The new contract says:

"No prior inspection, payment, or act, is to be construed as a waiver of the right of the government to reject any defective work or material or to require the fulfillment of any of the terms of the contract."

The specifications are a part of each of these contracts, and, speaking of the work and material, specification 31, attached as a part of the new contract, provides:

"The decision of the engineer officer in charge as to quality and quantity shall be final."

This is identical in word and letter with specification 32 attached to the original contract; and we cannot find in the original contract any

words to express or fairly imply that the final decision of the engineer officer during the progress of the work shall be construed as a waiver of the right of the government to reject any defective work or material whenever discovered; and, in the absence of any express language requiring it to be so construed, the courts would construe it not necessarily as the defendants do, but according to the conditions of each particular case.

The defendants' second specification in this connection is that the two contracts contain essentially different provisions respecting the effect of the annulment of the contract by the United States in case of default by the contractor. This is based on the defendants' construction of the provisions respecting the effect of the annulment of the contract as used in the original contract, which construction of the defendants we have attempted to show in the foregoing portion of this opinion is not sound, and that our construction of it makes it mean substantially what the provision in the new contract only more clearly expresses.

The defendants complain that the new contract contains a clause which is not in the original contract, to the effect that the contractor shall hold the government harmless against demands of any nature on account of the use of any patent, invention, article, or process included in the materials agreed to be furnished and the work to be done under the contract. In the original contract we find it expressly stated that the contractor shall be responsible for, and pay, all liabilities incurred in the prosecution of the work for labor and material. He had to furnish all labor and material. Any liability that he incurred therefor he was bound to meet, and, in law and substance, was as much bound for these charges under the original contract as is the contractor under the new contract.

The provision as to the time of beginning work and the limit of time within which the work shall be completed is substantially the same in each contract. Wherein the new contract differs, the difference is in favor of the contractor.

We conclude that both of the assignments of error are well taken. All of the work done under the new contract was embraced under the original contract; it was done under substantially the same specifications and stipulations, and it was shown to have cost the precise amount claimed in the petition. We think there is no substantial defense pleaded to the action, and on the trial there was no offer of proof tending to question the damage to the plaintiff in the amount claimed, and that amount was fully proved by competent evidence and the admission of the defendants.

To support their contentions, counsel for defendants have cited *O'Connor v. Henderson Bridge Co.*, 95 Ky. 633, 27 S. W. 251, 983; *Henderson Bridge Co. v. O'Connor*, 88 Ky. 303, 11 S. W. 18, 957; *Sparhawk v. United States*, 134 Fed. 720, 67 C. C. A. 274; *Quinn v. United States*, 99 U. S. 30, 25 L. Ed. 269; *Philadelphia, Wilmington & Baltimore Railroad Co. v. Howard*, 13 How. 329, 14 L. Ed. 157; *Farrelly v. United States*, 159 Fed. 671, 86 C. C. A. 539.

In the Bridge Company Case, the annulment attempted to be made

was held to have been wrongful and invalid, and the decision has no application here.

In Sparhawk Case and the Quinn Case, it seems to us that the decision supports the right of the plaintiff in the case before us.

In our opinion, Railroad Co. v. Howard supports what we have advanced on the subject of forfeiture.

The case of Farrelly v. United States, 159 Fed. 671, 86 C. C. A. 539, appears, on a hasty reading, to support the contentions of the defendants; but the very eminent judge who wrote the opinion of the court in that case distinguished it from the case of United States v. Maloney, 4 App. Cas. (D. C.) 505, in a way that puts the case we have in the class with the Maloney Case. He says:

"In the Maloney Case the contractor wholly failed to do any work whatever. He wholly failed to commence work on or before the 16th day of June, 1891, which he had expressly agreed to do. There was a complete breach of the contract before action was taken under the annulment clause."

Precisely this case as we have resolved it.

It follows that the judgment must be reversed, and the case remanded to the Circuit Court, with direction to have judgment entered for the plaintiff against the Stone, Sand & Gravel Company and its receivers as such, and the American Surety Company, in solido, in the sum of \$75,000, with legal interest from judicial demand, and against the Stone, Sand & Gravel Company and its receivers as such in the further sum of \$146,995.22, with legal interest from judicial demand, being amount due the plaintiff after allowing the Stone, Sand & Gravel Company a credit of \$6,206.69 for excavation done by it.

And it is so ordered.

ILLINOIS CENT. R. CO. v. O'NEILL.

(Circuit Court of Appeals, Fifth Circuit. March 15, 1910.)

No. 1,977.

1. EVIDENCE (§ 588*)—CREDIBILITY OF WITNESSES—DETERMINATION.

In determining the credibility of witnesses, it is the jury's duty to consider their interest, their opportunity for observation, and the general circumstances surrounding the giving of their testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. § 588.*]

2. RAILROADS (§ 346*)—CROSSING ACCIDENT—DEATH OF PEDESTRIAN—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In an action for the death of a pedestrian in collision with a railroad train at a crossing, the burden is on plaintiff to establish defendant's negligence and that such negligence was the proximate cause of the death by a clear preponderance of the evidence, while the burden is on defendant to establish the defense of contributory negligence in the same manner.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1117-1123; Dec. Dig. § 346.*]

3. RAILROADS (§ 346*)—CROSSING ACCIDENT—DEATH OF PEDESTRIAN—NEGLIGENCE.

In an action against a railroad company for death of a pedestrian at a crossing, the fact of the accident does not of itself show negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1119; Dec. Dig. § 346.*]

4. RAILROADS (§ 307*)—CROSSING—FLAGMEN.

A railroad company is not bound, in the absence of statutory requirement, to employ a flagman or watchman at a crossing, and its failure to do so is not negligence unless required by the exercise of reasonable care.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 972-977; Dec. Dig. § 307.*]

5. RAILROADS (§§ 313, 317*)—OPERATION OF TRAINS—CROSSINGS—SIGNALS—SPEED.

Where a city ordinance limited the speed of trains within the city to six miles an hour and required the ringing of the bell as crossings were approached, the operation of a train over a crossing at a speed exceeding six miles an hour and a failure to ring the bell, resulting in the death of a pedestrian at the crossing, constituted negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1002, 1004, 1005, 1009-1012; Dec. Dig. §§ 313, 317.*]

Effect of violation of statutes and ordinances regulating speed of trains, see note to *Shatto v. Erie R. Co.*, 59 C. C. A. 5.]

6. RAILROADS (§ 327*)—CROSSING ACCIDENT—DEATH—CONTRIBUTORY NEGLIGENCE.

While a railroad company is entitled to the right of way over a railroad crossing, a pedestrian is nevertheless entitled also to use the crossing, being first required to look and listen, and not to carelessly walk into danger, so that if he fails to look, or, looking, does not see the approaching train when it must have been visible to an ordinary observer, he would be guilty of contributory negligence precluding a recovery for injuries sustained.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

7. RAILROADS (§ 338*)—CROSSING ACCIDENT—LAST CLEAR CHANCE—DISCOVERED PERIL.

A railroad company is liable for the death of a pedestrian at a crossing, notwithstanding his contributory negligence, if the operatives of the train in the exercise of reasonable care ought to have discovered decedent's danger in time to have saved him, and failed to do so.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1096-1099; Dec. Dig. § 338.*]

8. DEATH (§ 10*)—ACTION FOR INJURIES—SURVIVAL.

An action for physical and mental pain and suffering, suffered by a person injured before his death, survives to decedent's widow and children.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 10.*]

9. DEATH (§ 86*)—MEASURE OF DAMAGES.

In an action for the wrongful death of a husband and father, the damages to the widow and minor children, consisting of the loss of support, etc., must be determined by considering all the probabilities, the amount of decedent's earnings, and the probabilities of his continued health, etc.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 112-114, 119; Dec. Dig. § 86.*]

10. MASTER AND SERVANT (§ 303*)—INJURIES TO THIRD PERSONS—NEGLIGENCE—INCOMPETENT ENGINEER.

The employment of an incompetent engineer resulting in a railroad crossing accident is negligence sufficient to justify a recovery if it was the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 303.*]

11. NEGLIGENCE (§ 1*)—DEFINITION.

"Negligence" is the omitting to do something that a reasonably prudent person would do, or the doing of something that such person would not do.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

12. DEATH (§ 105*)—WRONGFUL DEATH—VERDICT.

In an action by a widow for herself and minor children for the wrongful death of her husband, the father of the children, a verdict for plaintiff should be so divided as to find a specified sum for the widow and another specified sum for each minor child.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 149; Dec. Dig. § 105.*]

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Action by Mrs. Mary O'Neill against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The following is the charge of Foster, District Judge:

This is a case where the plaintiff sues for \$30,000 damages for the death of her husband and the father of her minor children—\$10,000 for each of them; and alleges, as a cause of action, the negligence of the defendant, setting it out under what I will term four general heads: First, the running of the train at an excessive rate of speed exceeding six miles per hour in violation of a city ordinance; second, having no flagman or watchman at the intersection of the streets, also in violation of a city ordinance; third, that the defendant failed to ring the bell or to blow the whistle or give any other signal; and, fourth, that the deceased was in full view of the engineer who had ample time to see him and to have stopped his train and avoided the accident and did not do so. The defense is a general denial and a plea of contributory negligence.

Now, gentlemen, you are the sole judges of the facts in this case. There has been very little conflicting testimony, and while I have a right to comment on the evidence it is not my intention to do so, further than to be of some assistance to you in arriving at a solution of the problem, and you are not bound in any way by my opinions as to what has been testified to; you are at liberty to disregard anything I say in regard to the evidence, and to draw your own conclusions from what you have heard. In determining the issues of fact, where there is conflict of testimony you must resolve those conflicts of testimony, you must try to resolve those conflicts so as to have all the witnesses speak the truth, but if you cannot do so then you will, of course, reject the evidence of those you do not believe, and you will give credence to the evidence of those you do believe. In determining who to believe you ought to take into consideration the interest that witnesses may have in the matter and the opportunity for observation that each of them had, and the general circumstances surrounding the giving of their testimony. The burden of proof is on the plaintiff to establish her case by a clear preponderance of the evidence, and the burden is on the defendant to establish its plea of contributory negligence.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Now, both the plaintiff and defendant must establish their respective—First, I should say the plaintiff must establish the negligence of the defendant by a preponderance of the evidence, and the defendant must establish the contributory negligence in the same way, but the defendant is not bound to put witnesses on the stand for the purpose. You are to judge both of these matters by all the evidence in the case, no matter by which side it is adduced. The mere fact that there was an accident does not of itself show negligence, and notwithstanding that the deceased in this case was certainly killed by defendant's train, that fact of itself does not establish the negligence of the defendant, and the plaintiff must still show you that the cause of death, the proximate cause of death, was the negligence of the defendant before she can recover. Now, if that is done, the question then arises as to the contributory negligence of the deceased. The defendant had the right of way at this crossing, and to that extent, perhaps, its right was superior to the deceased's, but the deceased also had the right to cross these railroad tracks at the intersection where he attempted to do so, and the mere fact he tried to cross the tracks was not of itself negligence. The defendant is not bound by law to employ a flagman at this intersection, or a watchman. The city ordinance introduced in evidence does not impose, in my opinion, that duty on the defendant. They were prohibited, apparently, by these same ordinances, from blowing a whistle to give warning of their approach, but they were required to ring a bell at intervals, how frequent the ordinance does not say. There is some conflict of testimony as to whether or not this bell was rung, and that is one of the points you will have to decide. Apparently there is no question about a flagman. It seems to be a fact that no flagman or watchman was provided, so if that is negligence as relied upon by the plaintiff, the fact itself is established.

Now, I charge you that while that defendant was not required by law to employ a flagman, the defendant was required to exercise all due and reasonable care for the protection of others who had the right to use that crossing consistent with the reasonable running of its trains, and it is for you to determine whether or not the failure to employ a flagman or watchman at that crossing was, or was not, violative of its duty. So it was the duty, imposed by law upon the defendant, not to exceed the rate of six miles an hour in running its trains. If you find that the defendant did not ring the bell, and that is a disputed question, it would be negligence. If you find that the train was running at a rate exceeding six miles an hour that would be negligence. Those two questions you have to determine. But the mere fact that the defendant may have been negligent would not entitle the plaintiff to recover unless the negligence resulted in the death of the husband of the plaintiff.

The defendant relies upon the plea of contributory negligence, and in determining that you have to consider the circumstances of the case as the evidence presents them. I charge you that the deceased was bound to look and listen before crossing the defendant's tracks, and not to carelessly walk into danger, and if he failed to look, or, looking, did not see the approaching train at a time when it must have been visible to an ordinary observer, it was negligence on his part, and in looking he was bound to look as a prudent and careful man would, and that is to take into consideration the track upon which a train might approach from both directions. So it would be negligence on his part if he failed to listen, or did not hear the bell when it was in fact ringing, or, seeing the train approaching walked in front of it thinking he had time to cross in safety when, as a matter of fact, he did not. You must determine these matters as questions of fact from all the evidence.

I charge you further that should you find that the defendant was negligent, and the negligence of the defendant caused the death of the husband of the plaintiff, and you should also find that the deceased was guilty of contributory negligence—in other words that his own negligence contributed to his death—even in that case the plaintiff could recover if the defendant in the exercise of reasonable care ought to have discovered the danger in time to save him and did not do so. Now, I will repeat that. I say that even if the deceased was guilty of contributory negligence, still, if the defendant, in the exercise of reasonable care ought to have discovered his danger in time to save him and did not do so the plaintiff can recover. In defining reasonable

care the element of danger is important. What is reasonable care in one case might not be in another. Gentlemen, it is that care and precaution which an ordinarily prudent and careful man would use to avoid injury to others in view of all the circumstances and in view of the probability of injury. If you find the deceased guilty of contributory negligence and that the defendant did not use reasonable care, still you have to determine whether or not the defendant should have discovered the danger of the deceased in time to save him. And there, if you find that not having a flagman or watchman at this crossing is negligence on the part of the defendant, and that, gentlemen, is purely a question for you to find, you are to find whether or not the fact that no flagman was at that crossing was negligence on the part of the defendant and was not using reasonable care, then you have still to determine whether or not if the flagman had been there he should have seen, in the exercise of his duty, the danger to this deceased in time to have prevented the accident. Now, do I make that clear—if you find that it was negligence for this defendant not to have a flagman at that crossing, still you must find that the flagman had he been there should have seen the danger to the deceased in the exercise of the flagman's duty in time to have prevented the accident and did not do so. Now, those facts you must determine before the plaintiff can recover. So it is with the engineer. If you find that the engineer did not look in time to see this man you have got to find whether or not he could have seen him by the exercise of reasonable care—that is, the ordinary reasonable manner that an engineer ought to do, not what he did do perhaps, but what he ought to do in running his train—and that if he had done what he ought to do he might then have prevented the accident after seeing the danger of the deceased.

If you find, gentlemen, that the plaintiff is not entitled to recover on the charge I have given you, and the facts as you have heard them from the witnesses, then, of course, your verdict would be for the defendant, and you have nothing further to consider. If, on the other hand, you find in view of the charge of the court, and the facts as found by yourselves, that there should be a recovery for the plaintiff, then you must determine the amount of damages. I charge you, on that point, that the deceased had he lived would have been entitled to recover, first for his physical pain and suffering and for his mental suffering, and such damages as were actually occasioned him by the accident, and that the right of action survives to this plaintiff for herself and her minor children for such pain and suffering, physical and mental, as the deceased suffered. Further than that she is entitled to recover for the loss of the support of the husband and father; that is, if you find that she is entitled to recover anything. Now, then, the amount, gentlemen, you must determine. You are not to take it for granted that the amount set forth in the plaintiff's petition is correct, although you cannot exceed that, but you are to look into the facts of the case, take into consideration all the probabilities, the amount that this deceased was earning, the probabilities of his continued health, etc. But the question of amount, gentlemen, you should not approach until you have first determined the liability.

I have been asked to give some special instructions and I will give plaintiff's instruction No. 4: "The violation of the city ordinance requiring the ringing of bells at intervals within city limits is evidence of negligence on the part of the employes of the railroad company for whom the railroad company is liable, if you should find from the evidence in this case that the bell was not rung upon the approach of a crossing." Gentlemen, I will add to that that you must determine also whether or not the negligence was the cause of the death before you can give a verdict for the plaintiff.

I will give the plaintiff's instruction No. 5, as follows: "It is for you to decide whether or not the engineer in charge of this engine was competent or physically fit to discharge properly the duties of his employment, and if you find that he was not, then I charge you that it was negligent on the part of the company to employ him for that work." So also, you must find, if you do find in accordance with this charge, you must also find that that negligence was the cause of the death before there could be a recovery on that score.

I will give the defendant's instruction No. 3: "The court instructs the jury, that the basis of this action is negligence, which is defined by law to be: The

omitting to do something that a reasonably prudent person would do, or the doing of something that such person would not do. Under the circumstances of this case, and as applied to the case, if you find from the evidence that the defendant by its employes has omitted to do something that a reasonably prudent person would do, or has done something that such person would not do, you would be warranted in finding the defendant was guilty of negligence; and if you find that plaintiff's husband has done something or omitted to do something which directly contributed to the collision and injury, then you will be warranted in finding such person guilty of contributory negligence."

Now, gentlemen, I will repeat that in order to find a verdict for the plaintiff you must determine whether or not the defendant has been negligent. If there was nothing else to the case, and you find the death resulted from the negligence of the defendant, and by that I mean the persons in charge of the train, also, your verdict would be for the plaintiff, and the amount you fix. If you find, on the other hand, that the deceased was guilty of contributory negligence—in other words, that his own acts, his own negligent action contributed to his death, or caused his death notwithstanding the negligence of the defendant, and you also find that the defendant could not by the use of ordinary care have prevented the accident after he ought to have seen the danger to the deceased—then the verdict must be for the defendant. But if you find that although the deceased was guilty of contributory negligence, and that the defendant ought to have run its trains so that in the circumstances of this case by the exercise of ordinary and reasonable care it would have discovered the danger to the deceased in time to prevent the accident, why, then, notwithstanding the contributory negligence, your verdict should be for the plaintiff. Now, gentlemen, I do not know whether I have made myself clear but I have tried to.

I am requested to charge you, gentlemen, as to the form of the verdict, and you will elect your own foreman, and you reach a verdict; if you find for the defendant you will write—your foreman will write—on the back of the petition which you will take with you, "We, the jury, find a verdict in favor of the defendant," and sign it. If you find a verdict in favor of the plaintiff, you will write it this way: "We, the jury, find a verdict in favor of the plaintiff in the sum of so many dollars in her behalf, and in so many dollars for the use and benefit of the two minor children." I think, if you find for the plaintiff, you ought to divide your verdict into three parts, and say: "We, the jury, find a verdict in favor of the plaintiff in so many dollars, and in so many dollars for such a minor child, and in so many dollars for such a minor child." When you have reached a verdict you will seal it up in an envelope and give it to the bailiff who will have you in charge, and you return in court to-morrow morning at 11 o'clock for the opening and reading of the verdict.

Gustave Lemle, for plaintiff in error.

Armand Romain, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The evidence required a submission of the issues of negligence and contributory negligence to the jury, and we find no reversible error in the charges given or refused.

The judgment of the Circuit Court is affirmed.

In re FENN.

(Circuit Court of Appeals, Second Circuit. March 7, 1910.)

No. 14.

1. INTOXICATING LIQUORS (§ 326*)—SALES—VALIDITY—PLACE.

Claimant's traveling salesman, without authority to extend credit to customers, called on the bankrupt, a druggist and retail liquor dealer in Vermont, and received orders for certain liquors, contemplating a credit of from 60 days to four months, and payment of half the freight by the seller, whose place of business was in Baltimore. The bankrupt, having had some experience with one of claimant's brands, also wrote to it in Baltimore, asking a shipment of three barrels. Both of these orders were first passed on by claimant's credit man in Baltimore, then accepted, and the goods delivered to a common carrier in Baltimore, to be transported to bankrupt in Vermont. *Held*, that both transactions constituted sales in Baltimore, and not in Vermont, and were not therefore subject to the Vermont laws regulating the sale of liquors.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 469; Dec. Dig. § 326.*]

2. INTOXICATING LIQUORS (§ 326*)—SALES—REGULATIONS—STATUTES.

V. S. 5102, providing that no person shall furnish, sell, or expose or keep with intent to sell, intoxicating liquors, except as authorized by the chapter, and 5140, providing that no person shall sell liquors at wholesale without having secured a license as provided in the chapter, etc., refers only to the furnishing, selling, exposing, or keeping of intoxicating liquors within the state, and does not prohibit the purchase of liquors without the state for shipment and sale therein.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 469; Dec. Dig. § 326.*]

3. INTOXICATING LIQUORS (§ 327*)—SALES—AGENT'S AUTHORITY—STATUTES—EFFECT.

V. S. 5139, provides that no person for himself or for any other person, either in person, by mail, or in any other manner shall solicit orders, offer for sale, or in any manner traffic at wholesale in intoxicating liquors under a license of the fourth class without securing from the Secretary of State a certain certificate. *Held*, that where a salesman holding a fourth-class license to solicit business for a resident dealer without a license solicited the business for claimant, a nonresident company, such solicitation, though unlawful, did not affect the validity of a contract of sale pursuant thereto, made in another state.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 467-473; Dec. Dig. § 327.*]

Appeal from the District Court of the United States for the District of Vermont.

In the matter of bankruptcy proceedings of Frederick Fenn. From an order of the Vermont District Court, sitting in bankruptcy, affirming a referee's order disallowing a claim of the Garrett-Williams Company for liquor sold to the bankrupt, it appeals. Reversed.

See, also, 172 Fed. 620.

Joseph S. Graydon, W. M. Hough, A. B. Hayes, Levi Cooke, and James A. Merrill, for appellant.

William H. Botsford and W. B. C. Stickney, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. Fenn, the bankrupt, was a druggist in Rutland, Vt., where he had duly qualified under the Vermont statutes as a retail liquor dealer. The Garrett-Williams Company is engaged in the wholesale liquor business in Baltimore, Md., and the claim is for liquors sold to Fenn from May to July, 1907. As to all the items save Exhibit B, the referee held that all the sales to Fenn were "in violation of the law of the state of Vermont and therefore illegal and claim therefor is disallowed." As to Exhibit B, he held that the sale to Fenn was "under contract partly made in this state and is therefore unenforceable and claim for the purchase price of said liquor is disallowed." The district judge affirmed without opinion.

As to all items other than Exhibit B the facts are these: One George J. Garrett, who was a traveling agent for the Garrett-Williams Company called upon Fenn and solicited him to purchase goods from it. They talked over the matter of various goods of the brands that Fenn wanted, and he gave orders for them. The proposition contemplated a credit of 60 or 90 days or 4 months, depending on the class of goods and half of the freight from Baltimore to be allowed by the seller in order to equalize with purchases from New York houses. Garrett testified that he sent these orders on to the house "to be accepted or rejected by them as they usually proceed in such cases." Fenn testified that nothing was said about the house having to pass on his orders, and that he knew nothing about such orders being taken subject to acceptance by the house. Joseph B. Garrett, the treasurer and credit man, testified that George J. was merely a traveling salesman soliciting orders on the road, and that he had no authority, either general or special, to extend credit to customers; that the witness as credit man passed upon these orders of Fenn, "passing upon their worth and determining the filling of the same." When the orders had been passed upon by him, the goods were taken out of the warehouse and delivered to a common carrier in Baltimore to be transported to Fenn. Fenn's negative testimony in no way tends to establish authority in George Garrett to bind the company, and it is quite clear upon this record that the minds of both parties, in the case of each sale, met in Maryland, where Fenn's orders were passed upon and approved as to all terms. The contract of sale, therefore, was not made in Vermont. The case is still stronger as to Exhibit B. Fenn had some experience with one of claimant's brands, known as "Old 49." Wishing some more of the same, he wrote to the company in Baltimore, asking them to send three barrels. There can be no pretense that there was any contract of sale in this instance until his order was accepted. He was given 90 days' credit. The circumstance that, if upon receipt of any of these goods they were found not up to sample or not as represented or insufficient in gauge, Fenn might return them, is immaterial. Such return would be for breach of warranty.

The next question is whether these contracts of sale or any of them were illegal, so that a claim for the agreed price of goods delivered under them cannot be maintained. Various provisions in the statutes of Vermont have been referred to and are relied on.

Section 5102:

"No person shall furnish or sell, or expose or keep with intent to sell, any intoxicating liquor, except as authorized by this chapter."

Manifestly this refers to the furnishing, selling, exposing, or keeping within the state of Vermont. This liquor was kept, sold, and furnished (delivered) to the purchaser in the state of Maryland.

Various sections provide for licenses of different classes. Those of the "fourth class" for wholesale traffic in intoxicating liquor are to be granted only by the Secretary of State.

Section 5139:

"No person for himself, or for any other person, persons or corporations, either in person, by mail or in any other manner, shall solicit orders, offer for sale or in any manner traffic at wholesale in intoxicating liquor by virtue of or under a license of the fourth class, without having secured from the secretary of state the certificate prescribed by the preceding section. A person who violates a provision of this section shall be fined one hundred dollars with costs of prosecution for each offense."

By its terms this section applies to a person who solicits, offers, or traffics "under a license of the fourth class." George Garrett held a certificate authorizing him to solicit business for F. M. Brown of Barre City, Vt., holder of a fourth-class license, but he held none authorizing him to solicit for the Garrett-Williams Company. If it be held that his solicitation within the state was unlawful, it is difficult to see how that can affect a contract which was made without the state.

Section 5140:

"No person or corporation shall sell intoxicating liquors at wholesale without having secured a license as provided in this chapter. A person or corporation that violates a provision of this section shall be fined three hundred dollars with costs of prosecution for the first offense and five hundred dollars with costs of prosecution for each subsequent offense."

Manifestly this refers to sales within the state.

We do not find in the decisions referred to in the briefs sufficient authority for holding this contract illegal, and not enforceable in Vermont. In *Territt v. Bartlett*, 21 Vt. 183, "the contract of sale was closed between the parties at Brandon, Vermont." In *Bancroft v. Dumas*, 21 Vt. 456, *Boutwell v. Foster*, 24 Vt. 485, *Briggs v. Campbell*, 25 Vt. 704, *Buck v. Albee*, 26 Vt. 184, 62 Am. Dec. 564, and *In re Lemerise & Co.*, 73 Vt. 304, 50 Atl. 1062, the sales were made within the state by a person not licensed to sell. In *Starace v. Rossi*, 69 Vt. 303, 37 Atl. 1109, order was taken by agent, sent to New York, and there accepted. What authority the agent had does not appear. All that is said on this branch of the case is:

"The contract was, in part at least, made in this state, and that prevents recovery as effectually as though it had been wholly made here. *Backman v. Wright*, 27 Vt. 187, 65 Am. Dec. 185; *Backman v. Mussey*, 31 Vt. 547."

Referring to these citations, we find that in *Backman v. Wright* the purchaser, being unlicensed, had no right under the laws of Vermont to buy or hold the liquor. This fact was known to the soliciting agent of the seller and his knowledge was imputed to his principal, who was denied relief as a participant in an illegal transaction within the

state. Fenn, however, was duly licensed as a retail liquor dealer. In *Backman v. Mussey*, supra, there is nothing to show that the soliciting agent did not have authority to make a binding contract. The contract between agent and purchaser was made in Vermont. As to deliveries thereunder plaintiff was defeated, but, as to deliveries upon subsequent orders by mail direct from the purchasers, plaintiff recovered. In *Gaylord v. Soragen*, 32 Vt. 110, 76 Am. Dec. 154, the sale was made in New York, but the seller knew the purchaser intended to use the goods in Vermont contrary to law and to prevent seizure for violation of statute marked the goods in a peculiar way at purchaser's request. It was held that he had so far participated in defendant's illegal design that he could not recover the price in the courts of Vermont. In *Beverick Brewing Co. v. Oliver*, 69 Vt. 323, 37 Atl. 1110, although orders were sent by mail and telegram to Albany and the goods delivered there to a common carrier, these orders merely gave details of requirements from time to time under a contract which the authorized agent of the seller had theretofore made with the purchaser in the state of Vermont.

We find nothing to constrain a decision that claimant is not entitled to prove his claim for the price of goods which were sold under a contract made in Maryland and delivered in that state to a common carrier for transportation to the bankrupt.

The order of the District Court is reversed.

MOREHOUSE et al. v. PACIFIC HARDWARE & STEEL CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 14, 1910.)

No. 1,744.

1. MOTIONS (§ 24*)—"ORDER TO SHOW CAUSE."

An "order to show cause" is but a means prescribed by law in the nature of a process to bring a defendant into court to answer plaintiff's demands.

[Ed. Note.—For other cases, see *Motions*, Cent. Dig. § 22; Dec. Dig. § 24.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5024-5027.]

2. BANKRUPTCY (§ 440*)—INJUNCTION—VIOLATION—PROCEEDINGS FOR CONTEMPT—REVIEW—"PROCEEDING IN BANKRUPTCY."

An order to show cause why petitioners should not be punished for contempt for violating an injunction of the court of bankruptcy in a collateral matter is not a "proceeding in bankruptcy" subject to review on an original petition, under Bankr. Act July 1, 1898, c. 541, § 24, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3431), authorizing a review of such controversy by that mode.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 915; Dec. Dig. § 440.*]

3. BANKRUPTCY (§ 439*)—"PROCEEDINGS IN BANKRUPTCY."

"Proceedings in bankruptcy" reviewable on petition, as authorized by Bankr. Act July 1, 1898, c. 541, § 24, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3431), include all questions arising in the administration of the bankrupt's estate, such as the appointment of receivers and trustees, orders requiring the bankrupt to surrender property of the estate, orders requiring the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bankrupt's voluntary assignee to surrender property of the estate, orders giving priority to the claims of a creditor, and directing a set-off of mutual debts, and orders confirming compositions.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 439.*

For other definitions, see Words and Phrases, vol. 1, pp. 703, 704.]

Petition to Review Proceedings of the District Court of the United States for the District of Nevada, in Bankruptcy.

In the matter of bankruptcy proceedings against the Exploration Mercantile Company, instituted by the Pacific Hardware & Steel Company and others, petitioning creditors, in which an injunction was issued against the bankrupt and others. An order was thereafter granted requiring petitioners to show cause why they should not be adjudged guilty of contempt for disobeying the injunction, and petitioners filed a petition to review. Dismissed.

This is a petition to review an order in bankruptcy. The petitioners allege: That on August 6, 1908, W. C. Stone filed in the district court for the First judicial district of Nevada for Esmeralda county a complaint, praying that a receiver be appointed for the Exploration Mercantile Company, a corporation of that state. That on said petition C. E. Wylie was appointed receiver, and took possession of the estate of said corporation. That thereafter, on September 12, 1908, the respondents herein filed in the United States District Court for Nevada a petition in bankruptcy, praying that the said Exploration Mercantile Company be adjudged a bankrupt. That said District Court issued an injunction against the alleged bankrupt, Walter C. Stone, and C. E. Wylie, as receiver, their agents, servants, attorneys, and counselors, and also a restraining order directing said parties to appear on September 18th and answer a motion for the said injunction and restraining order. That on said last-named date said alleged bankrupt appeared and moved the District Court to dissolve said injunction. That said motion was heard but not decided. That thereafter, on July 9, 1909, the petitioners were required to appear in said District Court on July 21, 1909, to show cause why they and each of them should not be adjudged guilty of contempt for disobedience of said injunction, and said order to show cause. That said injunction order was erroneous for the reasons: First, that said proceeding in the state court was not an action based upon a claim due or demand provable or dischargeable in bankruptcy, and that therefore the District Court had no power to issue the injunction; second, that by section 720 of the Revised Statutes (U. S. Comp. St. 1901, p. 581) said court was prohibited from issuing an injunction to stay proceedings in the state court; third, that the proceeding in the state court was not a bankruptcy or insolvency proceeding; fourth, that the petition in bankruptcy, filed by the petitioner's creditors, does not specify any act or ground of bankruptcy; fifth, that the state court had separate and independent jurisdiction over which the federal court had no supervisory power, and had complete jurisdiction before proceedings were taken in bankruptcy.

Thompson, Morehouse & Thompson, for petitioners.

J. L. Kennedy, for respondents.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). The respondents move to dismiss the petition on several grounds, only one of which need be considered; and that is, that the matter complained of is not reviewable until the petitioners shall have been adjudged guilty of contempt in the court below. If the order which is com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plained of were conceded to be an order in a bankruptcy proceeding proper, and of the class of proceedings which are made subject to the supervisory control of this court, it would seem, nevertheless, that it is not reviewable on petition for the reason that it is not an interlocutory order which determines any substantial right of the petitioners. An order to show cause is but the means prescribed by law for bringing the defendant into court to answer the plaintiff's demands. It is in the nature of process, and, in jurisdictions where interlocutory orders are made appealable if they affect substantial rights, it is held that an order to show cause is not of that nature. *Gray et al. v. Gaither, Ex'r*, 71 N. C. 55; *McAuliffe v. Coughlin*, 105 Cal. 268, 38 Pac. 730.

But, conceding the order to show cause to be a judgment of the court affecting a substantial right, we are of the opinion that a proceeding to punish for contempt one who has committed an act in violation of an injunction of a court of bankruptcy in a collateral matter, as in this case, is not a "proceeding in bankruptcy" which is subject to review in this court on original petition. Section 24 of the bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431]), establishes the appellate jurisdiction of Circuit Courts of Appeals over "controversies arising in bankruptcy proceedings" and their jurisdiction in equity, "either interlocutory or final, to revise in matter of law proceedings of the inferior courts of bankruptcy." Section 25a provides for appeals from judgments in three certain enumerated steps in bankruptcy proceedings, "in respect of which special provision therefor was required." *Holden v. Stratton*, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116. There is in the language of the act nothing to indicate that the revisory power so given to the Circuit Courts of Appeals is more extensive than that which was exercised by the Circuit Courts under Bankr. Act March 2, 1867, c. 176, 14 Stat. 517. In *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414, it was held that the appellate jurisdiction conferred on the Circuit Courts by the act of 1867 was of two classes of cases, one to be exercised under a petition for review, the other by the ordinary appeal or writ of error. The same distinction has been recognized in construing the bankruptcy act of 1898, and it has been held that the provisions for appeal and for review on petition are mutually exclusive, and that the revisory jurisdiction does not include any orders or decrees which are appealable or reviewable on writ of error. In *re Rusch*, 116 Fed. 270, 53 C. C. A. 631; *Walter Scott & Co. v. Wilson*, 115 Fed. 284, 53 C. C. A. 76; In *re Friend*, 134 Fed. 778, 67 C. C. A. 500; In *re Mueller*, 135 Fed. 712, 68 C. C. A. 349; *Odell v. Boyden*, 150 Fed. 731, 80 C. C. A. 397; *Hewit v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; *First National Bank of Chicago v. Chicago Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051.

It is conceivable that the line of demarcation between "proceedings in bankruptcy" and controversies at law and in equity, arising "in the course of bankruptcy proceedings," may in some cases be obscure; but, generally speaking, the former include all questions arising in the administration of the bankrupt's estate, such as the appointment of receivers and trustees, orders requiring the bankrupt to surrender property of the estate in bankruptcy, orders requiring the bankrupt's volun-

tary assignee to surrender property of the estate, orders giving priority to the claim of a creditor, orders directing a set-off of mutual debts, and orders confirming the composition. These are questions which, with a view to the prompt administration and distribution of the assets of the bankrupt, the law permits to be summarily disposed of by revision. The latter include all controversies and questions arising between the trustee and adverse claimants of property as property of the estate, whether the property be in his possession or theirs. The order which is sought to be reviewed in the present case is one made in a proceeding for contempt. It was not made with a view to obtain possession of property of the bankrupt, or to enforce a prior order of the court, but it is a criminal proceeding to punish by fine or imprisonment those who have been guilty of violating an injunction of the court. Such a proceeding has nothing to do with the estate in bankruptcy. It is the exercise of the court's power to preserve order in its judicial proceedings and enforce its own orders. It is a proceeding prosecuted for the benefit of the government, the courts, and the public. Section 2(13) of the bankruptcy act gives the court of bankruptcy power to enforce obedience, by its officers and other persons, to all lawful orders, by fine or imprisonment, or both. But the power of a court of bankruptcy to punish for a contempt does not rest alone upon the statute. It is a power which is inherent in all courts. Said the court in *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205:

"The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power."

A proceeding to punish for contempt committed in violation of an injunction issued in any suit or proceeding is a proceeding entirely distinct and separate from that in which the injunction was issued, and judgment therein is always reviewable by a writ of error even before final decree in the original case. *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997; *Bullock Elec. & Mfg. Co. v. Westinghouse Elec. & Mfg. Co.*, 129 Fed. 105, 63 C. C. A. 607; *Butler v. Fayerweather*, 91 Fed. 458, 33 C. C. A. 625; *Gould v. Sessions*, 67 Fed. 163, 14 C. C. A. 366. The case before the court is clearly distinguishable from *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, in which the question involved was whether the bankruptcy act authorizes the trustee to compel by process for contempt, the surrender to the trustee of assets properly belonging to the estate, and *In re Cole*, 144 Fed. 392, 75 C. C. A. 330 (*Id.*, 163 Fed. 180, 90 C. C. A. 50), in which the Circuit Court of Appeals for the First Circuit entertained jurisdiction upon a petition for revision of an order of the court of bankruptcy directing that the bankrupt turn over and deliver a certain sum of money to the trustee within 15 days, "in default of which she stand committed to the marshal of this district to be incarcerated until she obeys the order of this court," etc. Those were not proceedings to punish for contempt already committed, but orders, the purpose of which was to require the payment to the trustees of the money of the estate, and the commitments for contempt were alternative and for the purpose of compelling obedience to the orders.

The petition must be dismissed, with cost.

INGRAHAM v. COMMERCIAL LEAD CO. et al.†

(Circuit Court of Appeals, Eighth Circuit. February 24, 1910.)

No. 3,115.

1. CORPORATIONS (§ 232*)—LIABILITY OF STOCKHOLDERS—SUFFICIENCY OF PAYMENT FOR STOCK.

A corporation, which is a going concern, but has become in fact insolvent, and is without credit, and its stock of no value, may lawfully in good faith issue new stock to its old stockholders as a bonus for loans made it to pay its debts and enable it to resume business, and in case it fails such stockholders cannot be called on by creditors to pay par value for such stock, as if they had subscribed to the original stock of the company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 883; Dec. Dig. § 232.*]

2. CORPORATIONS (§ 232*)—LIABILITY OF STOCKHOLDERS—SUFFICIENCY OF PAYMENT FOR STOCK.

A corporation, which was lessee of a valuable mine, became insolvent owing at the time \$18,000 rental, which was past due. In the belief that the lease was of great value, and that they would be able to extricate the company from its difficulties if they could retain it, the officers and stockholders in good faith made a settlement with the lessor, by which they issued to it \$4,500 par value of new stock in consideration of its waiver of forfeiture of the lease and a year's extension of one-half the rent due. *Held* that, it not appearing that the waiver and extension were not a full and fair equivalent for the stock received, the lessor could not be held liable at suit of other creditors of the lessee for the par value of such stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 883; Dec. Dig. § 232.*]

3. CORPORATIONS (§ 232*)—STOCKHOLDERS—WHO ARE STOCKHOLDERS.

A creditor of an insolvent corporation, to whom on a settlement the company, in addition to giving its note for the debt, issued new stock as a bonus, but who refused to accept it, and returned it to the company, is not liable for its par value, in the absence of any showing of bad faith.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 232.*]

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Suit in equity by William S. Ingraham, doing business as the Illinois Fuel Company, against the Commercial Lead Company and others. Decree for defendants, and complainant appeals. Affirmed.

Fred Armstrong (W. B. Thompson and Ford W. Thompson, on the brief), for appellant.

Daniel N. Kirby and Bernard Greensfelder (W. F. Carter, Charles C. Collins, S. L. Swarts, Lee Sale, M. F. Watts, and Willi Brown, on the brief), for appellees.

Before SANBORN and ADAMS, Circuit Judges, and RINER, District Judge.

ADAMS, Circuit Judge. This was a bill by a judgment creditor of the Commercial Lead Company, a corporation, to collect his judgment from stockholders alleged not to have paid for the stock held by them. Two common defenses were made by all the defendants,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied April 27, 1910.

except the Columbia Lead Company and E. A. Rozier. The first consists of a denial that their stock was not fully paid, and the second of an averment that the corporation owes them more than any possible stock liability on their part. The Circuit Court, after a hearing on the merits, dismissed the bill, and complainant appeals.

These are the facts: The corporation was organized in 1903 as a manufacturing and business company under the provisions of chapter 12, art. 9, of the Revised Statutes of Missouri of 1899 (pages 1064-1082, Ann. St. 1906), to carry on the business of lead mining. Its capital was \$60,000, divided into 6,000 full-paid shares of \$10 each. Its principal asset consisted of a lease of a valuable lead mine located in St. Francois county, Mo. The expectation of the stockholders was that the capital would be sufficient to do all necessary development work and put the company upon a paying and profitable basis; but a protracted strike of the miners, the flooding of the mine, and the cost of development work soon exhausted the original capital and discouraged the stockholders. They had incurred debts amounting to \$60,000 or \$65,000. They had tried to borrow money, but could not do so on the credit of the corporation. They had tried to sell their leasehold, pay their debts, and quit business, but found it impossible to do so. They then took the requisite steps under the law of Missouri to increase their capital from \$60,000 to \$100,000, and attempted to sell the increased issue of capital stock, but had failed in doing that. Inspired by great confidence in the ultimate outcome of their venture, they then adopted a plan of raising \$75,000 by loaning that amount, in sums proportionate to the amount of the original stock held by each stockholder, to the company. As an inducement and part consideration for making these loans the stockholders were to receive 50 per cent. of the amount loaned by them in the increased stock of the company. Competent mining experts had assured them that by raising that amount of money they would have enough to pay off existing debts and \$10,000 or \$15,000 more, and that by judiciously using this excess the mine could be put upon a paying basis within 60 days. Conforming to this plan, the defendants, who were originally interested in the company either as directors or stockholders, and some few others, made loans to the company, receiving its promissory notes, bearing interest at 7 per cent. per annum, for the amount loaned by them, respectively, and also the percentage of stock agreed upon as a bonus. In this way \$69,500 was secured. The remaining \$5,500 could not be obtained without a greater bonus, and the same, by consent of the parties interested, was given.

This money was consumed in paying the old debts and in an attempt to resume mining operations. The result proved a failure. The defendants lost all the money loaned by them, and a few new creditors, like the complainant, have not yet collected their debts. The proof shows that the enterprise was originally undertaken in good faith for the purpose of organizing a business, but, like many other most promising mining ventures, proved disastrous; that afterwards an honest effort was made to resuscitate the company, by increasing its capital and making use of the stock in good faith to accomplish

that purpose. No stock-jobbing or speculating scheme was ever intended or practiced. The original capital had become so impaired that the stock representing it was valueless, and the new stock in the nature of the case could not be sold on the market for its face value. No independent investors would buy \$40,000 worth of new stock, when \$60,000 of worthless old stock was to share in its benefits proportionately. Whether we view the transaction in the light of the prevailing conditions at the time the loans were made by the defendants, or in the light of the subsequent actual developments, we cannot doubt that the \$75,000 loan to the corporation by the defendants was the full equivalent of the actual value of the notes and stock of the company received by them. The transaction, consisting nominally of loaning the money and taking the notes and increased stock of the company, was in reality the payment of \$75,000 to the company for \$40,000 of its increased stock and the promise (of doubtful value) of repayment by a company which then had no actual credit or financial standing.

The facts involved in the case of *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 534, 535 (35 L. Ed. 227), were substantially like those in this. Mr. Justice Brown, there speaking for the court, said:

"The case then resolves itself into the question whether an active corporation, or as it is called in some cases, a 'going concern,' finding its original capital impaired by loss or misfortune, may not, for the purpose of recuperating itself and providing new conditions for the successful prosecution of its business, issue new stock, put it upon the market, and sell it for the best price that can be obtained. * * * To say that a corporation may not, under the circumstances above indicated, put its stock upon the market and sell it to the highest bidder, is practically to declare that a corporation can never increase its capital by a sale of shares, if the original stock has fallen below par. * * * So long as the transaction is bona fide, and not a mere cover for 'watering' the stock, and the consideration obtained represents the actual value of such stock, the courts have shown no disposition to disturb it. * * * As the company in this case found it impossible to negotiate its bonds at par without the stock, and as the stock was issued for the purpose of enhancing the value of the bonds, and was taken by the subscribers to the bonds at a price fairly representing the value of both stock and bonds, we think the transaction should be sustained, and that the defendants cannot be called upon to respond for the par value of such stock, as if they had subscribed to the original stock of the company."

The effort of learned counsel for complainant to distinguish between *Handley v. Stutz* and the case now under consideration, on the ground that the former did not involve the application of the laws of Missouri, is not satisfactory to us. In the case of *Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104, which was before the Supreme Court at the same time it was considering *Handley v. Stutz*, a judgment creditor of an insolvent corporation, organized and doing business under the laws of the state of Missouri, sought to hold a stockholder liable for unpaid portions of stock held by him. It was there urged and conceded that capital stock of a corporation was a trust fund for the benefit of creditors, and the laws of Missouri and the decisions of the Supreme Court of that state on the subject were under consideration. In view of them all, conclusions were reached to the effect that, in determining whether stock is full-paid

or not, regard should be had to the actual value of the stock at the time it was issued and to the circumstances attending its disposition. It was said, among other things:

"If, when disposed of by the railroad company, it was without value, no wrong was done to creditors. * * *"

This contemporaneous utterance of the Supreme Court, in a case involving the laws now under consideration, compels us to hold that the doctrine of *Handley v. Stutz* was intended, in the absence of statutes affirmatively compelling different conclusions, to be of general application, and that it controls us in the disposition of the present case.

Our conclusion is that the corporation received the fair and reasonable value in money for the increased stock issued to some of the defendants as bonuses for their loans, and that the learned trial court committed no error in deciding in their favor.

The liability of the Columbia Lead Company depends upon some other and different considerations. That company was the lessor of the mine which the Commercial Company undertook to operate. The proof shows that it was a mine of great value. The fee was sold in 1907, after this suit was instituted and before it was tried, for \$690,000. The annual rental reserved by the lessor was \$36,000, payable in semiannual installments of \$18,000 each. On December 18, 1903, at a time when the officers and stockholders confidently believed they could extricate their company from its financial embarrassment and were willing to hazard their own money in an attempt to do so, the right had accrued to the lessor to forfeit the lease for nonpayment of an installment of \$18,000 rent, which fell due December 15, 1903. The lessor and the lessee met and negotiated a settlement, by which, in consideration of 450 shares of the increased capital stock of the lessee company, the right of forfeiture was waived and the time for paying \$9,000 of the installment then due was extended for one year. This agreement was undoubtedly made in good faith, at a time when the lessee company, its officers, and stockholders verily believed the lease was of great value. They exhibited their faith by loaning \$75,000 to the lessee company, secured only by their confidence in the enterprise, and at a time when all would be lost if the forfeiture could not be averted.

In view of these facts we are of opinion that the waiver of the forfeiture and an extension of time for paying the rent constituted the full and fair equivalent of the face value of 450 shares of the increased stock issued to the lessor. For the purpose of this case, however, it is sufficient that it does not appear from the proof that the waiver of the forfeiture and extension of time was not the full and fair equivalent of the value of the stock. Payment for capital stock need not be made in money alone, but may consist of valuable rights conferred by contract, which, in the situation of a corporation at the time, actually represents the fair and needed equivalent for the money. *Liebke v. Knapp*, 79 Mo. 22, 49 Am. Rep. 212; *Van Cleve v. Berkey*, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593.

No error was committed in dismissing the bill so far as the Columbia Lead Company was concerned.

Still other facts affect the disposition of the case against defendant E. A. Rozier. He was an attorney to whom the Commercial Company owed \$150 for legal services rendered. In settlement of that obligation it gave him its promissory note for the amount and issued to him seven shares of its increased stock. With clearer vision, perhaps, than other defendants of the intrinsic value of the stock, he refused to accept it and returned it to the company. There is no showing that his return of the stock was for the purpose of evading a legal liability once incurred by him.

For these reasons, as well as those advanced for exonerating the other defendants from liability, we perceive no error in dismissing the bill as to defendant Rozier.

The conclusions already expressed obviate the necessity of discussing other interesting questions of law and practice which were ably presented in argument and brief.

The decree of the Circuit Court is affirmed.

NOTE.—The following is the opinion of Dyer, District Judge, in the court below:

DYER, District Judge. The complainant filed on the 6th day of April, 1906, a bill of complaint in equity by which it seeks to recover of certain alleged stockholders in the Commercial Lead Company an amount alleged to be due for certain stock issued to the defendants named in the bill, which it is alleged was not paid for. The complainant has a judgment against the defendant corporation for a large sum of money, and, failing to realize anything on an execution issued upon that judgment against the corporation, now seeks to recover of certain stockholders for certain stock alleged to be unpaid. Each of the defendants make answer to the bill of complaint, and therein allege substantially the same defenses.

The bill in substance charges that on the 29th of May, 1905, the complainant recovered judgment for the sum of \$2,317.13 and costs against the defendant the Commercial Lead Company; that the said judgment was final and remains unappealed from, unreversed, unpaid, and in full force; that the Commercial Lead Company, ever since the rendition of said judgment against it, has been hopelessly insolvent, and owns and holds no property or assets out of which the said judgment could be paid. The bill then states that an execution was issued on the judgment on the 14th of October, 1905, and returned nulla bona. The bill then proceeds to charge that the Commercial Lead Company was organized under the laws of the state of Missouri in June, 1903, with a capital stock of \$60,000, divided into 6,000 shares, of the par value of \$10 each; that in August, 1903, said company voted for an increase of the capital stock from \$60,000 to \$100,000; that said increased stock consisted of 4,000 shares, of the par value of \$10 per share, but that said increase was duly authorized at a meeting of stockholders and a certificate therefor duly issued by the Secretary of State; that no part of the par value of said shares of stock, amounting to \$40,000, was paid by any of the stockholders of said company, either in money or in property of any kind, nor has there ever been transferred, conveyed, or delivered to said defendant company, in lieu of money, any property whatsoever for the said \$40,000 of its capital stock; and that there is now due, and always has been due, and unpaid to said Commercial Lead Company on each and every share of said 4,000 shares of stock the sum of \$10 per share.

The bill then charges that the Commercial Lead Company, without any payment of money or property to it whatsoever, issued and delivered to the defendants named in the bill certain of the number of shares of said increased stock therein set out, for which they have not paid said corporation any money or property whatsoever, and that said stock is and always has been assessable and

unpaid to the defendant corporation to the amount of the par value thereof. The bill then in paragraph 7 alleges that, at the time of the issuance of said stock, all of said stock was issued as a bonus to each of the shareholders of said Commercial Lead Company, in pursuance of some arrangement made and entered into by said Lead Company and with each of said defendants, the particulars and circumstances of which are unknown to this complainant. It is further stated in this paragraph that complainant is informed and believes that some of said defendants, whose names complainant is not able to give, advanced and loaned to said Lead Company certain sums of money, and that he is informed and believes that said defendants who did make such loans and advancements to said company have not been paid said sums of money so loaned said company, and that on payment of said amounts due by them to said company for the unpaid stock issued to them, and to each of them, they would be entitled to share pro rata with complainant and others, creditors of said company, in the amount due and owing on said stock, on an accounting of said moneys paid and loaned to the said Commercial Lead Company and the amounts due on the said shares of stock.

The answers of the defendants, and each of them, are, as before stated, substantially the same. The answer of James Green, one of the defendants, states that the Commercial Lead Company was organized under the laws of the state of Missouri, with a capital stock of \$60,000, divided into 6,000 shares, of the par value of \$10 per share, and afterwards, to wit, on the 20th day of August, 1903, said Commercial Lead Company voted to increase the stock to \$100,000, said increase to consist of 4,000 shares, of the par value of \$10 per share, and denies that no part of the par value of said shares of stock, amounting to \$40,000, was paid by any of the stockholders of said company, either in money or in property, and denies that there is anything due to the Lead Company on said shares. The defendant then denies that the Commercial Lead Company, without any payment of money or property, issued and delivered to the defendant 375 shares of said increased capital stock, and denies that this defendant (James Green) did not pay to said company any money or transfer or convey any property to it in payment thereof.

The answer, in the seventh paragraph thereof, alleges that the defendant was not a subscriber for said 375 shares, or any other number of shares of said stock of said company, but says, in the eighth paragraph thereof, that the Commercial Lead Company caused to be issued and delivered to this defendant a certificate for 375 shares of said increased capital stock, but denies that he did not pay full value therefor. The answer then goes on to state that on the 20th day of August, 1903, at a meeting of the stockholders of the Commercial Lead Company the capital stock was increased from \$60,000 to \$100,000, and that thereupon continuous efforts were made by the officers and directors of said company to dispose of said increased stock for the purpose of raising money with which to prosecute the work and discharge the obligations of the Commercial Lead Company, but that said efforts were wholly fruitless; that the officers and directors of said Commercial Lead Company failed after such efforts, extending over a period from August 20, 1903, until December 1, 1903, in making any sale at any price of such increased capital stock, or any part thereof; that during said period from August 20, 1903, to December 1, 1903, the creditors of the Lead Company were pressing it for the payment of debts amounting to about \$60,000, which included a debt then owed by the Lead Company to the complainant, amounting to \$1,000; that on and after December 10, 1903, for the purpose of raising money with which to discharge the indebtedness of said company, and also of continuing its business, the directors, by resolution of date December 10, 1903, authorized the officers of the company to borrow in the aggregate sum of \$75,000, with interest at 7 per cent. per annum, and further authorized the officers of said company for each dollar so borrowed to offer as a bonus 50 per cent. of the amount so borrowed in increased stock of said company; that in pursuance of such resolution said company by its officers and agents proposed to this defendant (James Green) that if he would lend said company \$7,500 for one year, with interest at 7 per cent., evidenced by note of this company, the company would cause to be issued to him 375 shares, full paid, of said increased capital stock as part consideration for making said loan of \$7,500; that this defendant accepted said proposition

and loaned said sum of \$7,500 to said company about January 1, 1904, and received the note of said Commercial Lead Company, dated December 10, 1903, payable one year after date, with interest at 7 per cent. per annum, and 375 shares of the increased capital stock of said Commercial Lead Company, which said note is now wholly unpaid and held by this defendant. The answer further alleges that the \$7,500 was loaned by him to said company, together with other moneys loaned in a similar way by others, and that said moneys were used by said company to relieve it from debts due by it to its creditors who were demanding payment; that among the said creditors so paid about that time was this complainant, who received from the said moneys so realized the sum of about \$1,000 in payment of the debt to him then due.

The evidence in this case supports substantially the answers of the several defendants, and the question for consideration is whether, under the circumstances stated in the answers and supported by the evidence, the defendants are liable for this stock. It will be seen that this answer practically discloses what is claimed to be two defenses—the first being that the capital stock issued was full paid, and that therefore no liability attaches to the defendant who received it; and, second, that, if the stock was not full paid, each of these defendants has a claim against the company that may be properly set off against the claim for unpaid stock. This case was argued at length before the court, and extensive briefs were filed on both sides.

It is hardly necessary to enter into a discussion of all the questions raised by counsel for complainant in their brief. It is sufficient for the court to say that in its opinion either of these defenses set up and proved are sufficient to defeat the claims of the complainant. There seems to be but little dispute about the facts in the case. The questions of law arising upon these facts constitute the differences between counsel. As it appears to the court, not only the facts, but the law, is with the defendants.

A decree in favor of the defendants will be entered, dismissing the bill of complaint, at complainant's costs.

MORGAN ENGINEERING CO. v. GENERAL CASTINGS CO.

(Circuit Court of Appeals, Third Circuit. February 12, 1910.)

No. 52.

COURTS (§ 493*)—FEDERAL AND STATE COURTS—ORIGINAL JURISDICTION—PRIORITY OF ATTACHMENT.

Since Mechanics' Lien Act Pa. June 4, 1901 (P. L. 431-469), repealed all prior acts relating to mechanics' liens in Pennsylvania, and established a complete and conclusive system in itself for the creation and preservation of liens for labor and material, conferring jurisdiction *ab initio* on the court of common pleas of proceedings specially prescribed for the enforcement of such liens, a nonresident claimant having entered suit in a Pennsylvania state court, by filing his mechanic's lien therein, such court acquired full jurisdiction of the subject-matter, and hence the claimant, though a citizen of another state, could not thereafter oust the state court of jurisdiction and maintain *scire facias* in the federal Circuit Court for such relief.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 493.*]

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

Scire facias by the Morgan Engineering Company against the General Castings Company to enforce a mechanic's lien. From an order quashing the writ, plaintiff appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Huggins, Huggins & Johnson and A. O. Fording, for Morgan Engineering Co.

G. D. Packer, for General Castings Co.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. This is an appeal by the Morgan Engineering Company, a corporation of Ohio, from an order of the Circuit Court of the United States for the Western District of Pennsylvania, quashing a writ of scire facias sued out by it in that court against the General Castings Company, a corporation of Pennsylvania, "sur claim for mechanic's lien at No. 121 Second term, 1909, of mechanic's lien docket of the court of common pleas No. 4 of Allegheny county." The case turns on the mechanic's lien law of the state of Pennsylvania of June 4, 1901 (P. L. 431-469), for, if by the filing of a lien thereunder the lienor invoked the jurisdiction of the state court, it is clear he cannot thereafter oust such jurisdiction by going into another court.

Under the old mechanic's lien law of Pennsylvania (Act June 16, 1836 [P. L. 695]), the lien was filed in the office of the prothonotary and entered in a mechanic's lien docket which that act provided for. No entry was made of the lien in the judgment dockets of the court, and the record in the mechanic's lien docket was the only entry of which purchasers and incumbrancers were bound to take notice. *Armstrong v. Hallowell*, 35 Pa. 487. This act and all others bearing on such liens were repealed by the act of 1901, which, as provided by the act itself, and held by the Supreme Court in *Todd v. Gernert*, 223 Pa. 103, 72 Atl. 249, furnished "a complete and conclusive system in itself, so far as relates to liens for labor and material." The act, instead of providing for a mere registry of a lien of which the court takes jurisdiction only when it proceeds to enforcement, confers jurisdiction on the court of common pleas ab initio, as will be seen by its provisions. Thus section 7 provides that:

"After the right to file a claim is complete, any owner or contractor may enter a rule, as of course, in the office of the prothonotary of the court of common pleas of the proper county, requiring any party named to file his claim within fifteen days after notice of the rule, or be forever thereafter debarred from so doing. * * * If a claim be filed, it shall be entered as of the court, term and number of the rule."

Section 10 provides the claim "must be filed in the court of common pleas of the county or counties in which the structure or other improvement is situate." Section 43 provides that as soon as a claim is filed it "shall be entered on the judgment index of the court," and, "when a claim is stricken off or satisfied, * * * a note thereof shall be made on said judgment index." Section 21 provides that within one month after a claim is filed "the claimant shall serve a notice upon the owner of the fact of the filing of the claim, giving the court, term and number and the date of filing thereof, and shall file of record in said proceedings an affidavit setting forth the fact and manner of such service. A failure to serve such notice and file an affidavit thereof within the time specified shall be sufficient ground

for striking off the claim." Section 22 gives a right to a subcontractor to "file of record in said proceedings" his claim and be substituted as a use claimant, and section 24 allows one to, "by leave of court, intervene as a party defendant and make defense thereto, with the same effect as if he had been originally named as a defendant in the claim filed." Section 32 provides the form of scire facias to be issued on the lien, which form recites that the claimant, "filed his claim in our court of common pleas of _____ county, of _____ term, 1____, No. _____," and requires the defendant to file an affidavit of defense "in the office of the prothonotary of our said court," and is tested in the name of the judge of such court. After providing for rules and proceedings to form an issue, the act, in section 52, provides that:

"Any rule granted under the provisions of this act may be made returnable at such time as the court may direct, either therein or by rule of court, or by special or standing order."

And section 53 that:

"All notices, petitions and rules shall be served upon counsel for the parties interested, or upon the parties themselves in the manner bills in equity are served * * * or in default of service then in such manner as the court shall direct."

And section 59 that:

"From any definite judgment, order or decree, entered by the court of common pleas * * * an appeal may be taken by the party aggrieved to the Supreme or Superior Court, as in other cases."

As a mechanic's lien is of statutory creation, and in Pennsylvania owes its existence to this particular act, it follows that one who avails himself of the right to such lien must accept with the right all limitations and conditions the statute imposes in the creation of the right, one of which in this case is to initially invoke the jurisdiction of the state court. Now, from the foregoing and other references that might be made to the act, it is clear to us that by filing his claim in the state court the claimant not merely made a record thereof, but thereby invoked the statutory jurisdiction of the court of common pleas, and thereby began a statutory judicial proceeding, and, whatever the rights of a nonresident claimant as to removal might be where he was involuntarily brought into such a proceeding, it is clear to us that having himself become the actor and sought the jurisdiction of the court to obtain his lien, and such lien being entered on the judgment index of the court, it is not in his power to thereafter oust the jurisdiction which he himself invoked. Such procedure would be at variance with all jurisdictional principles. Where a party has himself become the actor and entered suit in a state court of Pennsylvania by filing his lien therein, the fact that he is a citizen of another state makes him none the less a voluntary suitor in that court, and he has no more right to oust such primary jurisdiction than would a nonresident plaintiff who had brought an ordinary suit in a state court to thereafter remove it to a federal court.

We are therefore of opinion that, on the filing of this mechanic's

lien in the state court by the Morgan Engineering Company, that court acquired jurisdiction of the subject-matter thereof, and the Circuit Court properly declined to oust said jurisdiction by issuing a writ of scire facias on the lien.

Its order quashing such writ is therefore affirmed.

NOTE.—The following is the opinion of Orr, District Judge, in the court below:

ORR, District Judge. The defendant has taken a rule upon the plaintiff to show cause why a writ of scire facias sur mechanic's lien should not be quashed. The record shows that plaintiff filed its claim in the court of common pleas No. 4 of Allegheny county, in this district, for labor and materials furnished by the plaintiff as contractor in and about the construction of a building owned by the defendant. In support of the rule defendant has filed a number of reasons which may be briefly stated under two heads: First, the record of the mechanic's claim in the court of common pleas is a judicial record, and therefore a scire facias may not issue thereupon in this court; second, the statute of Pennsylvania which gives the right to the mechanic's lien has inseparately connected such right with an exclusive method of enforcement in the state courts, and therefore this court is without jurisdiction.

It must be borne in mind that the right of one who furnishes labor and materials in the construction of a building upon the land of another to a lien is purely statutory. At common law the artisan had a lien upon goods and chattels for the price of work done on them. He had a remedy by retainer. His exclusive right to the possession of the thing was the basis of his lien. If he voluntarily parted with the possession, his lien was lost. His right or lien never extended to the buildings upon another's land. To give him such right legislation was necessary. That right exists in Pennsylvania to-day, and the claim in this case rests solely upon an act of the General Assembly of that state, approved June 4, 1901 (P. L. 431), entitled "*An act defining the rights and liabilities of parties to, and regulating the effect of, contracts for work and labor to be done, and labor or materials to be furnished to any building, bridge, wharf, dock, pier, bulkhead, vault, subway, tramway, toll road, conduit, tunnel, mine, coal breaker, flume, pump, screen, tank, derrick, pipe line, aqueduct, reservoir, viaduct, telegraph, telephone, railway or railroad line; canal, mill race, works for supplying water, heat, light, power, cold air, or any other substance furnished to the public, well for the production of gas, oil or other volatile or other mineral substance, or other structure or improvement of whatsoever kind or character the same may be; providing remedies for the recovery of debts due by reason of such contracts, and repealing, consolidating and extending existing laws in relation thereto.*" The full title is thus given, with some words italicized, in order to emphasize the fact that the act was intended to be a full and complete expression of the legislature will as to everything relating to the rights and remedies of those who claim, and those who dispute, the right to mechanics' liens.

Moreover, in addition to a general repealing clause, 109 acts of assembly and parts of acts are specially repealed by said general act. Bearing in mind that none of the prior acts required a claimant to file his claim in any "court," it will be helpful to consider portions of the present act which show that the proceeding from its inception (from, and in some cases before, the filing of the claim) was intended by the Legislature to be a judicial proceeding. Section 10 explicitly directs that the claim "must be filed in the court of common pleas of the county or counties in which the structure or other improvement is situated." Section 7 gives any owner or contractor the right to rule a claimant to file his claim within 15 days or be forever barred, and directs that the claim be filed in the common pleas court at the number and term of the rule so taken. Section 22 gives any one furnishing material or labor to the claimant the right, at any time before actual payment of the claim, to "file of record in said proceeding a petition" asking that he be substituted as use claimant, and provides that any dispute as to the amount petitioner shall be entitled to as against the claimant shall be settled upon the distribution of the fund or by

an issue in said proceedings. Section 24 provides that the court may grant leave to any one having an interest in the property to intervene as a party defendant and make defense with the same effect as if he had been named as defendant in the claim. Section 23 gives any one having an adverse interest the right to attack the claim, and directs the court to stay proceedings on the claim, if necessary. And even after judgment on the sc. fa. the proceeding shall be stayed on the petition of one not made a party to the scire facias. Section 25 gives defendant the right by petition to require the claimant to file an affidavit of the amount due, and upon pleadings filed, or from the claim and the affidavit of defense, the court shall determine the amount due and permit the same to be paid into court. Section 32 provides that the claim "shall be sued out by a writ of scire facias in the following form: "The Commonwealth of Pennsylvania toGreeting: Whereas, A. B., claimant, on the day of, filed his claim in our court of common pleas," etc. Section 35 declares the judgment entered against the contractor shall be a personal judgment, and gives the court power to open a judgment entered against the contractor on the scire facias and adjust equities between the owner and the contractor, even after the owner has paid the claim. Section 36 enables the court to require a more specific statement of the claim and an examination of the books or papers referred to therein. Section 43 requires every claim filed, scire facias issued, verdict recovered, and judgment entered to be entered on the judgment index of the court, and also requires that, when a claim is stricken off or satisfied, the name of a defendant stricken out, a scire facias discontinued or quashed, or a verdict or judgment stricken off, set aside by granting a new trial, or otherwise reversed or satisfied, a note thereof shall be made on said judgment index.

The lien acquired under this statute is incidental to the prosecution of a claim through a judicial proceeding begun by the filing of the claim in court. It is uniformly styled a "claim" throughout the act, and the possessor of it a "claimant." If the act merely prescribed how a mechanic's lien could be acquired by filing certain papers in the prothonotary's office, or in any other county office, and stopped there, different questions would be presented. An irresistible conclusion is that the record of the common pleas is a judicial record. A writ of scire facias cannot be issued on such record in this or any other court except in that wherein the record remains. 2 Troubat & Haly's Practice, 1918; *Smith v. Ramsay*, 6 Serg. & R. (Pa.) 573.

It was conceded by defendant's counsel that if the statute simply created a right, or created a remedy for a preceding right, the claimant might have a remedy in this court. But it was insisted that the statutory right and statutory remedy were so closely connected and interwoven by the act that they cannot be separated. This is correct. It is immaterial that a citizen of another state avails himself of the benefit of this statute. The federal Constitution secures to him the same, but not any greater, privileges than those enjoyed by citizens of Pennsylvania. The plaintiff in this case never had a right to a lien independent of the limitation upon that right imposed by the act itself. Therefore plaintiff cannot maintain this scire facias. In *Middletown National Bank v. Toledo, Ann Arbor & Northern Michigan R. R.*, 197 U. S. 394, 25 Sup. Ct. 462, 49 L. Ed. 803, the principle was applied in an action brought outside the state of Ohio to recover the stockholder's liability given by the statute of that state, and it was held the action could not be maintained; that the statutory method providing for the enforcement of the right in the courts of the state must be followed. *Pollard v. Bailey*, 20 Wall. 520, 22 L. Ed. 376, is often referred to because it contains this general rule: "A general liability created by statute without a remedy may be enforced by an appropriate common-law action. But where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed." In *Chestnut Hill Turnpike Company v. Martin*, 12 Pa. 361, it is said: "It is a settled principle that where a statute confers a new power or right, and provides a particular mode by which it may be vindicated, no other remedy than that afforded by the statute can be enforced."

The law is stated in *American & Eng. Ency. of Law*, vol. 26, p. 671, as follows: "A statute instituting a new remedy for an existing right does not take away a pre-existing remedy without express words or necessary implication.

The new remedy is cumulative, and either may be pursued. But when a statute gives a right or remedy which did not exist at common law, and provides a specific method of enforcing it, the method of procedure provided by the statute is exclusive, and must be pursued strictly." The Supreme Court of the United States has decided this principle in *Fourth National Bank v. Franklyn*, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. Ed. 825, where it is said: "The individual liability of stockholders for corporate debts is always a creature of statute. At common law it does not exist. The statute which creates it may also declare the purpose of its creation and provide for the manner of its enforcement. The liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. The general liability created by statute without a remedy may be enforced by an appropriate common-law action; but, where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed."

It seems clear, therefore, that the rule in this case should be made absolute, and the scire facias quashed. It is so ordered.

WILLIAMS v. WELLS FARGO & CO. EXPRESS.

(Circuit Court of Appeals, Eighth Circuit. March 3, 1910.)

No. 3,047.

1. PENALTIES (§ 24*)—PARTIES PLAINTIFF—QUI TAM ACTIONS—INFORMERS.

Though there must be either express statutory authority authorizing an informer to prosecute an action for statutory penalty in his own name, or such right must be given by necessary implication, else it will be denied, yet, where a statute gives a portion of the recovery to an informer who prosecutes the suit, it contains sufficient implied authority to support an informer's prosecution in his own name.

[Ed. Note.—For other cases, see Penalties, Cent. Dig. § 21; Dec. Dig. § 24.*]

2. POST OFFICE (§ 52*)—POST ROADS—USE BY EXPRESS COMPANY—PENALTIES—SUIT BY PRIVATE INFORMER—CAPACITY TO SUE.

Rev. St. § 3982 (U. S. Comp. St. 1901, p. 2712), prohibits the establishment of a private express for the conveyance of letters or packets over any post road, and provides that any person violating the section shall be liable to a penalty of \$150 for each offense; section 4059 declares that all penalties imposed for a violation of law affecting the Post Office Department shall be recoverable one half to the use of the person informing and prosecuting the same and the other half to the use of the Post Office Department; but section 919, constituting part of the act regulating procedure in federal courts, commands that all suits for the enforcement of a penalty arising under the postal laws shall be brought in the name of the United States. *Held*, that a suit to recover a penalty for the alleged violation of section 3982 could not be brought by a private prosecutor, but was maintainable only by and in the name of the United States.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 52.*]

3. POST OFFICE (§ 29*)—POSTAL DEPARTMENT—GOVERNMENTAL MONOPOLY.

While Congress has full constitutional power to reserve to the postal department a monopoly of the business of receiving, transmitting, and delivering mails, and in the exercise of such right may enact such rules, regulations, and laws as will effectively preserve its monopoly and prescribe fines, penalties, forfeitures, and punishments therefor, yet this monopoly is intended to extend only to letters, packets of letters, and the like mailable matter; and Congress has never attempted to extend its monopoly to the transportation of merchandise in parcels weighing less

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

than four pounds, nor to prohibit private express companies making regular trips over established post routes from engaging in the business of carrying such parcels for hire.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 49; Dec. Dig. § 29.*]

4. POST OFFICE (§ 29*)—POSTAL MONOPOLY—"LETTERS OR PACKETS."

The word "packet," as used in Rev. St. § 3982, prohibiting the establishment of any private express for the conveyance of letters or packets over post routes, is limited to its original meaning throughout the postal laws to cover only a written communication of four or more sheets, which by Act March 2, 1827, § 5, c. 61, 4 Stat. 238, was required to pay quadruple postage, and does not include a "packet of merchandise" not exceeding four pounds sent by mail.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 29.*]

In Error to the District Court of the United States for the Western District of Arkansas.

Action by Nathan B. Williams, as informer on his own behalf and on behalf of the United States of America, against the Wells Fargo & Co. Express. A demurrer to the information was sustained, and plaintiff brings error. Affirmed.

Nathan B. Williams, pro se.

Charles W. Stockton and Edgar P. Mann, for defendant in error.

Before SANBORN, Circuit Judge, and CARLAND and POLLOCK, District Judges.

POLLOCK, District Judge. This action was brought by Nathan B. Williams, as informer, to recover from defendant, the Wells Fargo & Co. Express, a penalty of \$150. The manner in which it is claimed defendant violated the law, and subjected itself to the payment of this penalty sought to be recovered, as charged in the information, is as follows:

"That the defendant, Wells Fargo & Co. Express, has established and has in operation within the Ft. Smith Division of the Western District of Arkansas, and between points and places therein and divers other places, a private express for the conveyance for hire of packets by regular trips and at stated periods over post routes established by law, and particularly did said defendant, Wells Fargo & Co. Express, on the 27th day of February, 1907, so operate such private express between the city of Chicago, in the state of Illinois, and the city of Fayetteville, in the state of Arkansas, and that between said cities the mail is regularly carried; and that said defendant, Wells Fargo & Co. Express, did on the date aforesaid accept and carry for hire a certain packet, to wit, of merchandise, and, to wit, of the weight of 16 ounces, and, to wit, addressed to Williams & Buchanan of Fayetteville, Ark.; and did carry said packet and deliver the same to the said Williams & Buchanan on the date aforesaid, and dates immediately thereafter; and that the said defendant, Wells Fargo & Co. Express, did carry said packet over a post route established by law; and that said packet was not in its form or nature liable to destroy, deface, or otherwise damage the contents of the mail bag or harm the person of any one engaged in the postal service."

Against this information defendant lodged its demurrer based on two grounds: (1) Want of legal capacity in plaintiff as informer to maintain the action; (2) want of sufficient statement of facts to warrant recovery of penalty. This demurrer was by the court sus-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tained generally. Plaintiff refusing to plead over, judgment was entered for defendant. Plaintiff brings error.

If either ground of demurrer be well taken, the judgment must be affirmed.

While the statutory provision of the law claimed by plaintiff to have been violated by defendant is not indicated in the information, it is manifest from the nature of the acts charged against defendant the pleader had in mind section 3982, Rev. St. (U. S. Comp. St. 1901, p. 2712), which provides as follows:

"No person shall establish any private express for the conveyance of letters or packets, or in any manner cause or provide a conveyance of same by regular trips or at stated periods, over any post route which is or may be established by law, or from any city, town, or place to any other city, town, or place between which the mail is regularly carried; and every person so offending, or aiding or assisting therein, shall for each offense be liable to a penalty of one hundred and fifty dollars."

Therefore, the question first arising for disposition is: May the plaintiff, a private citizen, charged by law with the performance of no public duty, on his own initiative as informer bring and prosecute this information to recover the penalty prescribed for a violation of the act? In this regard it is the insistence of plaintiff his right to so do is clearly authorized by section 4059, Rev. St., which provides as follows:

"All penalties and forfeitures imposed for any violation of law affecting the Post Office Department for its revenue or property shall be recoverable, one half to the use of the person informing and prosecuting for the same, and the other half to be paid into the Treasury for the use of the Post Office Department, unless a different disposal is expressly prescribed. All fines collected for violations of such laws shall be paid into the Treasury for the use of the Post Office Department." Act June 8, 1872, c. 335, 17 Stat. 292, 325 (U. S. Comp. St. 1901, p. 2757).

On the contrary, it is contended by the defense this information was clearly instituted by plaintiff without lawful right to so do, for that section 919, Rev. St., in express terms requires an action in the nature of an information to recover the penalty provided for in this section must be brought in the name of the United States. That section provides:

"All suits for the recovery of any duties, imposts, or taxes, or for the enforcement of any penalty or forfeiture provided by any act respecting imports or tonnage, or the registering and recording or enrolling and licensing of vessels, or the internal revenue, or direct taxes, and all suits arising under the postal laws, shall be brought in the name of the United States."

It is further contended by the defense, as Congress has by section 292, Rev. St., imposed on the Sixth Auditor of the Treasury the duty of superintending the collection of all penalties and forfeitures imposed for any violation of the postal laws, that section evinces a legislative interpretation opposed to the right claimed by plaintiff as informer to prosecute this action. That section reads as follows:

"The Sixth Auditor shall superintend the collection of all debts due the Post Office Department, and all penalties and forfeitures imposed for any violation of the postal laws, and take all such other measures as may be authorized by law to enforce the payment of such debts and the recovery of such penalties and forfeitures. He shall also superintend the collection of all pen-

alties and forfeitures arising under other statutes, where such penalties and forfeitures are the consequence of unlawful acts affecting the revenues or property of the Post Office Department."

The question thus presented of the right of plaintiff to bring and prosecute this information is embraced by some doubt, for, while plaintiff has cited many authorities which it is claimed support his right, yet, from an examination of the authorities cited and independent investigation made, we fail to find the statutory provisions above quoted to have received judicial construction from any court of the land, and no authoritative decision is pointed out in briefs of counsel. Therefore, the question presented must be ruled by the application of the general principles of the law to the language employed in the act.

It would seem at the common law actions to recover penalties prescribed by the law were often prosecuted by what was known as "common informers." Blackstone's Commentaries, Book 3 [Coolidge Ed.] 160, and when a portion of the penalty recovered went to the person or persons informing, and a portion to the sovereign, the action was styled a "qui tam action." While it has been held there must be either express statutory authority authorizing an informer to prosecute in his own name, or such right must be given by necessary implication, else such authority will be denied (*Barnard v. Gostling*, 2 East, 569; *Flemming v. Bailey*, 5 East, 313; *Colburn v. Swett*, 1 Metc. [Mass.] 232), yet, on the contrary, it has been ruled where a statute gives a portion of the recovery to an informer who prosecutes for the same, as does section 4059 above quoted, such statute contains sufficient implied authority to support a prosecution by an informer in his own name. *Adams, Qui Tam, v. Woods*, 2 Cranch, 336, 2 L. Ed. 297; *United States v. Griswold*, Fed. Cas. No. 15,266; *Vandeventer v. Van Court*, 2 N. J. Law, 168; *Megargell v. Hazleton Coal Co.*, 8 Watts & S. (Pa.) 342; *Drew v. Hilliker*, 56 Vt. 641; *Nye v. Lamphere*, 2 Gray (Mass.) 295.

Applying the foregoing principles to the sections under consideration, it must be held, did these sections, which were, respectively, sections 23, 228, and 57 of chapter 335 of the act of June 8, 1872 (17 Stat. 288, 311, 292 [U. S. Comp. St. 1901, pp. 175, 2712, 2757]), entitled "An act to revise, consolidate and amend the statutes relating to the Post Office Department of the government," constitute the entire body of the statutory law bearing on the question under consideration, we would feel constrained to uphold the right of plaintiff, a private citizen, as informer, to bring and maintain this action, and more especially as other sections of the act from which these are taken recognize the right of an informer to prosecute in his own name for violations of the postal laws. But the question here involved is one of procedure in the federal courts, and while the language employed in section 4059, "one-half to the use of the person informing and prosecuting for the same," would, in the absence of any statutory provision to the contrary, by necessary implication, authorize the informer to bring and maintain this action as a private citizen in his own name and to the use of himself and the government, yet, as has been seen, this is beyond all peradventure a suit to recover a penalty

arising under the postal laws as provided in section 919 above quoted, and as that section forms a part of the procedure act in the federal courts, and as it in express terms commands that all such suits shall be brought "in the name of the United States," we are inclined to the opinion no other person than the United States may bring and prosecute an action to recover the penalty prescribed by section 3982, above quoted.

In this opinion we are fortified by a consideration of the fact that, as shown by the authorities cited and relied on by plaintiff as authorizing him to bring and prosecute this information in his own name, none arose under the provisions of said section 3982 above quoted, or to recover penalties prescribed for a violation of the postal laws, although, as shown by the reported cases, many in the history of the government arising under the act of which that section is amendatory have been brought and prosecuted in the name and by the authority of the United States, as will hereinafter be shown. From all of which it must have been thought the provision of the judiciary act above quoted applicable to such cases, and the lawmaking power, in its wisdom, deemed wise that the lawfully constituted authorities of the government should act on their official responsibility in cases of violation of the postal laws, as would seem to be indicated by the terms of section 292 above quoted.

Coming now to a consideration of the case in so far as the demurrer goes to the merits of the controversy, it will be noticed from that portion of the information above quoted the precise nature of the act of defendant relied on to constitute a violation of the statute is that defendant having established a private express for the conveyance of letters and packets for hire between the city of Fayetteville, in the state of Arkansas, and the city of Chicago, over a post road duly established by law, and over which road the mails are regularly carried between said cities, did accept and carry for hire over said post road and between said cities a packet of merchandise of the weight of 16 ounces. Does this information charge an infraction of the statute? While at one time questioned, there remains no doubt but that, under the constitutional authority granted, Congress may, as it has done, reserve to the postal department of the government a monopoly of the business of receiving, transmitting, and delivering the mails of the country, and in the exercise of such right of monopoly Congress may enact such rules, regulations, and laws as will effectively preserve such right of monopoly intact, and as will deter all others, including private individuals and express companies, from engaging therein, and to this end Congress may prescribe such fines, penalties, forfeitures, and punishments as it may deem proper to preserve this right of monopoly retained by the government. For this purpose section 3982 above quoted was enacted.

The question, therefore, presented concerns not the power of Congress to enact the above section, but what acts were intended to be prohibited, prevented, and punished by the language employed therein, and more especially the phrase "letters or packets," since the defendant in this case does not stand charged with the conveyance of any

letter or letters over a post road, but with conveying for hire over an established post road, between the cities named, a packet of merchandise. Has the government by its public acts, more especially the one in question, attempted to reserve to itself a monopoly of the transportation over post roads of parcels or packages of merchandise of the weight of 16 ounces? For, it is self-evident, the pleader by the expression employed in the information "packet of merchandise" intended to charge defendant with nothing more than the conveyance of a parcel or package of merchandise. The expression "letters" or "packets" occurs in the postal laws of our country from the beginning and was intended to include communications in writing conveyed from one person to another. Thus a correspondence limited to a single sheet was formerly called a single letter; two sheets a double letter; and three sheets a triple letter. All such communications composed of four or more sheets were called a packet. Thus section 13 of the act of 1825 (4 Stat. 105, c. 64), reducing into one the many statutes establishing and regulating the Post Office Department, and fixing postal rates, provided the charge for letters and packets carried, as follows:

"For every letter containing a single sheet * * * for every double letter (two pieces of paper) double that rate; for every triple letter (three pieces of paper) triple rate.

"For every packet containing four or more pieces of paper, or one or more other articles, and weighing one ounce avoirdupois, quadruple those rates; and in that proportion for all greater weights. Provided that no packet of letters conveyed by the water mails shall be charged with more than quadruple postage unless the same contain more than four distinct letters."

Section 5 of the act of March 2, 1827 (4 Stat. 238, c. 61), in fixing rates of postage, provided "quadruple postage shall be charged on all packets containing four pieces of paper."

The section under consideration is the result accruing from numerous amendments and the consolidation of separate sections of the postal laws of our country. This legislation had its counterpart in the statutes and ordinances of England. In the year 1656 the Post Office Department of the English government was first permanently established. Prior to that time the business of carrying the mails of that country, including Scotland and Ireland, was by the government farmed out by grant or patent to individuals, and prohibitory legislation was enacted to protect the patentee in his right to perform the service and receive the compensation under the grant made. That country, including her colonies in this, and in turn this country, after the Revolution, through the Post Office Department of the government, has at all times, to a greater or lesser extent, monopolized the business of carrying the mails of its citizens, of regulating the manner of conducting the business, the compensation to be paid for the services performed, and in the protection of the right of monopoly retained prohibiting all others from engaging in the business under penalties prescribed by law. Such laws enacted for the purpose of preserving the right of monopoly in the Post Office Department of the government, and preventing private express and other companies and individuals from engaging therein, have many times received the consideration of the courts of this country, as will be seen from a read-

ing of a few of the many cases. *United States v. Adams et al.* (S. D. New York, opinion by Betts, District Judge, 1843) Fed. Cas. No. 14,421; *United States v. Pomeroy* (N. D. New York, opinion by Conkling, District Judge, 1844) Fed. Cas. No. 16,065; *United States v. Thompson* (District Mass., Sprague, District Judge, charging jury, 1846) Fed. Cas. No. 16,489; *United States v. Kochersperger* (Circuit Court, E. D. Pa., opinion by Cadwalader, District Judge, 1860) Fed. Cas. No. 15,541; *United States v. Thompson* (Circuit Court, District of Mich., opinion by Wilkins, District Judge, 1853) Fed. Cas. No. 16,490; *United States v. Express Company* (Circuit Court, N. D. Illinois, opinion by Drummond, District Judge, 1869) Fed. Cas. No. 16,602; *Blackham v. Gresham et al.* (C. C.) 16 Fed. 609; *United States v. Easson* (D. C.) 18 Fed. 590; *United States v. Hall* (E. D. Pa., 1844) Fed. Cas. No. 15,281.

While from the foregoing cases it will be seen many questions arose touching the right of the government to be protected in its monopoly in the business of receiving, transporting, and delivering the mail matter of the country, consisting of letters or packets of letters, and touching the construction of penal laws designed to prohibit all others than the Post Office Department of the government from engaging in the business of carrying letters or packets for hire over post roads, yet in none has it been decided or even contended the word "packet" employed in the statute was designed or intended by Congress to be construed as granting the Post Office Department a monopoly of the right to receive, transport, and deliver parcels or packages of merchandise. On the contrary, the entire history of the legislation on this subject from the beginning, and the many adjudicated cases as well, show the legislative intent to have been to maintain for the government a monopoly only of the carriage of its mails, consisting of letters and packets of letters, and the like mailable matter. While it is true parcels or packages of merchandise weighing not to exceed four pounds in weight and not in nature such as liable to injure the contents of the mail sacks of the government may be received and carried through the mails, yet that the government has neither attempted to reserve to its Post Office Department a monopoly of the transportation of merchandise in parcels or packages weighing less than four pounds, nor has prohibited private express companies or others making regular trips over established post roads or between cities where mails are regularly carried, from engaging in the business of carrying such parcels of merchandise for hire, is evident from the language employed in the opinion of the Supreme Court in *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791. And that it has not reserved such right of monopoly in the carriage of merchandise such as was carried in this case by defendant, and perhaps lacks the constitutional power to so do, is clearly stated in the opinion delivered by Mr. Justice Field in *Ex parte Jackson*, 96 U. S. 727, 24 L. Ed. 877, wherein it is said:

"But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal

routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted, consisting of letters, and of newspapers and pamphlets, when not sent as merchandise; but further than this its power of prohibition cannot extend."

It follows, from what has been said, the ruling of the trial court in sustaining the demurrer to the information was without error and must be affirmed.

It is so ordered.

FULLERTON v. BIGELOW et al. †

(Circuit Court of Appeals, First Circuit. April 6, 1910.)

No. 845.

1. **CONTRACTS (§ 241*)—MODIFICATION—CONSTRUCTION—CORPORATE BONDS—SALE.**

A contract provided for the sale by complainant to M. of certain bonds of a mining corporation with certain accompanying shares of stock for \$65,000, \$10,000 of which was deposited with respondent to secure to M. the purchase of the corporation's property on foreclosure, but not to exceed 10 per cent. of the corporation's bonded indebtedness; M. being entitled to deduct from the \$10,000 the difference between such 10 per cent. and the amount he was required to pay for the property "at the lowest figure obtainable at public sale." M., however, before signing the contract, added an agreement that it was understood that the \$10,000 was to be held in escrow to protect him against "any costs or expenses over 10 per cent." in settling for and securing the cancellation of certain outstanding bonds or a judgment held by K. *Held*, that the added provision modified the contract as originally written, and hence M. was only required to proceed in a prudent manner to secure an arrangement for the satisfaction of the K. bonds to be perfected at the time of the purchase under foreclosure sale.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1126; Dec. Dig. § 241.*]

2. **DEPOSITARIES (§ 4*)—DUTIES—LITIGATION.**

In general, a mere depositary is bound to remain neutral and cannot take part in the principal litigation, nor can he involve himself in costs and fees beyond what is required to obtain a solicitor to observe the proceedings in the case.

[Ed. Note.—For other cases, see Depositaries, Cent. Dig. § 9; Dec. Dig. § 4.*]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Suit by William Fullerton against Edmund S. Bigelow and others. Decree for respondents, and complainant appeals. Affirmed.

J. A. Bentley and Joseph W. Lund (R. J. Cram, on the brief), for appellant.

G. Philip Wardner (Henry A. Wyman and Henry O. Cushman, on the brief), for appellees.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied May 26, 1910.

PUTNAM, Circuit Judge. This was a bill in equity which arose out of contracts between William Fullerton, the complainant, on the one part, and, on the other part, Willis G. Myers, who was the principal obligator, and Edmund S. Bigelow, who was the depositor of the money involved, \$10,000, which was placed in his hands to be ultimately paid by him to either Fullerton or Myers, or in part to each. Bigelow paid a portion of the amount to Myers, and offers the balance to Fullerton. Fullerton claims the entire sum. As the arrangement made Bigelow a depository, with certain obligations as to the distribution of the fund, he became a trustee; so that equity has jurisdiction notwithstanding the amount involved is a specific pecuniary sum. The Circuit Court entered a decree in favor of the respondents, and the complainant appealed to us. The propositions involved are somewhat difficult; but we have had the assistance of thorough presentation on one side and the other by the counsel for the respective parties, and we have given the case careful consideration. We are of the opinion that the respondents must prevail.

The contracts out of which the deposit arose, with a brief statement of the facts as made by the complainant, tell the story sufficiently. The contract between Fullerton and Myers, as submitted by Fullerton to Myers, bears date April 21, 1906. It was specific and clear, and there is nothing in the case which would justify any departure from it if it stood as originally drawn. It was signed by Fullerton, and forwarded by him to Myers for his signature. In that form it was as follows:

"Whereas, under contract dated October 30, 1904, between William Fullerton, of Denver, Colo., of the first part, and Willis G. Myers, of Boston, Mass., of the second part, the said Fullerton agreed to deposit in escrow 335 of the first mortgage bonds (of the par value of \$335,000) of the Gunnell Gold Mining & Milling Company, of Gilpin county, Colo., under certain conditions to be kept and performed by both parties hereto; and,

"Whereas, by mutual agreement, the said contract has at or about this date been canceled and declared to be of no further force or effect; and,

"Whereas, in lieu thereof, the said Myers has agreed to purchase the whole of the said bonds and stock mentioned in said contract—that is to say, the par value of \$335,000 bonds, and certificates of common stock of said company amounting to 3,394 shares, and of preferred stock amounting to 682 shares, or a total of 4,076 shares more or less, of a par value of \$407,600 of said stock—for the sum of eighty-five thousand dollars (\$85,000); that is to say, sixty-five thousand dollars (\$65,000) in cash, and twenty thousand dollars (\$20,000) in the six per cent. interest-bearing, first mortgage bonds of a new corporation organized, or to be organized, by said Myers and others in Boston for the purpose of taking over the property of the Gunnell Gold Mining & Milling Company; and,

"Whereas, the said Fullerton has already deposited all the bonds and stock before referred to with the United States Trust Company of Kansas City, Mo.:

"Now, therefore, the said Fullerton hereby acknowledges receipt of fifty-five thousand dollars (\$55,000) in cash from the said Myers, at the hands of the trust company above mentioned, as a part of the \$65,000 cash hereinbefore mentioned; and further acknowledges receipt from said Myers, through the said trust company, of an agreement to deliver to him twenty thousand dollars (\$20,000) of the new first mortgage bonds above referred to, as soon as the same shall be issued by the new corporation hereinabove mentioned.

"The ten thousand dollars (\$10,000) remaining unpaid of the total amount of \$65,000 to be paid in cash by said Myers to said Fullerton, the latter hereby agrees shall remain in trust in the hands of said United States Trust Company of Kansas City, Mo., until the following conditions shall be carried out, viz.:

"At the earliest day practicable the said Myers is to cause foreclosure pro-

ceedings to be begun against the Gunnell Gold Mining & Milling Company under the terms of a trust deed of said company, securing an issue of \$750,000 bonds of said company, made in June, 1899, and as a part of such proceedings intends to purchase, or cause to be purchased, the entire property of said Gunnell Company at the lowest figure obtainable at public sale.

"Whereas, there is a certain judgment recorded in favor of the Kimber estate against the said Gunnell Company for thirty-seven thousand dollars (\$37,000) of the said first mortgage bonds of said Gunnell Company.

"Now, therefore, if at such sale said Myers succeeds in buying in the property at a figure representing not more than ten per cent. (10%) on all the outstanding bonded indebtedness of said company, including the amount of bonds represented by the so-called Kimber judgment, then the said Myers agrees to authorize the said United States Trust Company to release the said amount of \$10,000 cash deposited by said Fullerton in escrow as above, and to pay the same over to said Fullerton on his demand immediately after the issuance to said Myers, or the new company represented by him, of a certificate of sale of said property under the Gunnell Company's trust deed before mentioned.

"If, on the other hand, the said Myers should be compelled at said sale to pay a larger amount than 10 per cent. on the bonds represented by the Kimber judgment, then such amount in excess of 10 per cent. is to be deducted from the \$10,000 cash deposited as above, and the balance remaining is to be turned over by said trust company to said Fullerton, on demand, at the time of the issuance of certificate of sale.

"In witness whereof, the said parties hereto have hereunto set their hands and seals this 21st day of April, A. D. 1906.

"[Signed] William Fullerton.

"Witness to signature of William Fullerton: Olga Jacobson."

It was, however, tampered with, because Myers attached to it the following, which he signed:

"Boston, Mass., April 21, 1906.

"I agree and assent to this instrument, understanding that it is the intention of this instrument and the parties hereto that if the cost to me of the Kimber bonds or judgment to the extent of \$37,000 exceed 10 per cent. of their face either at the time of the purchase under foreclosure sale or through any proceedings thereafter, then the amount of the excess is to be deducted from said \$10,000; it being the understanding that this sum of \$10,000 is to be held in escrow to protect me against any cost or expenses over 10 per cent. in settling for and securing the cancellation of the said bonds or judgment.

"[Signed] Willis G. Myers.

"Witness: B. L. Newman."

Myers returned it in that form to Fullerton. It was a biparty contract, and it was to have been signed by both Fullerton and Myers; but the only signature by Myers was in the manner we have shown. Fullerton accepted it in that form, and, therefore, the addition put on by Myers must be held to be a part of it.

There was a large amount of correspondence preceding the execution of the contract and accompanying it; but under the well-settled rules of law this cannot be taken into consideration.

The appropriate facts necessary to explain the circumstances to which the contract refers are stated by the respondents as follows:

"All efforts to get the Kimber judgment out of the way at the 10 per cent. figure having failed, foreclosure proceedings were instituted in the district court for the city and county of Denver, in May, 1906. Mrs. Kimber promptly appeared and answered and announced her intention of fighting foreclosure to the last ditch in the trial court, and by appeal to the Supreme Court of Colorado, and otherwise. This meant that the case would be in the courts at least four years. Mrs. Kimber further declared that, whenever the sale took place, she would by bidding force the price up to a figure that would net her the same

rate that Fullerton was receiving on his bonds, to wit, about 30 per cent. of the face value. As the bonds in the new company went on interest July 1, 1906, and as Myers, to Fullerton's knowledge, had agreed with those who were associated with him in the purchase of the mine to turn over a clean title to the company, the prospect of having to wait four years without deriving any income from the mine, and with no certainty of success at the end of that period, was disastrous. Myers accordingly agreed, if the Kimbers withdrew their opposition, to cause the property to be bid in at the sale at a figure that would net them \$10,000, which would give them the same percentage of the par value of their bonds as Fullerton was getting for his. This was done, and the cost to Myers of thus getting rid of the Kimber judgment was the \$10,000 paid to the Kimbers, and \$500 for counsel fees. \$6,800, therefore, was the difference between the \$10,500 and \$3,700, which was 10 per cent. of the \$37,000 par value of the Kimber bonds; and this sum of \$6,800 was paid over by Bigelow as trustee on Myers' demand. Bigelow tendered the balance of \$3,200 to Fullerton, who declined to accept the same; and the \$3,200 remained in Bigelow's hands, as trustee, until it was ordered by the court below to be paid into court, which was done."

We need only add that the record fully sustains this statement by the respondents.

The contract as submitted by Fullerton was very positive in its requirements, and so positive that, as it was drawn, its requirements would necessarily have been fully lived up to in order to deprive Fullerton of any portion of the deposit. Before Fullerton could have been required to pay any portion thereof, Myers would have been obligated to purchase the property "at the lowest figure obtainable at public sale." This was reinforced by a subsequent provision that Myers must have been "compelled at said sale to pay a larger amount" than what was named. This phraseology was so specific that Fullerton was entitled to have Myers bid at the sale the lowest figure obtainable without complicating the result by prior negotiations. Nevertheless, Myers' addendum substantially changed the nature of the proposed contract. It is true that he added the words, "or through any proceedings thereafter," which might well have been added without depriving Fullerton of his right to an unincumbered and unrestricted public sale, because it would only have been a provident thing for Myers to have looked out for the possibility of objections being taken to a confirmation of the sale. If that had been the only change made by Myers, the case would have still been with Fullerton throughout. But when he inserted the more general terms that, if the cost to him exceeded the specified sum, he relieved himself from making the exact time of an unrestricted and unembarrassed public sale the test; and his only obligation remaining was to proceed in a prudent manner to secure an arrangement which was to be perfected "at the time of the purchase under foreclosure sale," such as might safely have been accomplished. In view of what is shown in the record of the character of the parties with whom Myers was contending, it cannot be doubted that his course was prudent, and that, in any fair sense of the addendum which he put on the contract, he accomplished the purchase at the lowest price consistent with reasonable certainty for the accomplishment of the result which all the parties were looking for.

The complainant maintains that the Kimber bonds and judgment referred to in the contract between Myers and Fullerton were in fact purchased before the foreclosure sale took place. If such had been the case,

then the addendum made by Myers might not have saved him. On the other hand, the circumstances were that whoever controlled the Kimber bonds and judgment relied on an assurance given by Myers' counsel that a bid would be made at the sale sufficient to accomplish the purpose of those holders; and therefore they did not appear. The sale was made as stated by the respondents, and, immediately after the sale was made, the amount bid was paid by Myers' representative. The whole transaction conforms to the contract finally settled between the parties, as fairly and reasonably construed. The expression made use of by Fullerton in reference to the obligation intended by him to be imposed on Myers to purchase "at the lowest figure obtainable at public sale" was neutralized, as we have shown. Consequently, Myers must prevail, and the decree of the Circuit Court, so far as that is concerned, must be affirmed.

The depositary named in the contract between Fullerton and Myers was the United States Trust Company of Kansas City; but, by an arrangement, Bigelow was substituted for that corporation, and he executed a formal instrument establishing his position in reference thereto. The record shows that, when Bigelow signed the instrument executed by him, he had before him the contract between Fullerton and Myers; so we need not trouble ourselves to examine the precise terms of his written obligation. We, however, deem it proper to notice that the Circuit Court in its final decree directed that Bigelow should reimburse himself from the fund remaining in the sum of \$277.06 for disbursements in this litigation, and for counsel fees incurred therein to the amount of \$1,000. This is assigned for error, but this assignment has not been brought to our attention at our bar by the appellant. *Prima facie*, a mere depositary is bound to remain neutral, and cannot take part in the principal litigation; and he is not entitled to involve himself in costs and fees beyond what is required to retain a solicitor to observe the proceedings in the case. Moreover, there is nothing in the record brought to our attention that could in any way be regarded as "plea and proof" in reference to this allowance. However, the appellant has given us no light in regard to the circumstances. Therefore, we cannot adjudicate in reference thereto.

The decree of the Circuit Court is affirmed, and the appellees recover their costs of appeal.

WALKER v. LAWRENCE.

(Circuit Court of Appeals, Fourth Circuit. February 23, 1910.)

No. 908.

CONTRACTS (§ 117*)—LEGALITY—PUBLIC POLICY—AGREEMENT IN PARTIAL RESTRAINT OF TRADE.

An agreement by the seller, on a sale of a liquor business, stock, and good will, that he will not engage in a like business in that or any adjoining county for a period of six years, nor assist any one else in such business, and that he will remove from such territory and maintain his residence elsewhere for five years, is not unlawful as against public pol-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

icy, in the absence of proof that it was not a reasonable provision for the protection of the purchaser in the business.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554-569; Dec. Dig. § 117.*]

In Error to the Circuit Court of the United States for the Southern District of West Virginia, at Charleston.

Action by S. G. Walker against A. C. Lawrence. Judgment for defendant, and plaintiff brings error. Reversed.

Wesley Mollohan, W. G. Mathews, and Mollohan, McClintic & Mathews, for plaintiff in error.

W. E. Chilton, H. D. Rummell, Chilton, McCorkle & Chilton, and Rummel & Higginbotham, for defendant in error.

Before PRITCHARD, Circuit Judge, and BRAWLEY and CONNOR, District Judges.

BRAWLEY, District Judge. This is an action in assumpsit upon four promissory notes, aggregating \$9,000, exclusive of interest, dated February 15, 1907, executed by Walker, Lawrence & Co., a corporation, indorsed by Lawrence, the defendant, and delivered to the plaintiff. Afterwards, to wit, April 23, 1907, the plaintiff and defendant, together with said Walker, Lawrence & Co., and one Clark and Watson, made and entered into a certain agreement in writing, duly signed and sealed, whereby all the goods, wares, merchandise, and other property therein set forth, including the notes described, was sold by Lawrence to the plaintiff, who assumed said notes, and agreed to save said Walker, Lawrence & Co. and A. C. Lawrence harmless relative thereto. About two months thereafter, to wit, June 26, 1907, another agreement in writing was made, duly signed and sealed, by all the parties thereto, reciting the contract of April 23d. This last contract is set forth in full in the declaration, and by it it appears that Lawrence, the defendant, bought from Walker, the plaintiff, the business theretofore vested in Walker; Lawrence agreeing to assume payment of the notes and to indorse on them the words: "With interest from July 1, 1907."

Walker, Lawrence & Co. was a corporation engaged in the wholesale and retail liquor business in Kanawha county, W. Va., and the property described in the agreements consisted of real estate, leases and contracts, bottling house, beer cases, bottles, and horses and wagons, stock of liquors, licenses, book accounts, and bills receivable. The case was heard upon demurrer, which the court sustained, upon the ground that one of the considerations of the contract "is contrary to public policy, to wit, the part thereof wherein the said S. G. Walker agrees to remove from and stay out of the county of Kanawha and adjoining counties, and to refrain from engaging in the liquor business as set forth in said contract," and the judgment of the court was that the action be dismissed. The conclusions reached by us render it unnecessary to consider the first assignment of error, to wit, that "the court erred in requiring proof and granting oyer, over the objection of the plaintiff of the April contract mentioned in the declaration."

*For other cases, see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The plaintiff, in the contract of June 26, 1907, agreed to sell and convey all of his rights, title, and interest in the property and business described to the defendant and his associates, as follows:

"For the consideration mentioned in this agreement and bill of sale, the said party of the first part does hereby waive and transfer unto the said party of the third part all of the privileges and interests pertaining to the welfare of the parties to this agreement in said business, without any reservation whatsoever, and agrees not to enter into or engage in the wholesale or retail liquor business in the county of Kanawha, West Virginia, for a period of six years from this date, and agrees further that he will not aid any person, firm or corporation, or promote the interest of any person, firm or corporation, now or hereafter engaged in the wholesale or retail liquor business, whose interests may conflict with the interests of the second, third and fourth parties to this agreement, and for the consideration herein mentioned the good-will of the said S. G. Walker in the business herein mentioned is conveyed to the party of the third part, and it is hereby understood that the said S. G. Walker will not do any act, directly or indirectly, to interfere with or which shall in any way be inimical to the said liquor business of the parties of the second, third and fourth parts, whether said business is conducted by the said parties in their individual capacities, or by their assigns or otherwise."

It is further stipulated that:

"If the party of the first part shall engage in the wholesale or retail liquor or beer business, or become interested in any manner whatsoever in any of the said counties of the state of West Virginia, either directly or indirectly, at any time, within the period of six years next succeeding this date, or shall encourage or aid any person, firm or corporation to engage in any business or to do any act, or shall himself do any act, directly or indirectly, to interfere with or which shall in any way be inimical to the business of the said second, third and fourth parties to this agreement, or their assigns or shall by any act or utterance violate any of the provisions of this agreement, he shall pay as liquidated damages to the said party of the third part the sum of \$15,000.00. The \$9,000.00 in notes hereinbefore described and required to be deposited with the cashier of the Kanawha Valley Bank, shall be held by the said cashier as above required, until each and all of the said notes mature, and if at any time before or after maturity of any or all of said notes the said party of the first part shall become liable to pay the said \$15,000.00 as above set out, then such of the said notes as may be in the hands of said cashier shall be turned over to the party of the third part and the same credited upon the amount of liquidated damages above agreed upon. In default of payment of any of the aforesaid notes by the party of the third part to the party of the first part, as they become due, then in that event, all the notes herein mentioned shall become due and payable on demand."

There is a further stipulation as follows:

"The said S. G. Walker further agrees that he will within sixty days from the date remove from the said territory (consisting of the county of Kanawha and adjoining counties), and for the period of five years next succeeding the date of the agreement, live and reside outside of the said territory; if said Walker does not within sixty days from the date of this agreement remove from the territory aforesaid he expressly agrees that the notes for \$9,000.00, hereinbefore required to be deposited with and held by the cashier of the Kanawha Valley Bank, shall be turned over by said cashier to the party of the third part, and canceled. If the said party of the first part shall after removing, return and live and reside within the said territory at any time within the five years next succeeding the date of this agreement, he agrees and binds himself to pay to the party of the third part as liquidated damages the sum of \$15,000.00, and any notes heretofore required to be deposited with the said cashier, which may then remain in his hands, shall be turned over to the said A. L. Lawrence as a credit on the amount of such liquidated damages."

The declaration avers that S. G. Walker is a citizen of the state of Pennsylvania; that he has fully and in all respects complied with each and every provision of said agreement; that he had placed said notes in the hands of the Kanawha Valley Bank, to be held in accordance with the terms thereof, and to be paid and collected at the respective maturities of the notes; that when one of the notes, dated February 15, 1907, payable 11 months after date, for \$2,000, became due and payable, according to the face and tenor thereof, it was duly presented for payment, and payment refused; and that by reason of the agreement mentioned each and all of the notes, upon failure of the payment of the one which first matured, became at once due and payable, without regard to the date of their maturity.

The only question for determination is whether the considerations mentioned in the judgment on demurrer and hereinabove specifically set forth are contrary to public policy. The record does not contain any opinion of the learned judge below, setting forth the reasons of his decision. One of the greatest jurists of our day, Jessel, M. R., said:

"The suit raises points of the very greatest importance as regards the general law, upon which I can give my opinion—and I say my opinion advisedly, because I am free to confess that the law is not so clearly settled on the point that the judge can lay down the law; he can only give his opinion of the law. Judicial opinion has varied a great deal, and must vary a great deal, when you consider the ground upon which that judicial opinion or those judicial opinions have been founded. This is a branch of the law which depends upon what is commonly called 'public policy.' Now, you cannot lay down any definition of the term 'public policy,' or say it comprises such and such a proposal, and does not comprise such and such another; that must be, to a great extent, a matter of individual opinion, because what one man, or one judge, may think against 'public policy,' another may think altogether excellent 'public policy.' Consequently, it is impossible to say what the opinion of a man or a judge might be as to what 'public policy' is."

By the ancient common law a man was not allowed to restrain himself by contract from exercising any lawful craft or business in his own way, and this doctrine is said to have grown out of the English law of apprenticeship, which forbade the exercise of any regular trade or handicraft except after a long apprenticeship and admission into some guild or company; but the changed conditions of society have greatly modified the old doctrine. Men are no longer required to follow a particular trade or calling, or run the risk of being without work, and thus becoming a burden on the public, and the reasons which underlay the old law no longer exist. So far as may be gathered from the best-considered cases, the rule now seems to be that if the purpose of the parties is not in itself unlawful, if it is not unreasonably injurious to the public welfare, and does not impose a heavier restraint than the interest of the complaining party requires, such agreements will be sustained. Chief Justice Tindal, in *Horner v. Graves*, 7 Bing. 743, lays down a rule which has met general acceptance:

"We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of

no benefit to either; it can only be oppressive, and if oppressive it is in the eye of the law unreasonable."

The agreement here relates to the sale of the liquor business in the county of Kanawha, and the seller agrees not to engage in a like business in the county of Kanawha, or the adjoining counties, for a period of six years, and, as additional assurance against his setting up a competitive business in that locality, he agrees to remove therefrom and to remain away for a period of five years. It is difficult to see how such a contract contravenes any principle of public policy. It may be a convenience to the public that the liquor business be carried on in any particular community; but it is not a public necessity, certainly not a necessity that it be carried on by any particular person. The public may prefer to deal with such person rather than with the party to whom he sells; but it is not obliged to do so, and, so long as the transaction falls short of a conspiracy to control prices by creating a monopoly, the public does not suffer; while, on the other hand, it would seem to be an unreasonable restriction to the freedom of contract, and an invasion of private right, if a party were precluded from selling his business at the best price by an agreement not to compete with the person to whom he sells. "Many of these partial restraints on trade," says Baron Parke in *Mallan v. May*, 11 Mees. & W. 652, "are perfectly consistent with public convenience, and the general interest, and have been supported, such as a case of the disposing of a shop in a particular place with the contract on the part of the vendor not to carry on a trade in the same place. It is in effect the sale of a good will and offers encouragement to trade by allowing a party to dispose of all the fruits of his industry." The laws relating to the sale of intoxicating liquors in West Virginia have not been brought to our attention, and we cannot assume that it is the public policy of that state to encourage or allow every one who chooses to engage in that business, and that agreements tending to restrict the number of persons so engaged are repugnant to public policy. In most of the states with whose laws we are familiar, heavy taxes and onerous conditions are imposed for the express purpose of limiting the number of those who shall sell intoxicating liquors. A contract like this, therefore, is not obnoxious to the objection that it tends to create a monopoly.

Judge Taft, in *U. S. v. Addyston Pipe & Steel Company*, 85 Fed. 272, 29 C. C. A. 141, 46 L. R. A. 122, reviews many of the cases on this subject, and says:

"For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements: (1) By the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere by competition or otherwise with the business of the firm," etc., etc.

One of the leading American cases is *Diamond Match Company v. Roeber*, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464, where the court held valid the agreement of the defendant who had sold his match manufacturing business, with the good will, to a corporation then engaged in the same business, and covenanted with the purchaser

and its assigns not to engage within 99 years in the like business in any of the United States or territories, except Nevada and Montana.

In *Oregon Steam Navigation Company v. Winsor*, 20 Wall. 64, 22 L. Ed. 315, Mr. Justice Bradley says:

"Cases must be judged according to their circumstances, and can only be rightly judged when the reason and grounds of the rule are carefully considered. There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy. One is the injury to the public by being deprived of the restricted party's industry. The other is the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases, and the party is deprived of his occupation, and is obliged to expatriate himself in order to follow it. The contract that is open to such grave objection is clearly against public policy; but if neither of these evils ensue, and if the contract is founded on a valid consideration, and a reasonable ground of benefit to the other party, it is free from objection and may be enforced."

In *Gibbs v. Baltimore Gas Company*, 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979, the court held that combinations among those engaged in business impressed with a public or quasi public character; manifestly prejudicial to the public interest, could not be upheld, and that contracts which impose a restraint, though only partial, upon business of such character, would not be enforced, but it held that "where the public welfare is not involved, and restraint upon one party is not greater than protection to the other party requires, a contract in restraint of trade may be sustained."

In *National Enameling & Stamping Company v. Haberman* (C. C) 120 Fed. 415, Judge Platt, after tracing the history of the doctrine in an interesting opinion, holds that a restrictive covenant, unlimited as to time, covering the entire United States, being in part consideration of a payment for good will sold, is ancillary to the main lawful contract, and is reasonable, and no broader than is necessary to save the covenantee the rights and privileges for which he has paid, and may be enforced.

In the Third Edition of *Pollock on Contracts*, pp. 478, 479, may be found a list of the leading English cases between the years 1855 and 1899, in which restrictions were held reasonable.

In *Nordenfelt v. Maxim Nordenfelt Company*, [1894] App. Cas. 535, the extent of restriction in time was 25 years, and unlimited in space.

It would be useless to go further and to cite innumerable cases which hold that agreements for a consideration not to engage in a particular business for a limited time in a limited territory are not illegal or contrary to public policy. The territory embraced within the county of Kanawha and adjoining counties is not an unreasonable limitation of the space within which the plaintiff covenanted not to engage in business in competition with his vendee, nor is the period of six years an unreasonable time; but it is contended, with apparent seriousness, that Walker's agreement to remove from said territory within 60 days, and to live and reside outside of it for the period of

5 years, is "illegal and immoral," in view of the peculiar nature of the liquor business, and the question is asked on page 12 of the printed brief, submitted by defendant in error:

"Can we not assume, with such a remarkable provision, that Walker possessed some secret influence with relation to the liquor traffic, licenses, etc., that made it imperative for Walker to agree to leave the prescribed territory within 60 days before Lawrence would purchase the property?"

We must infer that Lawrence attached much consequence to the stipulation that Walker should not reside within the territory described, for it is expressly agreed that in case he failed to remove therefrom the \$9,000 of notes should be canceled; but we fail to see wherein such an agreement is either illegal or immoral. It is a matter of common knowledge that within those communities where there are severe restrictions upon the liquor traffic there is much illicit business in liquors carried on by those who, in the parlance of the day, are called "blind tigers," and it may be that Lawrence suspected Walker of such dangerous proclivities, and believed that Walker's agreement not to compete within that territory would be more completely carried out if he removed therefrom. Without some proof, we could not say that this restraint is more extensive than was reasonably necessary for the protection of the vendee in the enjoyment of the business purchased. An agreement not to reside within a certain limited territory is not in itself illegal. It was so expressly decided in an early case in the Court of Exchequer (*Dendy v. Henderson*, 10 Ex. 194) *Hurlstone and Gordon*, which was an agreement between plaintiff, a solicitor, and the defendant, who was employed at a salary as a resident clerk, and the defendant agreed that he would not for the space of 21 years, notwithstanding the decease of the plaintiff, reside in the parish of Tormoham or St. Mary's Church, or within 21 miles thereof, or carry on therein or within the distance aforesaid, during the period of 21 years, any business of the description of that carried on under the agreement. The declaration on this agreement alleged as a breach that the defendant resided in the parish of T., and during said period of 21 years carried on business in the said parish of the description of that carried on under the agreement, and there was a plea that, although the defendant resided in the parish of T., yet he did not so reside for the purpose or with the intention of carrying on business of the description of that carried on under the agreement. It was held that the restriction was not unreasonable, and was good in law. *Alderson, B.*, in the colloquy during the argument, as appears in the report, says:

"Is it clear that the protection of the plaintiff does not require that the defendant should not reside within the prescribed limits? The defendant must perform his agreement, unless he can clearly establish that the restraint is unreasonable."

Platt, B., says:

"The restriction as to residing within the particular distance seems to me a reasonable restriction in order to protect the other party."

Some stress is laid in the argument before us on the provision which appears in the contract of April 23d, whereby Lawrence sold the business to Walker, and it was agreed that Walker should promote the

personal political ambitions of the said A. C. Lawrence. Agreements of that kind must necessarily receive judicial condemnation; but there is no such provision in the contract of June 26th, which is here sued upon. We have already stated the grounds upon which the court below sustained the demurrer, and the reasons that lead us to conclude that there was error in such ruling; but as one of the assignments of error goes to the general demurrer, and the defendant in error would be entitled to an affirmance if on the whole record the judgment of the court below was right, we have carefully considered the other grounds which were not specifically mentioned in the order of the lower court, and are of opinion that the demurrer cannot be supported. Much of the argument of the defendant in error is incomprehensible to us. It is said that "this transaction savours of a whisky combine," that the contracts show "efforts upon the part of the parties to traffic in whisky licenses, and public office, and so word the writing as to allow the considerations for these illegal proceedings to pass through a court of justice."

Two contracts appear in the record. In that of April 23d Walker sold to Lawrence and transferred his good will in the business sold, agreeing not to engage as a competitor therein of Walker, Watson & Clark for a period of six years in Kanawha county, with one exception, specified. In the contract of June 26th, which is here sued on, Walker sold his interest in the same business to Lawrence, agreeing not to compete with the parties to whom he sold in Kanawha and the adjoining counties for the period of six years, without any reservation, and to remove and live outside of that territory for the term of five years. The hidden motives which underlay these transactions are beyond our ken, and we do not know that such motives are the proper subject of judicial inquiry. The motives of covenantees are not the test of the validity of contracts. Agreements not to compete within a limited territory and for a limited period of time are admittedly not unreasonably injurious to the public welfare. The agreement on the part of the seller that he would remove from and reside outside of the territory named was apparently for the purpose of securing more complete compliance on the part of the seller with his promise not to compete with his vendee. It may be that this was a heavy restraint; but the seller has, according to the declaration, performed his agreement, and it does not lie with the purchaser, who imposed this condition, to complain of it. It was not an unlawful condition, and it is the duty of courts, wherever possible, to construe the contract to be valid rather than void. "If there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts, when entered into freely and voluntarily, shall be held good and shall be enforced by courts of justice." *Jessel, M. R., in Printing Company v. Samson, 19 Eq. Cas. 462.*

The judgment of the court below in sustaining the demurrer is reversed.

Reversed.

UNITED STATES v. DAVIES, TURNER & CO.

(Circuit Court of Appeals, First Circuit. March 4, 1910.)

No. 841 (2,053).

1. CUSTOMS DUTIES (§ 36*)—CONSTRUCTION OF TARIFF LAWS—CLASSIFICATION—HANDMADE PRINTING PAPER.

Under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, pars. 396, 401, 30 Stat. 187, 189 (U. S. Comp. St. 1901, pp. 1671, 1672), handmade printing paper is dutiable as "handmade" rather than as "printing paper," even when suitable for printing.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 115-120; Dec. Dig. § 36.*]

2. CUSTOMS DUTIES (§ 36*)—CONSTRUCTION OF TARIFF LAWS—POLICY OF LAW—HISTORY OF LEGISLATION.

In construing the application of the terms "handmade" and "printing" as applied to paper imports, consideration was given to the evident intent of Congress (1) as revealed in numerous successive tariff acts to reduce the duties on printing paper for the benefit of the ordinary reading public, and (2) by elevating handmade paper into a new class, now that it has become in the art of printing a luxury.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 115-120; Dec. Dig. § 36.*]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For decision below, see 172 Fed. 298. The Circuit Court reversed a decision by the Board of United States General Appraisers, which had affirmed the assessment of duty by the collector of customs at the port of Boston.

D. Frank Lloyd, Deputy Asst. Atty. Gen. (Martin T. Baldwin, Sp. Atty., of counsel), for the United States.

Comstock & Washburn (Albert H. Washburn, of counsel, and Searle & Pillsbury and George J. Puckhafer, on the brief), for appellees.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This appeal relates to the classification of handmade paper. The importers claim that it should have been classified under paragraph 396 of the customs act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule M, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1671]), "Printing paper, unsized, sized or glued, suitable for books and newspapers," beginning with such paper "valued at not above two cents per pound," carrying a duty of 0.3 cent per pound, and closing it with such paper valued "above five cents per pound," carrying a duty of 15 per cent. ad valorem. The United States claim that it should be classified under paragraph 401 as "handmade paper, weighing not less than ten pounds and not more than fifteen pounds to the ream," assessed at 2 cents per pound and 10 per centum ad valorem, or "weighing more than fifteen pounds to the ream," paying 3½ cents per pound and 15 per centum ad valorem, and followed by a provision

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

that "every one hundred and eighty thousand square inches shall be taken to be a ream." The Circuit Court decided in favor of the importers, feeling itself persuaded to follow decisions of the United States Circuit Court of Appeals for the Second Circuit.

Aside from any peculiar rules in reference to the interpretations of customs statutes established by decisions of the courts, the interpretation claimed by the United States is the natural reading of the statute. It is true that handmade paper falls within the general description given by paragraph 396; but the word "handmade" is denominative, and not merely descriptive. It is a name, and is specific, and not general, and therefore, on the natural reading of the statute, controls, although, of course, under some circumstances, the common sense of the matter, and the force of other provisions of a statute, and the surrounding circumstances, might make what is descriptive overrule that which enumerates.

Our rule of interpretation, we understand, is the same as that applied by the Supreme Court in *Robertson v. Glendinning*, 132 U. S. 158, 159, 160, 10 Sup. Ct. 44, 33 L. Ed. 298, and in *United States v. Perry*, 146 U. S. 71, 75, 13 Sup. Ct. 26, 36 L. Ed. 890. In view of those decisions, which run so close to the case before us, it is only necessary to paraphrase them to sustain absolutely the present proposition of the United States.

Moreover, the general history of this particular art leads directly to this result. Handmade paper first appears *eo nomine* in the tariff act of 1897. The modern history of dutiable printing paper is as follows: Commencing with Act July 30, 1846, c. 74, 9 Stat. 42, the revenue tariff act, following through the two acts of March 3, 1857 (11 Stat. 192, c. 98), and March 2, 1861 (12 Stat. 179, c. 68), which were still revenue acts, the latter somewhat advanced on account of the necessities of the war, printing and book paper, unsized, paid relatively duties of 20 per cent., 15 per cent., and 30 per cent. *ad valorem*. Act March 3, 1863, c. 77, 12 Stat. 742, restored the duty of 20 per cent., which continued through Act June 6, 1872, c. 315, 17 Stat. 230. In 1883 (Act March 3, 1883, c. 121, 22 Stat. 488) this duty was reduced to 15 per cent., and so it continued until the act of 1897. In 1872 a new class, consisting of sized and glued printing paper, was assessed at 25 per cent. *ad valorem*, and so continued until 1883, when it was assessed at 20 per cent. *ad valorem*. In 1897 both sized and unsized ordinary printing paper were run into one class, as we have shown. Thus it appears that, in the face of the general advance in customs duties, the rates on printing paper in ordinary use were constantly reduced. It needs no argumentation to establish the proposition that this reduction was for the benefit of the ordinary reading public, and not for the benefit of any exclusive class or of any class using paper of exclusive manufacture.

Pulp for the manufacture of paper, this being from grass, first appeared in 1870 as free. After that, ordinary paper for printing both books and newspapers was rapidly cheapened by the introduction of machinery capable of making and using wood pulp. It is a matter of common knowledge that handmade paper is now relatively a luxury.

This apparently attracted attention in 1897. The common sense of the matter is that handmade paper was then elevated into a new class, and was thus especially distinguished from the ordinary printing paper for books and newspapers, and thenceforth segregated in the customs laws, carrying a higher rate of duty. The result is that the diminishing rates of duty, intended for the benefit of the general reading public, should be held to cover only such paper as that public uses, in favor of diffusing general literature and the knowledge of the news of the world. There is no reason that can be advanced why Congress should continue to give the users of handmade paper the constantly diminishing rates of duties imposed on common printing paper.

Emphasis is placed on the fact that, with reference to paper for books and newspapers, the word "only" and the word "exclusively," found in previous acts in this connection, have been dropped out in the act of 1897. The previous acts read in substance: "Printing paper suitable only for books and newspapers." Paragraph 396, in question here, reads: "Printing paper suitable for books and newspapers." The object of this change, of course, was simply to broaden out in favor of the ordinary reader or the manufacturer of ordinary reading paper, so that they may not be embarrassed by the narrowing words "only" or "exclusively." This fully accounts for their omission; and, at any rate, no sound argument can be built up from it in favor of importers of handmade paper.

Apparently, also, there is no settled practice of the departments with reference to this word "handmade." It never came into the statute until 1897; and while, according to the testimony of the importers here, there was a period continuing for some time in which they paid duties on handmade paper which could be used for printing at the rates provided in paragraph 396; nevertheless, in the collection district of New York, a different practice seemed to prevail. It appears that, previous to January 27, 1902, the customs officers at New York assessed this duty under paragraph 401. This was sustained by the General Appraisers (T. D. 23,486; G. A. 5,067) by decision dated January 27, 1902. This is the identical assessment which came before the Circuit Court for the Southern District of New York in *Miller v. United States*, 128 Fed. 469, decided on January 29, 1904. Very clearly there is not enough in the record to sustain the proposition that there was any settled usage in favor of the importers for any length of time, according to the practical rules usually applied with regard to that topic.

The only question, therefore, is whether the decisions in the Second circuit are to have the effect given to them by the Circuit Court. On a careful study of them, they do not seem to be of sufficient breadth and clearness to require us to depart from what is the natural interpretation of the statute in question. Otherwise we would, as usual, follow them. The original case on which the importers rely, *Miller v. United States*, affirmed by the Circuit Court of Appeals, 135 Fed. 349, 68 C. C. A. 131, has been more or less cut down by the same Court of Appeals in *Benneche v. United States*, 153 Fed. 861, 83 C.

C. A. 43, and *United States v. Seyd*, 158 Fed. 408, 85 C. C. A. 518, although it is true, as said by the Circuit Court here, the precise condition of facts involved in the Miller suit was not before the court in either of the two last cases.

The judgment of the Circuit Court is reversed, and the case is remanded to that court, with directions to enter a judgment in favor of the United States.

RIEDEL et al. v. WEST JERSEY & S. R. CO.

(Circuit Court of Appeals, Third Circuit. February 21, 1910.)

No. 68 (1,274).

1. NEGLIGENCE (§ 33*)—DANGEROUS PREMISES—TRESPASSERS.

Though the owner of premises is not bound to guard or protect a trespasser from dangers lurking thereon, he is liable for an injury to the trespasser, if willfully inflicted.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 45-47; Dec. Dig. § 33.*]

2. ELECTRICITY (§ 15*)—ELECTRIC THIRD RAIL—INJURY TO TRESPASSERS.

Defendant's railroad was equipped with the third-rail electric system; the rail carrying the power being similar to and parallel to the other rails. The rail was not covered or protected, except at crossings and stations, and normally carried 675 volts, which was sufficient to injure or kill a person coming in contact therewith. Plaintiff was between seven and eight years old, and while playing in the back yard of the house of friends he was visiting, which abutted on the right of way, was attracted by flowers growing on the far side of the rails, whereupon plaintiff's companion opened the gate in the right of way fence and started to pluck the flowers. Plaintiff in some manner fell on the rail and was shocked and burned, receiving permanent injuries. *Held*, that there was no implied invitation or license by defendant to children to enter the premises, and that defendant owed plaintiff no duty to cover the rail, nor did the facts show willful injury.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 15.*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Action by Louis Riedel, by his father and next friend, John M. Riedel, and John M. Riedel in his own right, against the West Jersey & Seashore Railroad Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

See, also, 170 Fed. 816.

Evans and Forster, for plaintiffs in error.

John Hampton Barnes, for defendant in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

GRAY, Circuit Judge. The writ of error in this case brings up from the court below a record disclosing the following facts:

Louis Riedel, who by his father and next friend brought suit in the court below, was a boy between seven and eight years of age, and was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

permanently injured by falling across the electric third rail of the West Jersey & Seashore Railroad Company, the defendant.

The day the injury occurred, he had been taken by his parents from Philadelphia, where they resided, to spend the day with some friends, the yard of whose house abutted against the line of the right of way of said defendant company, just above the village of Westfield, N. J. The right of way of the defendant company near this point, as well as elsewhere, was fenced with a three-strand wire fence, about four feet high, but at the premises in question there was a picket fence dividing the same from the right of way of the defendant company, about five feet in height, which served as part of the line fence of said company, the wire fence coming up to and ending at each end of this picket fence. In this picket fence was a gate opening onto the defendant's right of way.

The defendant company was originally chartered as a steam railroad, but, by the revision of the act of the Legislature of New Jersey concerning railroads, in 1903, the power was conferred upon it to substitute for steam any other motive power which it might deem best adapted to the economical operation of its railroad, and to use such devices and appliances for conducting and distributing power as might be required. Accordingly, at the time of the accident, and for a considerable period prior thereto, the company had installed an electric system for the operation of its road, the electricity being conveyed from the power house through what is known as a "third rail." This rail was situated between the two tracks upon which the cars traveled, but was in close proximity to the rail on one side and ran parallel therewith. It was in all respects like the rail which carried the cars and was without cover or protection of any kind, so that, to a casual observer, there was nothing to distinguish it in appearance from the other rails. The current of electricity carried by this third rail was normally 675 volts, a charge sufficient to seriously injure or even destroy the life of any one coming in contact therewith. This road ran entirely across the state of New Jersey, from Camden to Atlantic City, a distance of some 60 miles. At stations and road crossings, the third rail was covered, so that persons using said stations and crossings were protected therefrom; but, with these exceptions, throughout the entire length of the road, the third rail was uncovered.

On the day of the accident, the plaintiff, Louis Riedel, with two companions of about the same age, a boy and a girl, were playing together in the back part of the lot above described. What then occurred is thus stated:

"Looking through the fence, they saw and were attracted by some flowers growing on the other side of the rails, and went to the gate to open it. Finding it fastened, the plaintiff's companion, as he testified, 'put a nail or a piece of wood, then pulled it out again, and it came open.' Having thus unbolted the gate, the two started to pluck the flowers. The first boy crossed the tracks in safety, but the plaintiff fell, apparently having tripped over something, and, coming in contact with the third rail, was shocked and burned by the electric current, sustaining severe and permanent injuries."

Upon these facts, the court directed a verdict for the defendant, and upon exceptions to this charge of the court, the case comes before us

upon two assignments, alleging error in this action of the court. The facts are simple and undisputed, and the single question for our determination is, whether or not the defendant company owed a duty to the plaintiff to use such care in guarding and protecting this third rail as would have prevented the injury which happened to him, or, as more generally put by the defendant—is a property owner, who maintains on his premises a dangerous agency in the proper exercise and use of his premises, responsible to a child trespassing thereon who is hurt by contact with such agency, if there is nothing about it to entice or attract him, and where the owner has done nothing to invite such trespasser on his premises, or has any reason to expect that he will come upon them?

The exceeding danger presented by the "third rail," which has recently come into use in the operation of important electric roads, when such rail is uncovered and exposed, justly challenges our attention. The character, however, of this dangerous and death-dealing agency must not be allowed to obscure the well-settled principles by which the duty of the owner of premises, upon which such dangerous agency or instrumentality is situated, with respect thereto, is to be determined.

The plaintiff was a trespasser, and it must therefore appear, in order that he may recover from the defendant, that his case is an exception to the ordinary and well-settled rule, that the owner of premises owes no duty to a trespasser, whether an infant or adult, to keep such premises in a nonhazardous condition, or to protect him against concealed dangers lurking thereon. The contention of plaintiff's counsel, urged with much ability and insistence, is that the extreme danger arising from the exposed third rail was a concealed danger, by reason of the fact that the third rail, in size and appearance, was undistinguishable from the other rails by a boy of the immature age of the plaintiff, there being no evidence that he had been informed or in any way made aware of the character of such rail. It is therefore contended that the maintenance of this instrumentality argued such a wanton recklessness as to consequences on the part of the defendant, and willingness to inflict injury, as would render it liable to the plaintiff, even though he were technically a trespasser. Of course, though the owner of premises may owe no duty to guard and protect a trespasser from dangers lurking thereon, he has no right willfully to inflict injury on such a trespasser. It is on this ground that the so-called "spring gun" cases have been decided. Whether the conduct of such owner, in maintaining a dangerous situation or instrumentality on his land, would amount to such a wanton and reckless indifference to consequences as would imply a willingness to inflict an injury on a trespasser, must depend upon the circumstances of the case. There is a class of cases well known, in which it is held that a railroad company is liable, where its servants in charge of moving trains willfully run down a person in full view upon its tracks, even though they have given warning of their approach, and even though such person be a trespasser. Such cases serve to illustrate the proposition, that one may not willfully injure even a trespasser upon his premises. Of this class are the cases referred to by the counsel for plaintiff. Chicago

Transfer R. Co. v. Gruss, 200 Ill. 195, 65 N. E. 693; Chicago Transfer R. Co. v. Kotoski, 199 Ill. 383, 65 N. E. 350; Lafayette, etc., R. Co. v. Adams, 26 Ind. 76.

But these decisions do not support the contention, that the mere maintenance of a dangerous instrumentality upon one's land for ordinary and lawful purposes, and incident to its natural use in carrying on a lawful business, makes such a one a willful tort-feasor with respect to a trespasser who has come within its danger. In the present case, there was nothing willfully injurious in the defendant's installing upon its own premises this third rail, dangerous though it was to those who came in contact with it, for the lawful purpose of operating an electric railway system, nor can we say from that fact alone, or from any other evidence in the case, that the nonprotection of the third rail was such a wanton and reckless indifference to consequences as would legally imply willfulness and intentional wrong, as to any injury that might be occasioned thereby, whether that injury was suffered by an infant or an adult. There is nothing in the case from which the purpose to inflict injury can be inferred, as in the "spring gun" cases, or a willful indifference to consequences, as in the railroad cases above referred to. One's right to maintain for a lawful purpose a dangerous appliance or instrumentality on his own premises, is not limited or qualified by the degree in which it may be dangerous.

The precise question here involved has recently been decided by the Supreme Court of New Jersey, in the case of Sutton against the defendant in the present case. 73 Atl. 256. The facts were practically the same. The action was for the death of a child 13 years of age, who, in crossing the tracks of the defendant at a point other than a public crossing or station, came in contact with a third rail charged with electricity, and was killed. It was conceded that the decedent had no legal right to go upon defendant's premises at the point where he crossed the tracks. The court below sustained a demurrer to the declaration, and gave judgment for the defendant. The Supreme Court affirmed that judgment, saying:

"The real distinction running through the cases seems to me to be this:

"Where the landowner in the development of his property, and solely for the purpose of obtaining a more beneficial user therefrom, installs upon it an appliance which will be dangerous to people coming in contact with it, he is under no obligation to trespassers to so guard it that they shall not be injured; but where he installs the appliance for the purpose of inflicting injury upon the persons or property of those who unlawfully come upon his land, he is liable when harm is inflicted by such appliances. * * *

"The right of the plaintiff, therefore, depends upon whether the defendant company owes to a trespasser upon its right of way the duty of using care either to safeguard its third rail in such a way as to prevent him from coming in contact with it, or else of giving him notice that such contact is dangerous to life and limb. The rule is settled in this state that a landowner is under no obligation to a trespasser to keep his premises in a nonhazardous state; that, as to him, the landowner's sole duty is to abstain from acts willfully injurious. And this rule is applicable whether the trespasser is an infant or an adult.

"In the case in hand, the defendant installed the electric third rail system for the more complete beneficial use of its property. In doing so it acted under legislative sanction. * * *

"Having the lawful right to install this system for the operation of its road, it was within the protection of the rule which we have been discussing, and was under no obligation to the deceased except to abstain from acts willfully injurious to him. That it failed in this obligation is not suggested in the declaration."

There is nothing in the record to bring this case within the ratio decidendi of the so-called "turntable" cases, and other cases decided on the same principle, to which the plaintiff refers. In the present case, the railroad property was guarded by a statutory fence, and the gate through which the plaintiff and his companion entered upon the railroad premises was fastened by a bolt, which had been withdrawn by them. There is no evidence that there was anything to allure or entice children to go upon the railroad premises at the place where the accident occurred, and none that children had ever been in the habit of entering upon the railroad premises through this gate, or otherwise, for play or amusement, or for any other purposes. The motive of the children in attempting to cross the railroad, as testified by the children themselves, was to gather flowers growing on the other side of the railroad property. The present case, therefore, differs obviously from the cases referred to, the decisions in them being founded upon the maintenance of a dangerous appliance or object on the owner's premises which presented enticement and allurements to children, and to which they were in the habit of resorting, to the knowledge of the defendant. There was thus an implied invitation or license to the children to enter upon the premises, by reason of which they were divested of the character of trespassers, and there was imposed upon the defendants the duty of exercising reasonable care for their protection. *Railroad Company v. Stout*, 17 Wall. 657, 21 L. Ed. 745; *Snare & Triest Co. v. Friedman*, 169 Fed. 1, 94 C. C. A. 369; *Cooke v. Midland Great West Ry. of Ireland*, L. R. App. Cas. 1909, pt. 2, 229.

However deplorable these cases may be, we cannot, in order to remedy them, disregard those well-settled principles which have heretofore regulated and limited the restraint imposed upon landowners in the use of their own premises. If the comparatively recent use of the third rail has developed dangers to the public at large hitherto unknown, the Legislature of the state may feel called upon to exercise its undoubted police power, by imposing upon the users of these instrumentalities such precautions in their use as will measurably afford protection to those coming within their danger.

The judgment below is affirmed.

In re ROADARMOUR.

(Circuit Court of Appeals, Sixth Circuit. March 17, 1910.)

No. 2,003.

1. APPEAL AND ERROR (§ 671*)—REVIEW—RECORD—FACTS.

Where, on a petition to review an order disallowing an attorney's claim for compensation for successfully resisting the allowance of claims against a bankrupt's estate, there was no finding of facts by the referee or judge, but the record attached to the petition for review was limited to the orders of the referee and District Court, and the opinion of the District Judge, which was based on the absence of authority to allow the claim under circumstances such as are here presented, it could not be considered on review that petitioner's employment was had only after the trustee had refused to resist the claims.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 671.*]

2. BANKRUPTCY (§ 482*)—ATTORNEY FOR CREDITORS—RESISTANCE OF CLAIMS—FEES—ALLOWANCE FROM ESTATE.

Bankr. Act July 1, 1898, c. 541, § 64b, cl. 3, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), permits allowance of one reasonable attorney's fee for professional services actually rendered to the petitioning creditors in involuntary cases and to the bankrupt in involuntary cases while performing the duties prescribed by the act, and to the bankrupt in voluntary cases as the court may allow; and section 62, and General Order 35, par. 3 (32 C. C. A. xxxiv, 89 Fed. xlii), authorizes the trustee and receiver to employ attorneys, whose compensation is part of the expenses of the trustee or receiver. Section 64b, cl. 2, provides that, when property of the bankrupt transferred or sold shall have been recovered for the benefit of the bankrupt's estate by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery may be paid in full as a prior claim. *Held*, that an attorney employed by creditors to oppose claims after the appointment of a bankrupt's trustee is not entitled to compensation from the estate for his services, unless, at least, where the trustee has refused to make defense.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 482.*]

Petition to Review an Order of the District Court of the United States for the Eastern Division of the Southern District of Ohio.

In the matter of the bankruptcy proceedings of Graham, Riggs & Co. and William D. Graham. On petition of A. L. Roadarmour to review an order disallowing his claim for legal services in successfully resisting the allowance of certain claims presented against the bankrupt's estate. Affirmed.

A. L. Roadarmour, pro se.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

KNAPPEN, Circuit Judge. The petitioner seeks to review the action of the District Court in disallowing his claim for legal services in successfully resisting the allowance of certain claims presented against the bankrupt's estate. The record discloses that petitioner was not employed by the trustee to make such opposition, but that he was employed in that behalf by certain of the creditors of the bankrupt. It is alleged in the petition for review that petitioner's employment by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

creditors was had after the trustee in bankruptcy had refused to resist the allowance of the claims in question. There is nothing in the record presented to us sustaining this allegation. No finding of facts was made, either by the referee, whose order of disallowance was reviewed by the District Judge, or by the judge. The record attached to the petition for review is limited to the order of the referee, the order of the District Court, and the opinion of the District Judge, which contains the statement that the claims defeated aggregated a considerable amount and that petitioner's services "were valuable and resulted in the disallowance of such claims." The District Judge based his disallowance of petitioner's claim upon the entire absence of authority to allow it "under circumstances such as are here presented."

Petitioner discusses the question in his brief as if the refusal of the trustee in bankruptcy to oppose the allowance of the claims in question, and petitioner's employment in consequence of such refusal, were established by the record. But such is not the case. The allegation in the petition for review filed in this court is no evidence of such fact; nor is the allegation referred to put in issue. We are confined to the record attached to the petition or sent up in connection with the proceedings to review. It is clear that upon the record presented petitioner's claim was rightly disallowed. There is no express statutory authority for the allowance asked. Section 64b, cl. 3, of the bankrupt act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]), permits "one reasonable attorney's fee for professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein described, and to the bankrupt in voluntary cases, as the court may allow." The trustee and receiver are allowed to employ attorneys, whose compensation is part of the expense of the trusteeship or receivership. Bankr. Act, § 62; Gen. Order No. 35, par. 3 (32 C. C. A. xxxiv, 89 Fed. xiii). See, also, *In re McKenna* (D. C.) 137 Fed. 611, 615.

Section 64b2 of the bankrupt act provides that when property of the bankrupt transferred or sold by him shall have been recovered for the benefit of the estate of the bankrupt by the efforts, and at the expense of one or more creditors, the reasonable expenses of such recovery may be paid in full as a prior claim. And in such case the court of bankruptcy probably has authority to make an allowance by virtue of its general equity powers. *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157; *Receivers v. Staae*, 133 Fed. 717, 66 C. C. A. 547. It is obvious that petitioner's claim is not brought within either of the express provisions above referred to.

The rule is generally recognized that a trustee in bankruptcy represents the bankrupt's estate and creditors generally in respect to opposition to claims presented after the appointment of the trustee. See *In re Columbia Iron Works* (D. C.) 142 Fed. 234, where this subject is discussed in an opinion by Judge Swan. In recognition of this principle it has been held that a creditor may not institute a proceeding, under section 57 of the bankrupt act, to re-examine the allowed

claims of any creditor, without the concurrence of the trustee. In *re* Lewensohn, 57 C. C. A. 600, 121 Fed. 538, and cases cited. It has been held by this court that, where the trustee in bankruptcy refuses to appeal from an order of the District Court allowing claims, such court may, in its discretion, allow an appeal to be taken by creditors, although the better practice is to order the trustee to appeal, or to allow the dissatisfied creditor to appeal in his name; he being in either case indemnified against liability for costs. *Ohio Valley Bank Co. v. Mack*, 163 Fed. 155, 89 C. C. A. 605, and cases cited in opinion.

No authorities are cited in support of a proposition that an attorney employed by creditors to oppose claims, after the appointment of a trustee, may be allowed compensation for such services, unless in a case where the trustee has improperly refused to make defense. Such a rule would open the door to a confused and disorderly practice, entirely out of harmony with the theory of the bankrupt act. We do not wish to be understood as holding that creditors may not be permitted, under proper safeguards, to defend against the allowance of claims where the trustee refuses to make defense, or that the bankruptcy court has no authority in such case, under its general equity powers, to allow compensation to attorneys employed by creditors for the purpose of such defense, as was permitted in *Re Little River Lumber Co.* (D. C.) 101 Fed. 558. It is enough to say that such a case is not before us.

The order of the District Court should be affirmed.

In *re* ROHRER.

(Circuit Court of Appeals, Sixth Circuit. March 8, 1910.)

No. 2,030.

BANKRUPTCY (§ 217*)—RESTRAINING PROCEEDINGS IN STATE COURTS—PROCEEDINGS IN REM.

Where a mortgage lien was obtained long prior to a period of four months next preceding the filing of a bankruptcy petition against the mortgagor, and a foreclosure proceeding was instituted in a state court, also prior to the institution of the bankruptcy proceedings, though within the four-months period, the state court, having first acquired complete jurisdiction thereof, was entitled to retain the same; and hence the bankruptcy court had no authority to stay such proceedings, the power of stay conferred by Bankr. Act July 1, 1898, c. 541, § 11a, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3426), with reference to a suit on a claim from which a discharge would be a release, not being applicable to the proceeding in rem involved in the foreclosure.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 340; Dec. Dig. § 217.*]

Federal courts restraining proceedings in state courts, see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575; *Copeland v. Bruning*, 63 C. C. A. 437.]

Petition to Review an Order of the District Court of the United States for the Southern District of Ohio, in Bankruptcy.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

In the matter of the bankruptcy of David Rohrer. On petition to review an order of injunction against Charles F. Hofer, staying for a period of 12 months a sale of North Dakota lands under a foreclosure decree against David and Ada V. Rohrer. Order reversed, and proceeding dismissed.

Ferdinand Jelke, Jr., for petitioner.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

WARRINGTON, Circuit Judge. This is a petition to revise in matter of law an order of injunction made by the court below against Hofer, staying for a period of 12 months the sale of certain lands, situated in Burleigh county, N. D., under a decree of foreclosure theretofore obtained by him in the district court of that county against David Rohrer and Ada V. Rohrer.

The validity and priority of petitioner's mortgage lien are admitted. All statutory steps having been taken to give to the court jurisdiction both of the lands and the parties (Rev. Codes N. D. [Ed. 1905] §§ 6837, 6843, 6845, 6848), no objection is made in that regard, nor concerning the regularity of the proceedings had in the suit. The mortgage and the notes secured by it were executed and delivered by David Rohrer and Ada V. Rohrer to Hofer in Montgomery county, Ohio, February 28, 1908, and the notes were payable on demand at the German National Bank of Cincinnati. The mortgage was recorded in Burleigh county May 4, 1908. The foreclosure suit was begun August 31, 1909. Decree in foreclosure, including a personal judgment against Rohrer for any deficiency, was entered October 25, 1909. Special writ of execution was issued November 2, 1909, and the sheriff on the same day began advertisement for sale of the land on December 14, 1909.

On November 5, 1909, an involuntary petition in bankruptcy was filed against Rohrer in the court below, and on the 15th of the month he was adjudged a bankrupt, and a receiver was appointed. On the 29th of the month certain of the creditors filed a motion, supporting it with affidavits, in the court below, for an injunction against Hofer to stay the sale ordered as aforesaid by the Burleigh county district court, notifying Hofer and bringing him into the proceeding. The motion was granted and the injunction issued on December 9th; and on the 17th of the month Hofer filed a motion for rehearing and to set aside and vacate the order of injunction. His motion was overruled on January 4, 1910. Meanwhile, on December 21, 1909, three trustees were chosen and qualified in the bankruptcy proceeding.

The basis of the injunction was in effect one of alleged hardship, excepting a single claim made as to place of performance of the mortgage contract. The mortgage allows unpaid taxes on the land to be discharged by the mortgagee and interest to be recovered thereon, together with interest on the loan after default, at the rate of 12 per cent. per annum, and also allows an attorney's fee in the event of foreclosure. These allowances are admittedly in accord with the statute law of North Dakota; but it is objected that they are not authorized by the laws of Ohio. The remaining complaint is that under the laws

of North Dakota the sheriff is authorized to sell the lands for cash in not less than quarter sections and without appraisalment; and it is urged that if the lands were sold in smaller tracts, at private sale, on terms of one-third cash and deferred payments secured by mortgages, a much larger sum could be realized for the creditors and without detriment to the mortgagee.

The mortgage lien of Hofer was obtained long prior to a period of four months next preceding the date of the filing of the petition in bankruptcy against Rohrer; and while the suit was commenced and the decree of foreclosure rendered within that period, neither the mortgage lien nor the judgment lien is denounced by any provision of the bankruptcy statute. *Metcalf v. Barker*, 187 U. S. 165, 174, 23 Sup. Ct. 67, 47 L. Ed. 122; *Hiscock v. Varick Bank of New York*, 206 U. S. 28, 41, 27 Sup. Ct. 681, 51 L. Ed. 945. The state court acquired complete jurisdiction and control over the defendants and the property prior to the commencement of the bankruptcy proceeding against Rohrer, and that jurisdiction was not divested by anything done in that proceeding; "the rule being applicable that the court which first obtains rightful jurisdiction over the subject-matter should not be interfered with." *Pickens v. Roy*, 187 U. S. 177, 180, 23 Sup. Ct. 78, 47 L. Ed. 128; *Farmers' Loan Co. v. Lake St. Rd. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667; *Leidigh Carriage Co. v. Stengel*, 95 Fed. 637, 645, 37 C. C. A. 210. The trustees of the bankrupt must therefore seek relief in the Burleigh district court. *In re Gerdes*, 102 Fed. 318, 320; *Sample v. Beasley*, 158 Fed. 607, 85 C. C. A. 429; *In re McKane*, 152 Fed. 733; s. c. 158 Fed. 647. Power vested by section 11a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]) to stay a suit "founded upon a claim from which a discharge would be a release" is not applicable to the proceeding in rem involved in the action to foreclose. *Tennessee Marble Producer Co. v. Grant*, 135 Fed. 322, 67 C. C. A. 676.

The order of injunction is reversed, and the proceeding in that behalf dismissed, with costs.

In re KAYSER.

Appeal of WEISBROD & HESS.

(Circuit Court of Appeals, Third Circuit. January 17, 1910.)

Nos. 79, 1,300.

1. BANKRUPTCY (§ 164*)—CREDITORS OF BANKRUPT'S WIFE—PAYMENT—"PREFERENCE."

That a bankrupt who was insolvent paid \$2,600 of his money to creditors of his wife did not constitute a preference under Bankruptcy Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), defining "preference," though the effect of such payment was to reduce the percentage which would otherwise be paid to the petitioning creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. § 164.*

For other definitions, see Words and Phrases, vol. 6, pp. 5498, 5499; vol. 8, p. 7759.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. BANKRUPTCY (§ 180*)—FRAUDULENT CONVEYANCES—INTENT.

Payment by a bankrupt while insolvent, on his wife's separate debt, cannot be recovered by the bankrupt's trustee as fraudulent in the absence of evidence and a finding that the bankrupt was actuated by a fraudulent intent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 252; Dec. Dig. § 180.*]

3. FRAUDULENT CONVEYANCES (§ 271*)—FRAUD—BURDEN OF PROOF.

One averring fraud as a ground for vacating a conveyance has the burden of proving the fraud alleged.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 796-798; Dec. Dig. § 271.*]

Appeal from the District Court of the United States for the District of New Jersey.

In Equity. In the matter of the bankruptcy proceedings of Albert Emil Kayser. Bill by the trustee against Weisbrod & Hess to recover a payment made by the bankrupt alleged to be fraudulent and to constitute a preference. From a judgment for the trustee, defendants appeal. Reversed, with instructions.

Frederick A. Rex, for appellants.

Herbert A. Drake, for appellee.

Before BUFFINGTON, Circuit Judge, and J. B. McPHERSON, District Judge.

J. B. McPHERSON, District Judge. Albert Emil Kayser having been adjudged a bankrupt, his trustee seeks by the present bill in equity to recover from Weisbrod & Hess \$2,600 of the bankrupt's money which they received from him under circumstances that are said to make the payment preferential. The testimony shows the facts to be as follows: The bankrupt's wife inherited from her mother the fee of a house in which the business of a hotel and saloon had been carried on for several years before the mother's death. The bankrupt, his wife, and her mother, had lived together in the house, and the household furniture on the premises was probably the property of the mother; but the liquor license was in the name of the bankrupt, and the business of the hotel and saloon was under his control. In 1896 Mrs. Kayser, who had then become the owner of the house, borrowed \$2,000 from Weisbrod & Hess, and secured it by a duly recorded mortgage on the real estate. In 1901 she borrowed from the same persons \$1,550 additional, securing the loan by a bond and warrant in which her husband joined, and this bond was also entered of record. The remaining facts upon which the present controversy arises are thus stated in the opinion of the District Court:

"On October 7, 1905, less than four months before the petition in bankruptcy was filed, Kayser, by written contract, agreed to sell his saloon business in Camden, N. J., to one Valentine Schwoebel, for the sum of \$3,900. His wife was the owner of the house in which the business was carried on. The purchase price of \$3,900 was paid by Schwoebel in the following manner: \$500 in cash to Kayser, on October 7, 1905, and \$1,400 in cash to Kayser, on November 4, 1905. On the last-mentioned date Schwoebel also gave his bond and warrant to the defendants for \$2,000. The defendants thereupon credited that sum on the indebtedness of Kayser's wife to them, and Kayser gave Schwoebel

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a receipt in full for the purchase price of \$3,900. About December 14, 1905, Kayser's wife paid in cash to the defendants the sum of \$600, which was also credited on her indebtedness to them. This sum was paid out of the \$1,400 received by Kayser on November 4th. It is these two sums of \$2,000 and \$600 that the complainant now seeks to recover from the defendants."

The District Court further found that the business was the bankrupt's, and not his wife's and that the purchase price was his, and not hers.

We accept these findings as correct, but we are unable to draw the conclusion that the payment was a "preference" as that word is defined by the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]). Section 60a declares, *inter alia*, that:

"A person shall be deemed to have given a preference, if, being insolvent, he has within four months, etc., made a transfer of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

As we think, one requirement of this definition has not been met by the foregoing facts. It is true that the bankrupt was insolvent when the \$2,600 was paid. It is also true that the money was his, and that the effect of paying it to Weisbrod & Hess will be to reduce the percentage that would otherwise be paid to the petitioning creditor; but it is not true that Weisbrod & Hess were creditors of the bankrupt. On the contrary, the undisputed testimony shows that they were creditors of his wife, and that the loans upon which the \$2,600 was paid and credited were made to her and upon the credit of her separate property. In this essential particular the facts do not fit the statutory definition of a preferred creditor. The learned judge has stated that the payment may have been preferential, but he does not so declare it in terms. His statement is contingent, and is wholly based upon the assumption that the debt was the bankrupt's, and not his wife's:

"If it be assumed that the indebtedness to the defendants was created in connection with the saloon business, then, since that business was Kayser's and not his wife's, and since Kayser was insolvent on November 4 and December 14, 1905, complainant is entitled to recover because of the unlawful preference. * * * It follows, therefore, if we assume Kayser and not his wife to have been the defendants' debtor, that the defendants acquired a preference contrary to section 60b of the bankruptcy act."

But we think it cannot be assumed that Kayser was the debtor. The district court does not find that the fact was so; and, as we have just stated, the uncontradicted testimony leads to the opposite conclusion.

After the examiner had taken the testimony upon the bill as originally filed, the counsel for the trustee apparently felt the weakness of his case; for, after both sides had put in their evidence, he sought and obtained permission to amend by charging the transaction to have been, not a preference, but a fraudulent transfer by the bankrupt in violation of section 67e. After this amendment was allowed, some further testimony was taken, and the argument both in the District Court and in the Court of Appeals was directed to the charge of fraud as well as to the charge of unlawful preference. But on the point of fraud the difficulty is the absence of evidence from which the neces-

sary intent can be found. The learned judge does not find that the payment of the \$2,600 was fraudulent; he contents himself with showing what is perfectly true—that Weisbrod & Hess received money that belonged to the bankrupt, and applied it in partial payment of a debt that was due by his wife. But although he concludes that they must account to the trustee for this money, he is careful—and we think he was properly careful—to omit the finding that the payment was intended by the bankrupt to delay, hinder, or defraud his creditors. In our opinion, the evidence would not have justified such a conclusion, and the learned judge was right in declining to commit himself to that position. But as a finding of fraudulent intent is nevertheless essential before a decree in favor of the trustee can be supported, we have examined all the testimony that bears upon this point, and have reached the result that in our opinion the transaction was in good faith. We think that the only intention of the bankrupt was innocent, and that he had no other purpose than to diminish his wife's debt by making a partial payment thereon. It is probable that the original loans may to some extent at least have been applied in aid of the business, and it was therefore proper and reasonable that as the business was now coming to an end he should devote a portion of the proceeds to clear off some of the burden that she had placed upon her property. Such an intent would not of itself be fraudulent, and the trustee offered no evidence which is sufficient to turn an apparently innocent transaction into one which was in fact unlawful. No authority need be cited for the proposition that he who avers fraud takes upon himself the burden of proving it; and the very best that can be said for the testimony in the present case is that it fails to support the burden and leaves the charge in serious doubt.

The decree is therefore reversed, with costs, and the District Court is instructed to dismiss the bill.

PEOPLE'S SAVINGS BANK & TRUST CO. v. ROGERS.

(Circuit Court of Appeals, Fifth Circuit. March 29, 1910.)

No. 1,921.

1. RECEIVERS (§ 202*)—ADMINISTRATION OF ESTATE—HEARING.

Where, in proceedings before a master to audit and hear objections to a receiver's account, a bank intervened to prove its account for money alleged to have been borrowed by the receivers under order of court, it was error to render a decree against the bank, requiring it to return a payment made by the receiver, without pleadings or process against the bank, or its being awarded its day in court.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 403; Dec. Dig. § 202.*]

2. RECEIVERS (§ 155*)—BORROWING MONEY—ORDERS—PRIORITY.

A receiver, authorized to complete certain contracts, was authorized to borrow from time to time \$5,000, and to execute notes in his official capacity which would constitute a first lien on the estate. Thereafter he was authorized to borrow \$1,000 to purchase certain appliances, and again to borrow \$5,000 more, and to issue receiver's certificates therefor. *Held*, that such orders should be construed together, and created a preference

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for such loans to the amount of \$11,000, but did not establish for the receiver a continuing credit; the authority being exhausted on a loan to the amount specified being negotiated.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 287; Dec. Dig. § 155.*]

3. RECEIVERS (§ 97*)—BORROWING MONEY—RENEWAL OF NOTES.

Where a receiver, authorized to borrow money, had not sufficient funds to take up the original notes when due, their renewal according to the custom of banks did not work a change in the original loan.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 181; Dec. Dig. § 97.*]

4. RECEIVERS (§ 163*)—PAYMENTS—COURT ORDER—VIOLATION—EFFECT.

Where a bank loaned money to a receiver under court orders entitling it to a preference, the fact that the receiver made payment to the bank on such date in violation of an order directing that he pay out no more money until further order of the court could not preclude the bank from offsetting its privileged indebtedness, if any, as against such payment.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 312; Dec. Dig. § 163.*]

Appeal from the District Court of the United States for the Northern District of Alabama.

Receivership proceedings against C. M. Burkhalter & Co. From an order disallowing an alleged preferred claim filed by the People's Savings Bank & Trust Company, and from a decree against the bank, it appeals. Reversed and remanded.

James Weatherly, for appellant.

John London, for appellee.

Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

FOSTER, District Judge. In this case it seems that F. H. Allison was appointed co-receiver of C. M. Burkhalter & Co. on December 3, 1903, for the express purpose of completing certain contracts; the other receiver having been appointed some time previously. By the same order he was authorized to borrow money to carry on the work; the order reading:

"It is further ordered, adjudged, and decreed, as it may be necessary for the said receiver, Allison, to borrow money to carry out this decree, that he be authorized to borrow from time to time the sum of \$5,000, or so much thereof as may be necessary, for which he may execute notes in his official capacity as receiver, which shall constitute a first and prior lien upon the estate of the said C. M. Burkhalter & Co."

On March 10, 1904, he was further authorized to borrow \$1,000 with which to purchase steam drills and a boiler, and on June 20, 1904, he was again authorized to borrow \$5,000 by the following order:

"This cause coming on to be heard upon the petition of F. H. Allison, receiver of C. M. Burkhalter & Co., praying for an order authorizing him to borrow the sum of \$5,000, temporarily, to carry on said contract, which he is now carrying on under the order of this court, and now being duly considered by the court, it is ordered, adjudged, and decreed that said F. H. Allison, as receiver of C. M. Burkhalter & Co., be and he is hereby authorized and empowered to borrow said sum of money, namely, \$5,000, and, if necessary, to borrow that amount, and issue receiver's certificates therefor."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Under the authority of these three orders Allison negotiated various loans from the People's Savings Bank & Trust Company, appellant herein, and on April 15, 1905, filed an account as receiver, on which he placed appellant as preferred creditor for \$11,000. After filing his account, Allison paid the bank \$4,285.55, on April 26, 1905, and then seemed to disappear from the scene, as Thos. M. Rogers, appellee, was apparently appointed to succeed him.

Certain creditors objected to the account, and it was referred to a special master to audit and to hear the objections. Into these proceedings the bank interjected itself, presumably for the purpose of proving the correctness of the account, with the result that the master denied its claim for \$11,000 as a preferred creditor, found that it was entitled to \$600, but only as an ordinary creditor, and recommended that it be required to turn over to the receiver the sum of \$4,285.55, paid it by Allison on April 26, 1905.

This last recommendation the master seems to have based on the assumption that the court had issued an order on March 29, 1905, directing that Allison pay out no money for any purpose whatever until the further orders of court. Exceptions were taken to the master's report, but after trial by the court the report was confirmed, and a decree was entered against the bank in the sum of \$4,285.55, with interest, the whole amounting to \$5,038.27, and the bank was ordered to pay the said sum to Thos. M. Rogers, appellee.

The record before us is incomplete and unsatisfactory and we cannot determine from it whether the bank is entitled to anything or not. It seems clear, however, quoad the decree ordering it to pay over the sum of \$5,038.27, appellant has had no day in court. The bank merely appeared before the master by counsel, for the purpose of offering evidence to support the account as to the amount allowed it by the receiver, and without pleadings or process a money judgment has been rendered against it.

The orders authorizing the receiver to borrow money must be considered together, and undoubtedly create a preference for the amount of \$11,000; but they do not establish for him a continuing credit, which was the construction given them by the bank.

Some of the notes seem to have been renewed at maturity without actual payment. If the receiver had not sufficient funds to take up his original notes when due, their renewal according to the usual custom of banks would work no change in the original loan. But when the amount authorized by each order had been once repaid the transaction was at an end, and any loan thereafter made to the receiver by the bank is not entitled to preference.

While the payment of \$4,285.55, on April 26, 1905, was in violation of the court's order, still, if at the time there was anything due the bank as a privileged creditor, it would be idle not to permit the bank to offset it as against this payment.

The decree herein is reversed, and the cause is remanded, with instructions that it be referred to the special master to restate the account between the bank and the receiver in conformity with these views.

JOHNSONBURG VITRIFIED BRICK CO. v. YATES.

(Circuit Court of Appeals, Third Circuit. January 24, 1910.)

No. 90 (1,307.)

1. PLEADING (§ 248*)—AMENDMENT—MATERIALITY.

Where plaintiff sought to recover a license fee for the construction of certain patented brick kilns, and alleged that in consideration of the license defendant promised to pay plaintiff her "price," and that such price was \$300 per kiln, and was just and reasonable, an amendment expressly declaring that defendant had promised to pay \$500 a kiln was not objectionable as changing the cause of action sued on, in that the claim first filed was based on a quantum meruit.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 702; Dec. Dig. § 248.*]

2. LIMITATION OF ACTIONS (§ 182*)—PLEADING.

Under the law of Pennsylvania, a party cannot claim the benefit of the statute of limitations unless he has pleaded it.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 676; Dec. Dig. § 182.*]

3. APPEAL AND ERROR (§ 173*)—LIMITATIONS—QUESTIONS NOT RAISED AT TRIAL.

The statute of limitations cannot be first set up in the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1104; Dec. Dig. § 173.*]

4. APPEAL AND ERROR (§ 1056*)—RULINGS ON EVIDENCE—PREJUDICE.

Defendant was not prejudiced by the court's exclusion of certain evidence, offered on cross-examination, relating to a collateral inquiry mainly, if not wholly, concerning transactions between husband and wife.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.*]

5. APPEAL AND ERROR (§ 1058*)—RULINGS ON EVIDENCE—PREJUDICE.

Defendant was not prejudiced by the court's erroneous exclusion of cross-examination of plaintiff's husband relating to the difference between certain patents obtained by him, where the patents and the differences between them were afterwards fully described by other witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4200-4206; Dec. Dig. § 1058.*]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Action by Jessie Yates against the Johnsonburg Vitrified Brick Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Fred H. Ely, for plaintiff in error.

J. S. Ferguson, for defendant in error.

Before GRAY and LANNING, Circuit Judges, and J. B. McPHERSON, District Judge.

J. B. McPHERSON, District Judge. This case was fully tried out on the merits, and was submitted in a charge to which no exception was taken. Neither party asked for instructions, and the only ques-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tions that are presented to us arise upon the admission or rejection of evidence, and upon the allowance of an amendment to the plaintiff's statement of claim.

Taking up first the amendment, we may observe that it seems to have been superfluous, and therefore can have done no harm. The statement of claim averred that the plaintiff owned a patent for improvements in brick kilns, and had agreed to license the defendant, "in consideration whereof the defendant then and there promised to pay the plaintiff her price for a license to build, remodel, and operate said kilns, and the plaintiff avers that her price for a license to build or remodel and operate such brick kilns is \$500 per kiln; that such price is just and reasonable." After the plaintiff had put in her case, the defendant moved for a compulsory nonsuit on the ground of variance, asserting that, although the statement of claim was based upon a quantum meruit, the testimony tended to prove an express contract. Thereupon the plaintiff, *ex majori cautela*, asked and was permitted to amend by adding a count declaring that the defendant had expressly promised to pay \$500 per kiln. The allowance was excepted to on the ground that the amendment set up a different cause of action from the cause originally stated. It is our opinion, however, that the amendment added nothing material. If the defendant promised to pay the plaintiff "her price," and such price was \$500 per kiln, it was not essential to add another formal averment that a direct promise to pay \$500 was expressly made. The amendment did little more than amplify the statement in one particular, and the distinction sought to be drawn seems too refined to be supported. Moreover, even if the cause of action had been changed, we should hesitate to interfere with the discretion of the Circuit Court, unless the defendant was injured thereby. The injury alleged is that the statute of limitations had run at the time of the trial; but it is a sufficient answer to this allegation that no such complaint was made in the court below. In Pennsylvania a party does not benefit by the statute of limitations unless he pleads it, and the defendant did not plead it, or object to the amendment on that ground, or ask for an instruction that the statute was a bar. The question cannot be raised in this court for the first time.

Other exceptions relate to an assignment of the patent. The patentee was the plaintiff's husband, and had assigned the patent to her in December, 1899. The defendant asserted that he had executed a second assignment to her in August, 1906, and attempted upon cross-examination to find out why this was done. The court ruled out the questions, and this action is assigned for error. Without discussing the reasons that were given for excluding the testimony, it is enough to say that we have not been convinced that any injury was done to the defendant by closing the door upon the subject. It appeared to be a collateral inquiry—a matter that concerned mainly, if not wholly, the husband and his wife. If its relevancy had been clear, the objections might have force; but the argument has failed to satisfy us that the existence of the second assignment had any bearing upon the issue, except, perhaps, so remotely that the possible connection may safely be neglected.

There is more substance in the first and second assignments of error.

The plaintiff's husband had taken out two patents, one in 1882 and the other in 1899. The suit was upon the second, and one of the substantial defenses was that he had not built the kilns in accordance with the patent. He was the important witness for the plaintiff, and was asked on cross-examination to explain the difference between the patents. These questions were excluded on the ground that they were not cross-examination, and upon this point we are obliged to differ from the trial judge. The question would apparently have been proper, even if it had been asked of any witness acquainted with both patents; but, when the relation of this witness to the plaintiff and to the whole case is further taken into account, it is clear, we think, that much latitude in his cross-examination should have been permitted. If, therefore, the inquiry into the difference between the patents had been abandoned at this point by the defendant in deference to the court's ruling, we should have been compelled to regard the error as serious, and might have felt bound to reverse for that reason. But it is apparent, from a full examination of the stenographer's notes, that the differences to which the questions were directed were afterwards described by other witnesses, and therefore that the defendant succeeded in getting before the jury the same matter to whose exclusion these assignments are intended to apply. For example, the defendant offered the patent of 1882 in evidence, and as both patents were thus before the jury, a full comparison was possible, and may, indeed, have been made; and, further, several witnesses testified concerning the method of building the kilns under the patent of 1882, and the method that was followed under the contract in suit; so that the subject seems to have been gone into as fully as the defendant desired. For this reason the rulings did no visible harm, and the first and second assignments of error must therefore be overruled.

The remaining assignments do not require special notice. We have given them careful attention, but regard them as of minor importance. None of them should be sustained. It may be that the plaintiff has recovered a substantial verdict upon evidence that leaves something, perhaps a good deal, to be desired; but the trial judge must have been better informed upon the subject than we can be, and he considered and refused a motion for a new trial.

The judgment is affirmed, with costs.

JULIUS KESSLER & CO. v. GOLDSTROM.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1910.)

No. 3,062.

1. TRADE-MARKS AND TRADE-NAMES (§ 87*)—INFRINGEMENT—INJUNCTION.

Where defendant in fact sold three bottles of whisky bearing complainant's trade-mark, but which was a spurious article prepared by defendant, to complainant's detectives, and it was also shown that defendant had in his possession a supply of labels carrying complainant's trade-mark, which might be easily affixed to spurious goods, so as to palm it off on the public for complainant's straight whisky, the fact that the sale to the detectives was by complainant's solicitation did not preclude complainant from an injunction, under the rule that a plaintiff cannot recover damages for an act done by defendant at plaintiff's solicitation.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 96; Dec. Dig. § 87.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 66*)—UNLAWFUL COMPETITION—INJUNCTION.

Defendant's acts constituted a continuing menace to complainant's business, entitling complainant to injunctive relief.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 66.*]

Unfair competition in use of trade-mark or trade-name, see notes to *Scheuer v. Miller*, 20 C. C. A. 165; *Lare v. Harper & Bro.*, 30 C. C. A. 376.]

3. TRADE-MARKS AND TRADE-NAMES (§ 98*)—INFRINGEMENT—PROFITS—DAMAGES.

An accounting of profits resulting from the infringement of a trade-mark will be denied, where the damages or profits are trivial or disproportionate to the expense of taking an account.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. § 98.*]

Appeal from the Circuit Court of the United States for the District of Nebraska.

Suit by Julius Kessler & Co. against Solomon S. Goldstrom. From a decree dismissing the bill, complainant appeals. Reversed and remanded, with instructions.

James L. Hopkins, for appellant.

Sylvester R. Rush, for appellee.

Before HOOK and ADAMS, Circuit Judges, and AMIDON, District Judge.

ADAMS, Circuit Judge. This is an appeal from the decree of the Circuit Court dismissing complainant's bill, brought to secure an injunction against infringement of a trade-mark and for an accounting.

It being conceded that complainant, Kessler & Co., was the owner and entitled to the sole and exclusive use of the words "W. H. McBrayer" as a trade-mark in the sale of whisky, the only question for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

decision is whether defendant, Goldstrom, has infringed that trade-mark. The facts are these: Complainant, having reason to suspect the defendant, employed two detectives to visit him at his place of business and ascertain the facts. They went, and (omitting unnecessary details) asked if they could buy some "W. H. McBrayer" whisky. A purchase of three bottles resulted, each bearing complainant's trade-mark. The testimony concerning the negotiation is somewhat conflicting. The defendant testified that he informed the purchasers that the liquor sold to them was not the genuine McBrayer whisky. Complainant's witnesses testified that defendant did not so inform them. This conflict, if material, is irreconcilable; and it behooves us to look elsewhere for truth.

It is undisputed that defendant sold whisky, which was not genuine "W. H. McBrayer" whisky, with a label on the bottles showing that it was. The contents of two of these bottles were analyzed by a competent chemist, and found to be an immature alcoholic solution, with beading oil added to make it look attractive. The same chemist analyzed complainant's "W. H. McBrayer" whisky, and found it to be a well-matured, genuine whisky. In fact, defendant admits that what he sold was not genuine whisky, but was a liquor of an inferior kind, which he had put up. It is also undisputed that defendant had in his possession a supply of labels carrying complainant's trade-mark. These were conveniently at his place of business; but defendant claims that he had them to affix to packages of complainant's genuine whisky when he sold it. His present contention is that proof of the sale of the three bottles in question (the same being all that were affirmatively shown to have been improperly sold by defendant) to emissaries of complainant is not sufficient to warrant a decree as for an infringement. The learned trial judge so ruled, saying:

"It is a fundamental rule of law that a plaintiff has no cause of complaint against a defendant for damages resulting from an act done by defendant at the instance and solicitation of plaintiff."

If this were an action for damages, the rule so announced would doubtless be applicable. But is it applicable and controlling in this equitable proceeding? The proof shows that defendant made improper use of complainant's trade-mark. He affixed it to whisky of a kind and value inferior to complainant's, and sold that whisky with the assurance, necessarily conveyed by the appearance of the trade-mark upon it, that it was genuine "W. H. McBrayer" whisky. This conduct disclosed a purpose on defendant's part to injure the reputation of complainant's whisky. It amounted to palming off an inferior quality of his own for complainant's superior quality. Notwithstanding the fact it was sold to emissaries of complainant, it disclosed defendant's intent and purpose exactly the same as if it had been sold to a real purchaser. Defendant did not know at the time that the purchasers were acting for complainant, and his motives and action must obviously be judged from the viewpoint of his own understanding of the facts.

Our conclusion is that the facts in evidence, with the reasonable

inferences which common experience and observation require us to draw from them, disclose a continuing menace to complainant's business, which, under familiar principles of equity, entitles it to injunctive relief. Similar proof has been held to justify an injunction in the following cases: *Lever Bros. v. Pasfield* (C. C.) 88 Fed. 484; *Chicago Pneumatic Tool Co. v. Philadelphia Pneumatic Tool Co.* (C. C.) 118 Fed. 852; *Badische Anilin & Soda Fabrik v. A. Klipstein & Co.* (C. C.) 125 Fed. 543. The case of *Kahn v. Gaines & Co.*, 88 C. C. A. 437, 161 Fed. 495, upon which defendant relies, does not seem to militate against the conclusion reached by us. It rests on different facts and involves different questions.

It results that the learned trial court erred in refusing to grant an injunction restraining infringement. That should have been done.

We are, however, of opinion that the facts of the case do not justify a decree for an accounting. In the case of *Regis v. Jaynes & Co.*, 191 Mass. 245, 247, 77 N. E. 774, the Supreme Judicial Court of Massachusetts, in an exhaustive opinion in a trade-mark case, said:

"If it appears that the amount of damage to the plaintiff or of profits realized by the defendant is only insignificant, or that no actual damage has been sustained, the court may confine its relief to an injunction against any future infringement."

The rule, we think, is that where damages or profits are trivial, or disproportionate to the expense of taking an account, a decree for that purpose should not be entered. *Saxlehner v. Siegel-Cooper Co.*, 179 U. S. 42, 21 Sup. Ct. 16, 45 L. Ed. 77; *Bradford v. Belknap Motor Co.* (C. C.) 105 Fed. 63; *Little v. Kellam* (C. C.) 100 Fed. 353, 355. It is difficult to conceive of a case in which the foregoing rule would be more applicable than in this.

The decree is accordingly reversed, and the cause remanded to the Circuit Court, with instructions to award complainant an injunction as prayed for in its bill, and otherwise to conform to the views expressed in this opinion.

JULIUS KESSLER & CO. v. KLEIN.

(Circuit Court of Appeals, Eighth Circuit. March, 22, 1910.)

No. 3,063.

Appeal from the Circuit Court of the United States for the District of Nebraska.

Suit by Julius Kessler & Co. against Meyer Klein. From a decree dismissing the bill, plaintiff appeals. Reversed and remanded.

James L. Hopkins, for appellant.

Sylvester R. Rush, for appellee.

Before HOOK and ADAMS, Circuit Judges, and AMIDON, District Judge.

ADAMS, Circuit Judge. This is an appeal from a decree dismissing a bill for want of equity. The relief sought was an injunctive order against the infringement of a trade-mark and an accounting of damages and profits.

The facts and questions of law involved are substantially like those in the case of Kessler & Company v. Goldstrom (just decided) 177 Fed. 392, and for the reasons stated in that case the decree in this must be reversed, and the cause remanded to the Circuit Court, with directions to enter a decree awarding complainant the injunctive relief prayed for in the bill, and conforming in other respects to the views expressed in the opinion in that case.

RUGGLES v. BUCKLEY et al.

(Circuit Court of Appeals, Sixth Circuit. March 29, 1910.)

No. 1,986.

PARTNERSHIP (§ 307*)—PARTNERSHIP BUSINESS—SETTLEMENT—COMPENSATION OF SETTLING PARTNER.

Where certain trust land transactions constituted a branch of the general business of a partnership, and on dissolution this branch was left in the hands of the liquidating partner for settlement, he, not being entitled as against the firm to compensation for his services in closing the firm's business was not entitled to retain for his own benefit all compensation received by him after dissolution in the sale of the trust lands and timber in the settlement of the trust.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 710, 711; Dec. Dig. § 307.*]

On rehearing. Denied.

For former opinion, see 175 Fed. 57.

Before WARRINGTON, Circuit Judge, and McCALL, District Judge.

McCALL, District Judge. The relief sought by the petition to rehear is stated in the petition, and is as follows:

"That the opinion and decree of this court and of the court below shall be so modified as to provide that the complainant, Ruggles, in accounting for the proceeds realized by him from the sale of trust lands and timber, shall retain for his own sole use and benefit all compensation earned by him under the contracts between himself and outside investors, for services rendered by him subsequent to the dissolution of the partnership, in caring for and protecting the interests of such outside investors in the trust lands, and that he shall also retain for his own sole use and benefit, from the proceeds of the partnership interest in said trust lands, a fair compensation for his services subsequent to the dissolution of the partnership in caring for and protecting the partnership interest in said lands, such fair compensation to be determined as above outlined or by reference to a master."

The pith of the relief prayed for is stated in a question propounded in the second paragraph, page 3, of the petition to rehear, and is as follows:

"Is Buckley entitled to share in Ruggles' compensation from the outside investors for his services after the dissolution of the partnership, in taking care of their investments in which the partnership had no interest?"

In the case of Ruggles v. Buckley, 158 Fed. 980, 86 C. C. A. 154, this court decided that Ruggles and Buckley were partners, and that the trust land business was a branch of their general partnership business. In the opinion of the court, announced January 4, 1910, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which it is now sought to have reviewed and modified, we held in substance that, since Ruggles and Buckley were partners, Ruggles was not entitled to compensation for his services in winding up the partnership business of Ruggles & Buckley, which was at his instance left in his hands for that purpose, in the absence of an agreement to that effect. *Ruggles v. Buckley* (C. C. A.) 175 Fed. 57.

This trust land business was carried on in the names of Ruggles and such other investors as became interested with him. But Ruggles represented and stood for the partnership of Ruggles & Buckley. The agreements made between Ruggles and outside investors provided, among other things:

First. There was to be repaid to each investor (including Ruggles) the amount of his cash investment.

Second. Pay each investor (including Ruggles) interest, as a preferred profit on his cash investment at 7 per cent. per annum from the time of his investment.

Third. Pay to Ruggles one-half of the remaining profit, "in consideration of his business skill, time, and services in directing what shall be done."

Fourth. Divide the other half between all the investors (including Ruggles), in the respective proportions which each one's investment bears to the whole investment, with due regard for the time each investor's portion was invested.

Fifth. Any losses were to be borne in the same proportion as profits were to be divided.

Thus it is seen that, since Ruggles stood for Ruggles & Buckley in this trust land business, any money furnished by him to it was the money of the firm of Ruggles & Buckley, unless it is clearly made to appear that it was not so invested for the firm, and the interest thereon and the profits or losses sustained in the business would be shared equally between Ruggles and Buckley. This disposition of the assets and profits and loss in the trust land business, as between Ruggles and Buckley, is in accord with the findings of this court in *Ruggles v. Buckley*, 158 Fed. 980, 86 C. C. A. 154. The outside investors do not compensate Ruggles for his business skill, time, and services, except as stipulated in the contract just stated, and such compensation goes to Ruggles for the firm of Ruggles & Buckley.

The relief now sought under the petition to rehear is based upon the proposition to change the contract under which the trust land business was entered into and conducted, to the extent of giving to Ruggles more than his half of the profits arising to the firm of Ruggles & Buckley out of the trust land business. And, as a reason for this change in the contract, it is insisted that, since the partnership was dissolved in 1903 by the decree of the court, Ruggles should not be held to abide by the terms of the contract in its relation to himself and Buckley since that time. And in justification of this proposed change in the contract, it is pointed out that, after the firm was dissolved and the receiver appointed, the receiver employed Buckley at a salary to aid in the winding up of the receivership, and that Buckley is being paid out of the assets of the business for his work under the receiver-

ship, which work is of the same character that he was doing for the partnership without compensation prior to the appointment of the receiver, and Ruggles should not be required to continue to render his services to the partnership business, since the receivership proceedings, without compensation.

It seems that counsel for Ruggles loses sight of the fact that the trust land branch of the business of Ruggles & Buckley never went into the hands of the receiver at all, but was left just where it was, in the hands of Ruggles, at his instance, to be wound up by him as one of the partners instead of by a receiver. We disposed of this point in the opinion of January 4, 1910, by saying:

"We see no force in this insistence. The result to Ruggles is the same, whether the receiver employed Buckley or some one else. Moreover, Buckley rendered these services under an express agreement for compensation, while Ruggles rendered his services without any such agreement, and without any expectation on the part of any of the persons in interest to allow him compensation."

This paragraph must be read in the light of all the facts of the case, and, when so read, it means that Ruggles agreed to and is rendering his services in the trust land business without any agreement for compensation therefor, and without any expectation on the part of any of the persons in interest to allow him compensation, otherwise than is provided for in the contract relating to the trust land business.

We see no sufficient reason for granting the petition to rehear, and the same is denied, with costs.

FIRST NAT. BANK OF OMAHA v. WHITMORE

(Circuit Court of Appeals, Eighth Circuit. March 5, 1910.)

No. 2,998.

1. BILLS AND NOTES (§ 498*)—DRAFTS—ACCEPTANCE—PRESUMPTIONS.

The holder of a draft delivered to the drawee for acceptance, in order to raise a presumption of acceptance by the drawee's destruction thereof or refusal to return it within 24 hours, under Negotiable Instruments Law (Comp. St. Neb. 1909, c. 41, art. 10) § 136, providing that where a drawee, to whom a bill is delivered for acceptance, destroys it or refuses to return it within 24 hours, he shall be deemed to have accepted it, must show that the drafts were negotiable, or of a nature and kind that could be presented for acceptance, or that they were actually delivered to the trustee for acceptance.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 498.*]

2. BILLS AND NOTES (§ 526*)—DRAFTS—PRESENTMENT FOR PAYMENT.

Evidence held to show that drafts delivered to a trustee were presented for payment, and not for acceptance, within Negotiable Instruments Law (Comp. St. Neb. 1909, c. 41, art. 10) § 136, providing that where a bill is delivered for acceptance, and the trustee destroys it or refuses to accept it within 24 hours, acceptance will be presumed.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 526.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. **BILLS AND NOTES (§§ 390, 404*)—DRAFTS—PRESENTMENT FOR ACCEPTANCE AND PAYMENT.**

Presentment of a negotiable instrument for acceptance is distinct and different from presentment for payment, since presentment for payment cannot be made until the instrument presented is due, while presentment for acceptance must be made before maturity.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1057, 1091-1103; Dec. Dig. §§ 390, 404.*]

Hook, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Nebraska.

In the matter of the bankruptcy proceedings of William J. Crandall. From an order affirming the disallowance of a claim by the First National Bank of Omaha, on objection of Howard J. Whitmore, trustee, the bank appeals. Affirmed.

Isaac E. Congdon (William J. Coad, on the brief), for appellant.

Frank M. Hall (Frank H. Woods and Steven B. Pound, on the brief), for appellee.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. The appellant filed a claim against the estate of William J. Crandall, a bankrupt, amounting to \$9,000. The foundation of this claim was four drafts drawn by one McWhorter upon Crandall and deposited by the former for credit with the appellant, which forwarded them by mail to the Citizens' Bank at Firth, Neb., of which Crandall was president, for collection and return. The appellant gave McWhorter credit for the amount of the draft. The Citizens' Bank received the drafts; but Crandall, its president, about the time the drafts were received, absconded. The drafts were not returned to appellant, and what became of them does not appear from the record. The appellant claims that under the law of Nebraska these drafts must be deemed to have been accepted by Crandall, and that his estate is liable for the amount of the same.

This claim of appellant is based upon section 136 of what is known as the "Negotiable Instruments Law" of Nebraska. Comp. St. 1909, c. 41, art. 10. The section referred to reads as follows:

"Where a drawee to whom a bill is delivered for acceptance destroys the same or refuses within twenty-four hours after such delivery or within such other period as the holder may allow to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same."

So far as the character of the drafts are concerned and their mode and purpose of delivery to Crandall, the burden of proof was upon appellant to show that they were negotiable and were delivered to Crandall for acceptance. We find it unnecessary to determine whether, under the facts appearing in the record, there was a destruction of the drafts, or a refusal to return the same accepted or nonaccepted, by Crandall, within the meaning of section 136 herein quoted, for the reason that we are of the opinion that appellant failed to sustain the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

burden of proof imposed upon it in showing that the drafts were negotiable paper of the nature and kind that could be presented for acceptance, or that they were actually delivered to Crandall for acceptance. There were introduced in evidence, at the hearing before the referee, letters of transmittal which appellant claims were exactly similar to the letters used in transmitting the drafts in question to the Citizens' Bank. In these letters the following language is used:

"We inclose the following for collection and returns in Omaha or Eastern exchange."

On the deposit slip issued to McWhorter by appellant, when the former was credited with the amount of the drafts by the appellant, is the following statement:

"For drafts and checks credited or taken as collections, this bank acts only as agent, and assumes no liability on them, nor on drafts in payment for them."

The conclusion is irresistible that the appellant simply took the drafts for collection; that they were sight drafts, and were delivered to Crandall for payment, and not for acceptance. Presentment for payment and presentment for acceptance are two different acts, well known to the law of negotiable instruments. Presentment for payment cannot be made until the instrument presented for payment is due. Presentment for acceptance must be made before the instrument presented for acceptance is due.

We do not think that the appellant has brought itself within said section 136, herein quoted, in the particulars specified, and therefore the decree appealed from must be affirmed.

And it is so ordered.

HOOK, Circuit Judge, dissents.

PUGH v. BLUFF CITY EXCURSION CO.

(Circuit Court of Appeals, Sixth Circuit. March 8, 1910.)

No. 1,988.

1 TRIAL (§ 216*)—INSTRUCTIONS—DAMAGES.

Plaintiff, in an action for the wrongful killing of her son, if entitled to recover at all, was entitled to recover substantial damages; it being shown that the son was 29 years of age, in good health, earning \$20 a week, and that she was dependent upon him for her support. The jury, having been correctly instructed as to the measure of damages, reported a disagreement, and asked if they might find a verdict for nominal damages, to which the court replied that they were authorized to find a verdict for such damages as under all the evidence and the charge they thought plaintiff was entitled to recover, after which they returned a verdict for plaintiff fixing her damages at \$1. *Held* that, while the court's instruction was correct in point of law, the court should have gone further and prevented the jury from returning a verdict for nominal damages.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 216.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

2. APPEAL AND ERROR (§ 977*)—NEW TRIAL—REVIEW.

The rule that the overruling of a motion for a new trial is an exercise of discretion, which will not be reviewed, does not apply where the verdict is inconsistent on its face and shows an abuse of power on the jury's part.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

3. NEW TRIAL (§ 58*)—DUTY TO GRANT—DISCRETION.

Where a verdict is inconsistent on its face and shows an abuse of the jury's power, the court's obligation to grant a new trial is a positive duty and is not discretionary.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 58.*]

4. APPEAL AND ERROR (§ 232*)—VERDICT—OBJECTION AND EXCEPTION.

Where a verdict for nominal damages was inconsistent and an abuse of the jury's power, a motion for a new trial, promptly made on the ground that the verdict was contrary to law and the evidence, constituted a sufficient objection to the verdict, and an exception to the denial of the motion was sufficient to preserve the matter for review.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 232.*]

In Error to the Circuit Court of the United States for the Western District of Tennessee.

Action by Mary Pugh, administratrix of Jesse P. Pugh, deceased, against the Bluff City Excursion Company. Judgment for plaintiff for nominal damages, and she brings error. Reversed, and new trial ordered.

G. T. Fitzhugh, for plaintiff in error.

H. C. Warinner, for defendant in error.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

PER CURIAM. The plaintiff, who is a widow, brought suit against the defendant to recover damages for causing the death of her son by negligence in the management of a vessel on which he was a passenger. Such an action is given by a statute of the state in which the occurrence happened. On the trial it was testified that the son at the time of his death was 29 years old and in good health; that he was capable of earning, and at the time of his death had been earning, \$20 a week; that she was almost entirely dependent upon her son and a daughter who contributed to her support. These facts were not seriously disputed. After being out for some time to consider their verdict, the jury came into court and reported a disagreement and asked if they might find a verdict for nominal damages, to which the court replied that they were authorized to find a verdict for such damages as under all the evidence and the charge previously given they thought the plaintiff was entitled to recover. The jury returned this verdict:

"We, the jury, find a verdict for the plaintiff and fix the damages at one dollar."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The plaintiff moved for a new trial upon grounds, one of which was that the verdict was contrary to the law and the evidence. The motion was overruled, and the plaintiff excepted. One of the errors assigned is the same as the one assigned as a ground for a new trial.

The charge of the court previous to the retiring of the jury was unexceptionable, and the answer given to the inquiry made by the jury was correct in point of law; but the court should have gone further and prevented the jury from doing what they seemed to be contemplating. It is the general rule that the granting of a new trial is a matter of discretion, and will not be reviewed. But it is not so where the verdict is inconsistent on its face and shows the abuse of power on the part of the jury. If the granting of the motion is a positive duty, it is not discretionary. If it is necessary to correct a mistrial, it becomes a positive duty to set aside the erroneous proceeding and grant a new trial. And such, we think, was the case here. The jury found the plaintiff was entitled to recover. And if she was, it was absurd to say that she was entitled to only nominal damages. The conclusion seems unavoidable that the verdict was simply a compromise to prevent a disagreement. Its effect was to cut off the plaintiff from her privilege of having another trial if the jury were unable to agree upon the question of her right to recover. And upon the new trial to which she was entitled, she might be able to satisfy the jury that she was entitled to recover upon the merits of the action and have substantial damages.

The motion, promptly made, for a new trial, was a sufficient objection to the verdict, and the exception to the refusal of the motion was also sufficient.

Without determining other questions, we must reverse the judgment, and direct the court below to award a new trial.

MCMILLAN v. WATER ARCH FURNACE CO.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1910.)

PATENTS (§ 328*)—INFRINGEMENT—SMOKE-BURNING BOILER FURNACE.

The McMillan patent, No. 519,267, for a smoke-burning steam boiler furnace, is an improvement patent only, and is limited by the prior art, which discloses all the elements of the patent combination to the special arrangement, form, and capacity of the discharge flues; as so construed, held not infringed.

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by James McMillan against the Water Arch Furnace Company. Decree for defendant, and complainant appeals. Affirmed.

The appellant filed a bill in the Circuit Court to enjoin an alleged infringement by the appellee of letters patent No. 519,267, issued to the appellant May 1, 1894; and this appeal is from a decree, on final hearing of the issues, dismissing the bill for want of equity.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

In the specifications of this patent the invention is stated to be "improvements in steam boiler furnaces," relating "to smoke-burning steam boiler furnaces," with the objects and general description of the invention thus stated: "Its object is to secure the complete combustion of the carbon given off from burning heat generated by the burning gases.

"The invention has for its further object the protection of the boiler by the more equal distribution through it of the heat.

"The invention consists of the use of an inclosed fire box located below the boiler and separated therefrom by a brick arch and discharging the products of combustion into the combustion chamber through flues in a bridge wall of great thickness."

Drawings appear, of which figure 1 "is a transverse vertical section of the furnace," and figure 3 "is a vertical longitudinal section," as follows:

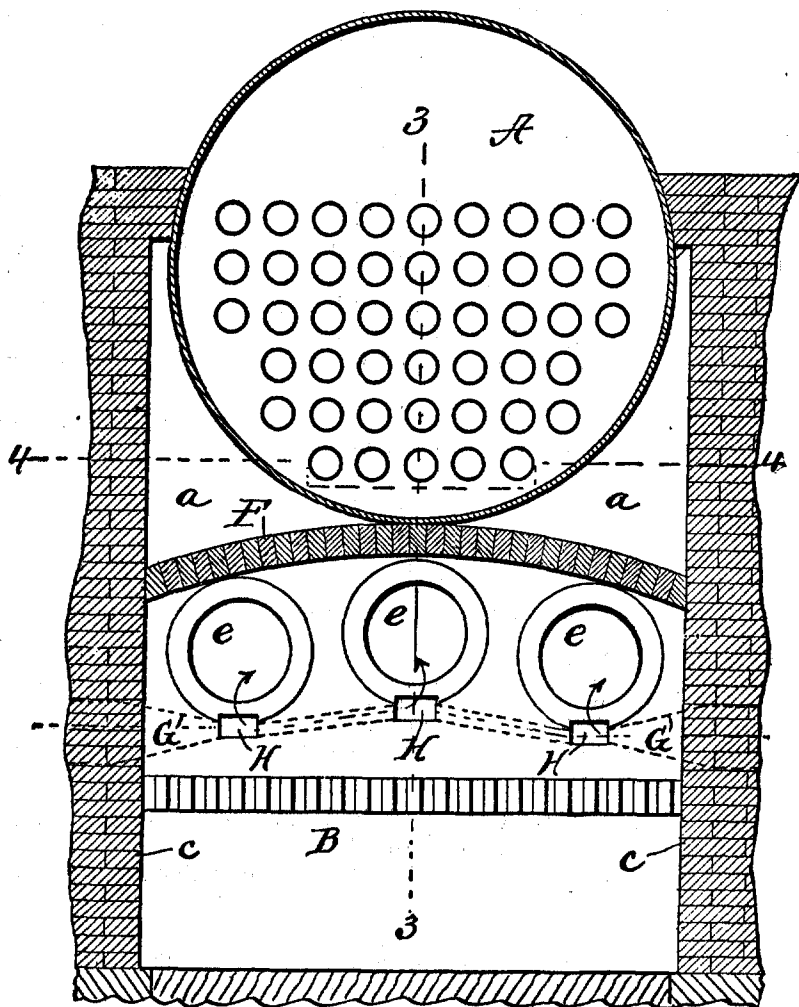
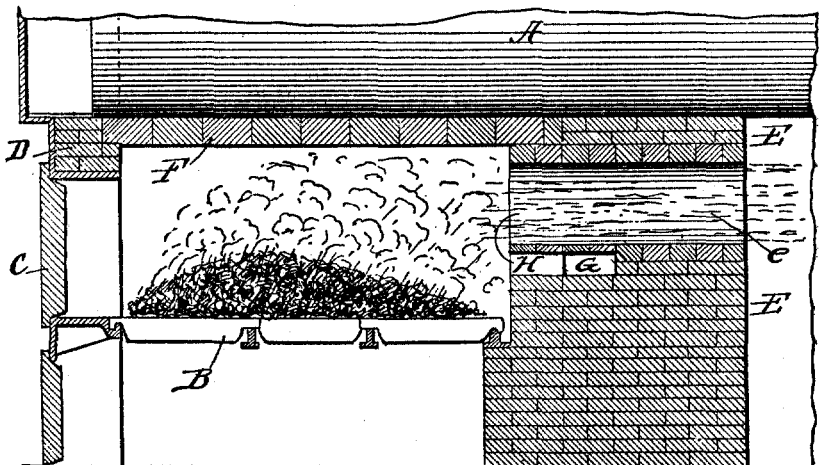


Fig 1



The further specifications, references to the drawings, and statement of claims are as follows:

"In order to secure complete combustion, it is necessary that a high temperature of the distilled gases be maintained. This is found exceedingly difficult of accomplishment when the roof or top of the fire box is the crown sheet of the boiler, as the water is necessarily of lower temperature than the burning gases, and, as they immediately come in contact with the boiler in the old style of construction, they are chilled to such an extent that their inflammation is checked and a cloud of black smoke can be plainly seen rolling back to the flue. Furthermore, it is necessary to provide not merely a supplemental supply of oxygen to complete the combustion of the gases, but means must be supplied not only for preventing the lowering of the temperature by the natural radiation, but for actually raising it for heating the supplemental air supply. The difficulties enumerated are overcome in my improved furnace, and the purposes set forth above are subserved in the manner hereinafter described.

"For the purpose of clearness, I have shown in the accompanying drawings the major features of an ordinary steam boiler furnace, comprising the boiler, A; the grate bars, B, the furnace front, C, and its side walls, c, and the feeding doors, D. The bridge wall, E, is of unusual thickness, being preferably not less than three feet thick. Its center reaches to the boiler and its upper surface is curved in arch form. A solid arch, F, that is an arch without perforations of the same height as the bridge wall, covers the entire fire box, extending from side wall to side wall and from the front wall, C, to the bridge wall, E. The outlet for the products of combustion is through the bridge wall; a multiple number of flues, e, of ample capacity being provided for this purpose. A supplemental air supply is provided for by means of ducts, G, G, extending through the side walls, c, c, and thence through the bridge wall below the apertures, e, discharge ports into the fire box being provided one directly below each of the apertures, e, as shown at H. By this construction the air is introduced into the furnace already well heated and immediately it mingles with the burning gases as they enter the flues in the bridge wall. The front wall, C, of the furnace is closed tightly around the front end of the boiler, A. Chambers, a, a, are formed by the construction described upon each side of the boiler and above the arch, F, of the fire box, these chambers being open at their rearward end and closed at their forward end so that there is no draft through them and the heat from the arch, F, which becomes very intense, is radiated to the boiler. When the furnace is in use the arch, F, quickly becomes heated to a high degree so that the gases

distilled from the fuel are not cooled by contact with it, on the contrary, its temperature is sufficiently high to stimulate combustion. The same is true of the walls of the apertures, *e.* These apertures, or flues, serve the purpose, in fact, of retorts, and all the conditions essential to perfect combustion are present; namely, combustible gases, an ample supply of oxygen and high temperature, and there issues from these retorts a perfectly white flame, giving off an invisible vapor. By preventing contact of the vapors resulting from combustion with the comparatively cool surface of the boiler until their combustion has become complete, perfect combustion is made possible; furthermore, the boiler itself is protected from the constant variations of temperature due to the exposure of its surface to the direct action of the flames, the heat from the arch being uniform and the combustion at the rear of the bridge wall being substantially without variation.

"I claim as my invention—

"1. A steam boiler furnace having its fire box completely inclosed by masonry, and having discharge flues in tubular form and of such capacity as to secure free draft and insure complete combustion within the flues leading from its fire box through such masonry, substantially as described and for the purpose specified.

"2. In a steam boiler furnace the combination of a grate, side walls, a solid arch covering the fire box, a bridge wall extending to and joining the rear end of the arch, and flues, in tubular form leading from the fire box through the bridge wall and of such capacity as to secure free draft and insure complete combustion within the flues, substantially as described and for the purpose specified.

"3. In a steam boiler furnace the combination with a boiler, of a fire box, an arch, *F*, covering the fire box and separating it from the boiler, and a bridge wall extending to the arch and having flue openings, *e, e*, leading outwardly from the fire box, and air ducts leading from without the furnace and opening to the fire box below the flue openings, *e, e*, said bridge wall being of such thickness that the flue openings serve the purpose of retorts, substantially as described."

The opinion filed below rests the decree on noninfringement, under the limitations imposed by the proof of prior art and rulings of the Patent Office upon the application, as exhibited in the "file wrapper and contents." In so far as reference to the facts in evidence seems needful or useful mention thereof is made in the ensuing opinion.

Louis K. Gillson, for appellant.

John G. Elliott, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The specifications of the McMillan patent in suit (No. 519,267) state that the subject-matter of the invention is "improvements in steam boiler furnaces," that it "relates to smoke-burning steam boiler furnaces," and that its objects are (a) "complete combustion of the carbon given off from burning fuel while securing the full benefit of the heat generated by the burning gases," and (b) "the protection of the boiler by the more equal distribution through it of the heat." Numerous prior patents are in evidence, both domestic and foreign, purporting to be improvements in furnaces for steam boilers, for like object in burning the smoke without loss of heating efficiency; and each of the means or elements combined in the McMillan furnace is present in the combination of the Stevens patent No. 333,430, and in other patents to be mentioned, except as to the special arrangement, form, and capacity of the discharge flues. The claim of patentable novelty, therefore, is thus stated in the brief for appellant:

"While McMillan did not propose a single new element in his construction, he did propose a combination which was novel and operated on a new principle; and he did secure results superior to any which had been previously attained."

These discharge flues are described in claims 1 and 2 of the patent as "in tubular form" and "of such capacity as to secure free draft and insure complete combustion within the flues"; and the patentability of the combination rests, as we believe, on departure in this provision from the discharge flues in other furnace combinations of the prior art. Moreover, the Patent Office so ruled, in effect, upon the application in question, as the exhibit file wrapper and contents shows repeated rejections of the original claims upon reference to several of these prior patents (including the above cited Stevens patent) as anticipations, and that ultimate allowance was obtained after amending the claims by inserting the above-quoted statement of the functional capacity of these discharge flues in present claims 1 and 2.

The appellant's bill alleging infringement of this patent was dismissed in the trial court, as stated in the opinion there filed, upon the ground that no infringement appeared in the appellee's furnace. It was further contended, as the appellee contends on this appeal, that the patent was invalid for want of invention, and that issue is discussed in the opinion referred to. Determination thereof is not deemed needful, however, in our view of the indubitable force of the evidence of prior art to limit the scope of any invention which may arise under the patent, so that the claims can neither be interpreted broadly, as sought in the appellant's contention of novelty above quoted, nor as needful to uphold the present charge of infringement.

In the appellant's brief, the McMillan device is aptly described as consisting of—

"throwing a roofing arch of masonry over the fire box, extending this arch back to the bridge wall, making this bridge wall of very considerable thickness and carrying it up to the roofing arch and perforating it with commodious flues which, as he explains in his patent, perform the functions of retorts; and by introducing a supplemental supply of air in such manner as to mingle it with the burning gases as they enter these retort flues. The forward end of the boiler was located over the fire box, so that the heat radiating through the roof of the latter would be utilized in raising the temperature of the water, the rearward end of the boiler extending over the usual so-called combustion chamber located back of the bridge wall."

The fire box thus described appears in several prior patents, of like single fire-box type, having a roofing arch of masonry to protect the boiler from direct contact with the fire; and the bridge wall so appears and is without novelty, either in location, structure, or "thickness." For means to discharge the gases and smoke—common to all furnace patents, with variations in form and location—the claims describe "discharge flues in tubular form" (mentioned in the specification as "a multiple number," with three shown in the drawings), leading from the fire box through the bridge wall. Their function is stated to be twofold: (a) Clear passageway for the burning gases; and (b) retort action in consuming the smoke en route, by means of the heat retained in the bridge wall. The remaining provision is an air duct—

also shown in prior patents—which aids the burning of smoke in the flues through “a supplemental air supply.”

The furnaces made by the appellee, which are alleged to infringe the several claims of this patent, unquestionably have these elements in like combination for like object, except as follows: That the fire box is of the double fire-box type, having two arches, and for the discharge means a single flue through the bridge wall is adopted, which differs in form and greatly exceeds in size the aggregate of the flues shown in the patent; and it has two discharge openings from the double fire box—one for each fire. Were the appellant's contention tenable that the patent combination was not only novel, but “operated on a new principle,” and was entitled to complete protection against equivalents, it might well be conceded that these variations therefrom would furnish no escape from infringement. That contention, however, is predicated alone on the patentee's arrangement, form, and capacity of discharge means, and we believe the prior furnace patents referred to leave no room for the scope of invention claimed in its so-called retort action.

While the field of furnace art was crowded with devices to relieve the smoke nuisance, when the patentee undertook another improvement, it is undisputed that neither the prior attempts nor the devices in suit have completely solved the problem. Improvers in that direction are entitled, as of course, to all benefits conferred by the patent laws for any invention they disclose; but monopoly beyond the limits of invention is neither authorized nor just. So, whatever improvement was disclosed by the patentee in the above-mentioned provision, monopoly thereof must be limited to the actual invention; and to that end we deem it sufficient to cite a few of the prior patents, having pertinent discharge means in like combinations.

Stevens' (United States) patent, No. 333,430, has the single fire box and roofing arch, thick bridge wall, and numerous small discharge flues leading from the fire box, mainly extending through the bridge wall, but a portion extending upward through the roofing arch. It provides an air supply also “to perfect and intensify combustion.”

Bowe's (United States) patent, No. 371,872, has no roofing arch for the fire box, but shows the thick bridge wall, with “two or more” tubular flues, described as extending through it from the fire box to discharge the smoke and gases, “concentrate the heat,” and serve to “complete the combustion”; and the Pratt and Palmer (United States) patent, No. 312,655, shows both single and double fire box, with roofing arches, having a single discharge flue through the bridge wall.

Criner's (United States) patent, No. 246,943, has the inclosed fire box and a large flue passage in the bridge wall for the discharge, with a supply of air to complete combustion; and McIlhenny's (United States) patent, No. 328,133, has like elements in combination.

Heiser's German patent, No. 5,430 (of 1879) is for a furnace—not shown with a steam boiler, but stated in the specifications as adaptable therewith—shows a single fire box and extremely thick bridge wall, with discharge means of greater capacity than those of the McMillan patent, which are specified as “retorts” and have that function alike

with such patent, and are alike aided therein by a supply of air through air ducts.

Without extending this opinion by further references to the prior art, we believe it clearly appears therefrom that no interpretation of the claims in suit is authorized, which excludes other improvers from using discharge flues serving as well for the so-called "retort action" mentioned in the patent as their function; and therefore that the appellee's furnace, having a different form of structure within the prior art, does not infringe. Its double fire box, of another type in the art, has advantages in better regulation of the firing and thus regulating the discharge of smoke and gas; and its greatly enlarged single discharge flue, with an opening from each fire, is within such prior art, adapted to the type of furnace, and not an appropriation of the patentee's device.

The decree appealed from is therefore affirmed.

LEWIS CONST. CO. v. SEMPLE et al.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1910.)

No. 1,711.

1. PATENTS (§ 26*)—INVENTION—TRANSFER OF DEVICE TO ANALOGOUS ART.

Pumps and spoil pipes for dredgers belong to arts not so remote that the transfer of a method of lining from one to the other involves invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. § 26.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SPOIL PIPES FOR DREDGERS.

The Semple patent, No. 752,474, for an improvement in pipes for use in carrying sand, gravel, and other material from dredgers and hydraulic or other excavating devices, the pipe having a lining composed of blocks of wood arranged in circular series presenting the grain of the wood endwise at the inner surface of the blocks for a wearing surface, such series of blocks being inclosed in a casing of longitudinal wooden strips, the series of blocks being bound with hoops, and the outer casing wound with wire, discloses patentable invention, but, in view of the prior art, and prior structures in analogous arts, is entitled to only a narrow construction and is limited to the precise structure shown. As so construed, *held* not infringed by a dredge pipe having a bottom only of similar blocks held in place by flanges on the inner surface of the inclosing pipe.

Appeal from the Circuit Court of the United States for the Northern Division of the Western District of Washington.

Suit in equity by Zoe Agnes Semple and Ethel Swanstrom, as executors of the will of Eugene Semple, deceased, against the Lewis Construction Company. Decree for complainants, and defendant appeals. Reversed.

Leander T. Turner and Frank A. Steele (John D. Morgan, on the brief), for appellant.

T. O. Abbott and Philip Tindall, for appellees.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GILBERT, Circuit Judge. A patent was issued on February 16, 1904, to Eugene Semple for an improvement in pipes. Letters patent No. 752,474. He brought the present suit against the appellant to obtain an injunction and damages on account of the alleged infringement of his patent. The specification describes the invention as an improvement in pipes for use in carrying sand, gravel, and other material from dredgers and hydraulic or other excavating devices. It is constructed with an inner layer of wooden blocks, an outer layer of wooden strips surrounding the blocks, and hoops surrounding each circle of blocks and secured thereto, said hoops fitting within the outer layer of wooden strips, and a binding wire or rod wound spirally around the wooden strips, the wooden strips extending longitudinally and constituting a casing. The claims which are said to be infringed are 3, 4, 8, 9, and 10, and are as follows:

"(3) A pipe having a lining composed of a series of blocks of wood, presenting the grain of the wood endwise at the inner faces of the blocks, and a casing, substantially as set forth.

"(4) A pipe having a lining consisting of blocks arranged with the grain extending in practically a radial direction, whereby the end of the grain will be presented at the inner faces of the blocks, substantially as set forth."

"(8) A pipe for use in carrying sand, gravel and other material from dredgers, hydraulic, or other excavating devices, having its interior composed of blocks of wood arranged in circular series, and presenting the grain of the wood endwise, at the inner faces of the blocks.

"(9) A pipe having a lining consisting of blocks arranged in circular series with the grain extending in practically a radial direction, and a casing consisting of a circular series of longitudinal strips encircling the lining of blocks and extending over the joints between the adjacent circular series of said blocks, substantially as set forth.

"(10) A pipe having a lining composed of a plurality of circular series of blocks, the adjacent series abutting each other, and the blocks having the grain extending in practically a radial direction, substantially as set forth."

Wooden pipes, made of staves and wire-wound, were made and were well known in the art before the date of Semple's invention. They were not calculated to withstand the friction of sand and gravel, in carrying material from dredgers and other excavating devices. Various expedients had been adopted to reinforce them and to lengthen their life, by an inner casing of wood or metal. Semple conceived and carried out the idea of lining the pipe with blocks of wood so arranged as to present the grain of the wood endwise at the inner surface.

The pipe used by the appellant was manufactured under a patent issued to James Hopkirk, on March 21, 1905, No. 785,423, for an improvement in stave wooden pipes. The device consists of a stave pipe bound with metal hoops or spiral wire; two of the staves being thicker than the others at the lower edges and presenting opposed shoulders within the pipe. Between the shoulders are inserted single arcuate segmental blocks. These segmental blocks are cut across the grain, and they constitute a removable wearing surface in the bottom of the pipe.

The appellees contend that the Semple patent is for a pioneer invention; that, as such, its claims are entitled to a liberal construction; and that the patent is not to be limited to the exact mechanism de-

scribed, but is entitled to the benefit of the doctrine of equivalents. It becomes necessary, therefore, to examine the prior art and to determine the rank of Semple's invention. The patent to H. M. Stow of March 31, 1874, exhibits a polygonal stave pipe bound with a spiral wire and having a lining of staves so arranged as to break joints. The patent to Winfield S. Potter of April 7, 1894, describes a mortar in which ore is crushed or triturated, as lined with blocks so arranged that the wear thereon shall be across the grain of the wood. A similar use of wooden blocks is found in the patent to J. B. Irvin, of December 3, 1889. The patent to Isaac D. Smead of January 6, 1903, exhibits an iron pipe consisting of series of iron staves built one upon another, and bound together with steel hoops. The patent to M. F. Wilcox of October 8, 1901, shows wooden pipes built up and formed of a number of wooden strips bound together by metallic hoops. The patent to Samuel Houston of October 23, 1875, is for a pavement, consisting of blocks of wood, with the end grain for a wearing surface. The patent to Jacob Boyers of November 8, 1881, for an improvement in pumps, has for its claim 2:

"A pump provided with a hardwood lining having the end of the grain presented to the action of the piston and fluid."

Some confusion as to the nature of the Boyers' invention arises from the statement in the specification that the hardwood lining is to be prepared by sawing and bending it so as to adjust it to the pipe bore, and the appellees contend that the intention was not to use a lining of wood with the grain presented to the action of the piston and fluid, since it is impossible to steam and bend such blocks. But it is obvious that the inventor had in mind two forms of hardwood lining, one of which might be blocks of wood with the end grain for a wearing surface as specified in claim 2.

The patent to J. H. Martin, May 15, 1883, No. 277,762, is for a closed rectangular pipe clamped together and lined on the sides and bottom with blocks of wood "which are sawed out across the grain so that when placed in position the wear will come on the end grain."

The file wrapper of the Semple patent shows that the examiner rejected the original application, on a reference to the patents to Smead, Wilcox, and Houston. The patent to Houston showed a pavement consisting of blocks of wood with the grain on the end, and the examiner held it to be no invention to substitute that for the lining shown in the Wilcox structure. The applicant amended his application, and it was again rejected on the patents to Wilcox and Houston. The applicant again amended his application by adding claims 9 and 10. All the claims involved in this suit were rejected on reference to the patents to Wilcox and Houston. On appeal to the Board of Examiners in Chief, the decision of the examiner was reversed, and the patent allowed. The board considered the question of anticipation and patentability only as affected by the Wilcox, the Houston, and the Smead patents, but made no reference to the Martin patent or the Boyers patent. That those patents were not considered is shown by the language of the decision of the board, in which it was said:

"While it is true that blocks of wood with their ends disposed with the ends of the grain upward to resist wear have been used as elements of a pavement, and while it may be said to be of general knowledge among the mechanics that the ends of the fibres of a wooden block more strongly resist frictional wear than do their sides, yet it does not appear that this well-known fact has ever been utilized by pipemakers to make any part of a pipe. We are of the opinion that this new idea of a pipe lining so formed as recited in each claim is not imitative, but rather is conceptive novelty entitled to protection."

It appears from the testimony that, prior to the date of the Semple invention, others, who were engaged at Seattle in the work of hydraulic dredging and filling the tide flats with the débris, had had under consideration the use of various materials for a wearing surface for their wooden pipes, one of which was wooden blocks, and that the difficulties which confronted them were two: First, the greatly increased weight of the pipe that would result from such lining; and, second, the problem of holding the blocks in place in the pipe. Semple was the first to devise a scheme for retaining the blocks in place. For that device he obtained a patent, and we hold that his invention was patentable. But, in view of the prior art, and the long and well-known use of blocks of wood as a wearing surface, as pavement, as lining for flumes and as lining for the bottom and sides of box flumes, and particularly its use as shown in the Boyers and the Martin patents, we think that the scope of the Semple patent must be limited to the use of such blocks in circular series, with his device for holding them in place, and that he cannot be allowed the broad claim of invention of the idea of lining a wooden pipe in whole or in part with wooden blocks presenting the end grain to the attrition of the spoil. It does not follow that, because he was the first to introduce into a large wooden pipe wooden blocks presenting the end grain as a wearing surface, he became entitled to a monopoly of the use of such blocks in wooden pipes. He had before him the Boyers patent, in which the same device was used for a wearing surface. It is true that the Boyers patent relates to the lining of pumps, but the two arts are not so remote that the transfer of the lining from one to the other would involve invention. *Stearns & Co. v. Russell*, 85 Fed. 218, 29 C. C. A. 121; *Standard Caster & Wheel Co. v. Caster Socket Co.*, 113 Fed. 162, 51 C. C. A. 109; *W. F. Burns Co. v. Mills*, 143 Fed. 325, 74 C. C. A. 525. He had before him also the patent to Martin, in which the bottom and sides of a rectangular flume were lined with such blocks and for the same purpose. There was no invention in adopting the use of such blocks in a cylindrical pipe. It was but a change in form. Nor can invention be predicated upon the use of such lining blocks in radial form. No other form was possible. If a pipe is to be lined with blocks so as to present the end grain thereof as a wearing surface, and retain a cylindrical inner surface, the blocks must of necessity be arranged radially. In short his invention was a mere improvement or adaptation of what had gone before, and it does not mark a distinct step in the development of the art. The novelty of his patent must rest on the means which he adopted to carry his idea into effect.

In view of the rank of the Semple invention, as we find it, it is unimportant that no pipe has been used or even manufactured under the patent, or that the Hopkirk pipe, owing to its decreased weight and cost, its simplicity of construction, the facility with which its blocks may be inserted and removed, has proved valuable and successful and has gone into extensive use. The Semple invention being confined, as it must be, substantially to the precise construction which the patent describes, it is obvious that the Hopkirk invention does not infringe it. Instead of using a circular series of blocks, lining the whole pipe, the appellants use only a single block in the bottom of the pipe. In the Semple device it is evident that each circular series of blocks must be held in position by hoops or bands to which each block is nailed or otherwise attached. In the appellant's pipe there are no hoops for the lining, nor any device to hold the blocks in position, save the projecting shoulder of a stave on either side between which each segmental block is dovetailed to form the floor of the pipe. These marked differences of construction are sufficient to avoid infringement.

The decree is reversed, and the cause remanded, with instructions to dismiss the bill.

NOTE.—The following is the opinion of Hanford, District Judge, in the court below:

HANFORD, District Judge. These are suits in equity for injunctions restraining the infringement of patents and for damages. I find a description of the invention covered by Hopkirk's patent in the brief filed by his solicitor, which, to be accurate, requires only an addition of a few words. With the amendment it reads as follows: The invention covered by the patent may be briefly described as a device for a wearing face in cylindrical conveyors of earth matter in suspension in water, by means of which the structure of the conveying pipe is protected from wear; the wearing face being composed of wooden blocks shaped to set vertically and radially and fit substantially the form of the pipe, with the end grain of the blocks constituting the interior skin (and held securely in the bottom by projections or extensions upon either side of the interior), the wearing face being removable and renewable without injury to the structure of the pipe.

To make out of the above a perfectly accurate description of Gov. Semple's invention covered by claims 3, 4, 8, and 10 of his patent, it is only necessary to take out of it the words inclosed in parenthesis. The Semple patent is the elder, and there is no pretense that any of his ideas were suggested to him by Hopkirk. The actual difference in the two devices is that, in the one designed by Semple, the lining is arranged in sections encircling the hollow interior space, each section being bound by a hoop; whereas, in the Hopkirk pipe, only a segment of the bottom interior surface is lined by wooden blocks set radially and vertically, and, as a substitute for the part of the lining omitted, the arch of the cylinder is completed by the material and shape of the casing, a thickened edge of one of the staves of the pipe on each side forming a shoulder against which the segment of lining in blocks presses as a wedge, so as to make a tight joint and preserve the cylindrical form of the hollow interior space. The fact that an accurate description of the later invention can be adapted to describe accurately the elder, without the addition of a single word and merely by deleting part of a sentence, demonstrates to a certainty that all of the meritorious features of the earlier have been absorbed in the later device.

The argument of the defense in the Semple case assumes that the first question to be decided is: "Does any claim of the Semple patent include a pipe made like the device shown in the drawings annexed to the Hopkirk patent,

and which, instead of having a complete lining of end-grain blocks, has only a partial lining secured as shown in said drawings?" Only one answer can possibly be made to this, and that is a negative answer; but that inquiry could have been conceived only in a misunderstanding of the law. A valid patent does not necessarily have to embody all the ideas which may originate in the future and be applicable to the invention which it protects. Any device which embodies all of a previously patented invention is none the less an infringement by reason of the addition of something new. Such a device, even though it be better and more serviceable by reason of the addition, is not even patentable unless the addition is a new discovery and a useful improvement.

I consider that the arguments in behalf of both complainants ably sustains the finding of the board of examiners in chief, on the appeal taken by Gov. Semple from the decision of the original examiner, in which it was said: "While it is true that blocks of wood, with the ends disposed with the ends of the grain upward to resist the wear, have been used as elements of a pavement, and while it may be said to be of familiar knowledge among mechanics that the ends of fibers of wooden blocks more strongly resist frictional wear than do their sides, yet it does not appear that this well-known fact has ever been used by pipe makers to make any part of a pipe. We are of the opinion that this new idea of a pipe lining, so formed as recited in each claim, is not imitative, but is conceptive novelty to protection. Accordingly the decision of the examiners is reversed."

I find in the case no grounds which would justify a court in annulling that decision. The claims of the Hopkirk patent are so phrased as to leave the merit of his invention quite obscure; but, read in connection with the specifications and drawings, it is possible to find that they do cover an original idea applied to a practical use. The merit of the device is in the means provided for subdividing the bore of a pipe by the peculiar shape of two of its sections, so as to form a segmental space or groove, which space may be filled by suitable material shaped to fit, and constituting a reinforced wearing face, without changing materially the cylindrical form of the bore. For this device, I hold his patent to be valid; but it does not entitle him to a monopoly in the use of pipe having an interior wearing face covering only part of the bore, and held in place by any and every possible means, and I hold that the defendant Hawley has not infringed the Hopkirk patent because he has not used pipe constructed on the principle of Hopkirk's design. The insertion in a pipe of end-grain blocks, covering part of the interior surface and held in place by pieces of scantling or cleats nailed to the casing, is not the same thing as the Hopkirk device, nor equivalent, because it does not accomplish the purpose of forming a reinforced wearing face without changing the cylindrical form of the bore, which is an important feature.

In case No. 1,425 it will be decreed that an injunction be issued as prayed for. At present I am not sufficiently advised to be able to determine what, if any, damages should be allowed to the plaintiff; and, unless the parties agree with respect to the damages, the case will be referred to the master in chancery to hear evidence and assess the damages.

Case No. 1,486 will be dismissed, with costs.

RANSOME CONCRETE MACHINERY CO. v. UNITED CONCRETE MACHINERY CO.

(Circuit Court of Appeals, Second Circuit. March 7, 1910.)

No. 54.

PATENTS (§ 27*)—INVENTION—CONCRETE MIXER.

The Ransome patent, No. 814,803, for a concrete-mixing machine, consisting of a batch-mixing drum, in view of the prior Burns patent, No. 661,847, for an apparatus for mixing tea "and other material," even conceding that the Burns patent applies only to mixers of dry and nonsolidifying materials, is void for lack of patentable invention, being a mere adaptation to a double use, requiring only mechanical skill.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 31, 32; Dec. Dig. § 27.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by the Ransome Concrete Machinery Company against the United Concrete Machinery Company. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 165 Fed. 914.

Stephen J. Cox, for appellant.

Edward S. Beach, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. This is a suit to restrain the alleged infringement of letters patent No. 814,803, issued to Ernest Leslie Ransome on March 13, 1906, for an improvement in concrete-mixing machines, and assigned to the complainant.

The patentee states at the commencement of his specifications:

"My invention relates to that type of mixers known as 'batch mixers,' in which the material to be mixed is placed into the mixer a batch or charge at a time, and is in like manner discharged when mixed."

"Batch mixers" are to be distinguished from "continuous mixers." The latter are long cylindrical devices which receive materials and discharge them when mixed as a continuous operation. They are said to be less effective than "batch mixers" in mixing the material and to be subject to other objections.

Broadly speaking, the structure of the patent consists of a revoluble drum with openings at both ends, blades or flanges within the drum secured to its inside periphery, and a discharging chute. The materials for making concrete—cement, sand, stones, and water—are put into the drum through the inlet or charging opening. The drum is then rotated. The flanges both mix and elevate the material, and at the same time move it toward the discharge end. When the mixing operation is completed, the materials are discharged through the chute.

The especial feature of the patent is undoubtedly the construction and arrangement of the flanges. One set of flanges is set diagonally across the inside of the drum, so as to form lifting pockets at the discharge end. Another set runs across the first set in the opposite di-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rection. By this arrangement the material is moved back and forth—lifted and thrown back—from one end of the drum to the other, and finally is elevated and dumped into the chute, which is adjusted to receive and discharge it at the outlet opening of the drum. The patentee in the patent says of this arrangement of flanges and their operation:

"To the inner surface of the drum, A, is fastened a plurality of shelves or flanges, B, the distinguishing feature of which is that they are placed athwart the width of the mixer in such a manner as not only to cause the mixing of material that comes within their sphere of influence when the mixer is revolving, but to move such material toward the discharge end of the mixer, and also to carry said material up and discharge it at such a height that when the chute, C, is placed in the required position, the mixture to be discharged from the machine falls therein. These shelves or flanges may be of any desired number or size."

And later he further says:

"When the mixer is fully charged and the drum is in motion, the material is given a constant movement over and down the inner surface of the drum, and down from the heights to which some of said material is carried by the shelves or flanges, and in addition to the described movements the material is moved by the plurality of shelves or flanges back and forth the width of the mixer, whereby the material is moved in a number of directions to obtain movements which are of great advantage in securing an intimate commingling of the materials."

The claims of the patent which it is contended that the defendant infringes are Nos. 2, 3, 5, and 7, which read as follows:

"2. A mixer having a revoluble drum adapted to receive material at one end and discharge it at the other, the drum having a centrally-orificed head at the discharge end, a shelf secured within the drum and extending along the inner side thereof diagonally with respect to the axis of the drum, the discharge end of the shelf extending to the head at the discharge end of the drum and forming a pocket in connection therewith, an additional shelf secured within the drum and extending diagonally of the axis thereof across the first-named shelf and a means extending through the said orifice in the discharge-head of the drum, for carrying off the material from the drum.

"3. A mixing apparatus having a revoluble drum, adapted to receive the material at one end and discharge it at the other end, a lifting-shelf secured to the drum against the inner side thereof, the shelf extending diagonally with respect to the axis of the drum for the major portion of the length of the shelf, and said major portion of the length of the shelf being relatively straight, and the shelf terminating at the discharge end of the drum in an offset portion, the concave side of which faces the direction of the revolution of the drum, whereby to form a lifting pocket."

"5. A mixing apparatus having a revoluble drum adapted to receive the material at one end and discharge it at the other end, a shelf secured in the drum against the inner side thereof, the shelf extending diagonally with respect to the axis of the drum for the major portion of the length of the shelf, and the shelf terminating at the discharge end of the drum in an offset portion, the concave side of which faces the direction of revolution of the drum, whereby to form a pocket, and an additional shelf secured in the drum and extending diagonally of the axis thereof across the first-named shelf."

"7. A machine of the class described, having a revoluble hollow member provided at its discharge end with a head, a plurality of shelves secured to the inside of the member and having offset ends disposed relatively to said head to form a series of lifting pockets adjacent to the discharge end of the revoluble member, and other shelves extending across the first-named shelves."

The defenses are:

- (1) Invalidity.
- (2) Noninfringement.

At the outset it is desirable to simplify the issues. Consideration of the question of infringement may be postponed until after the determination of validity. If the patent is invalid, other questions are immaterial. So, while prior patents and uses are set up to negative novelty, we may well consider them in the first place as showing the state of the prior art. It will not be worth while to carefully differentiate between structures, if the differences claimed to exist involve no invention. As want of invention in view of a prior device may defeat a patent which is not anticipated by it, the question of invention should receive primary consideration. Similarly we should select at the outset the defendant's best reference in the prior art. It is unnecessary to go over the whole field, if one patent advances more than all others toward the patent in suit.

Now it is unquestionable that the patent granted to Robert Burns on November 13, 1900 (No. 661,847), for an "improvement in apparatus for mixing tea and other material," if for an analogous purpose, is the nearest approach to the present patent. Before examining it in detail, however, we must consider the preliminary inquiry whether the apparatus covered by it is for a purpose analogous to that of the Ransome device.

The objection of nonanalogy proceeds upon the assumption that the Burns patent is for a tea mixer and the Ransome patent for a concrete mixer. As the complainant well points out, tea and concrete are widely different materials to be operated upon by mixing apparatus. Tea is dry, light, and nonadhesive. Its component granules are of uniform size and weight and of the same nature. A tea mixture is still tea. Time is not an element in tea mixing. Delays are immaterial. Concrete, on the other hand, is a mixture of different materials constantly tending to solidify into a stonelike substance. It is wet, heavy, and adhesive. The length of time required to mix it is most material. Indeed, the operation of mixing concrete is to some extent a race against its tendency to solidify.

If, then, the assumption be well founded that the Burns mixer is exclusively for tea and the Ransome mixer exclusively for concrete, the marked differences in the material operated upon may possibly afford ground for the contention that, if Ransome employs the Burns apparatus, he uses it for a new and nonanalogous purpose. But the assumption is not well founded. The Burns patent, as we have seen, is for apparatus for mixing tea "and other material." And in the body of his specifications Burns speaks of the use of the mixer upon other materials than tea:

"In working such tender material as tea leaves, it has been found advisable to have a less twist than can be employed for coffee or like material."

Moreover, the testimony is that Burns mixers—upon which his last patent was really an improvement—had been employed for mixing many materials other than tea and coffee, including sand. Similarly, while the patentee in the patent in suit says at the beginning that he has

invented an improvement in "concrete-mixing machines," the word "concrete" does not again appear in the patent. "Material" only is spoken of. In view of the language of the patent, we cannot say that the Burns apparatus is exclusively a tea mixer. Nor are we certain that the patent in suit should be treated as exclusively for a concrete mixer. Both devices are mixers. Their purpose is to mix materials. Changing materials does not change their purpose.

If, then, we treat the Burns patent as being broad enough to cover apparatus for mixing *any* materials, the question of analogous use does not arise. The mixer of that patent would be used for the purposes covered by it as well when employed to mix concrete as when used to mix tea. The only questions then arising would be whether the Ransome apparatus is the same as the Burns apparatus, and, if differences exist, whether they are of a nature involving invention.

But, while we are inclined to think that the Burns patent is broad enough to cover the use of the apparatus described in it for mixing all materials, including concrete, it is unnecessary for the purposes of this case that we should so rule. While, in view of the language of the patent, we cannot assume that it covers tea mixers alone, we shall assume, for the purposes of this discussion, that it applies only to mixers designed to commingle dry and nonsolidifying materials. The question, then, is whether its use for mixing wet and solidifying materials is for a new and nonanalogous purpose. And this resolves itself into the inquiry whether, in case the Burns mixer were used for mixing concrete, it would operate in substantially the same manner to accomplish substantially the same results as when used upon dry material. We think that it would. Notwithstanding the difficulties involved in mixing concrete, we are satisfied that the Burns mixer would act upon the required materials in the same way as upon other materials. The apparatus shown in the Burns patent, with all its appendages, is undoubtedly better adapted to mix a light, dry material than concrete; but we have no doubt that it would mix and discharge the one in the same manner that it would mix and discharge the other, and with quite similar results.

For these reasons we think the use of the Burns apparatus for the purpose of mixing concrete at the utmost only a double use, not involving invention. It is rather a case of changing the materials to be operated upon than of changing the method of operation. Indeed, it seems about as clear a case of double use as is shown in the well-known illustrations given by the Supreme Court in *Potts v. Creager*, 155 U. S. 597, 608, 15 Sup. Ct. 194, 198, 39 L. Ed. 275:

"If, for example, a person were to take a coffee mill and patent it as a mill for grinding spices, the double use would be too manifest for serious argument. So, too, this court has denied invention to one who applied the principles of the ice cream freezer to the preservation of fish. *Brown v. Piper*, 91 U. S. 37 [23 L. Ed. 200]."

See, also, *Mast v. Stover*, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856.

We come now to the more difficult question whether Ransome has in fact used the Burns apparatus. In examining this question it is

only necessary to compare the essential features of the apparatus. This may be done as follows:

Patent in Suit.	Burns Patent.
(1) Revolvable drum.	(1) Revolvable drum.
(2) Inlet. } Separate; (3) Outlet. } one on } each side } of drum.	(2) } Inlet and outlet; opening on (3) } one side of drum only.
(4) Discharge chute.	(4) Discharge chute; also used for charging.
(5) Lifting flanges and cross-flanges.	(5) Lifting flanges and cross-flanges.
(6) Flanges may be of any desired number or size.	(6) Flanges can be given any suitable twist or pitch.
(7) Flanges so placed as not only to cause mixing of material, but to move it toward discharge end of mixer and into discharge chute.	(7) An incline leading from flanges to discharge chute.
(8) Discharge chute can be adjusted to act as practical closure for outlet end to prevent splashing out. Doors at both ends for same purpose.	(8) Chute can be adjusted to act as closure for opening to prevent escape of materials.
	(9) Roof-shaped spreader.

It is evident from this comparison that the apparatus of the patent in suit contains most of the broad features of the Burns structure. Indeed, this is not seriously disputed by the complainant; the only difference which it points out being the following:

(1) The Burns drum is not open at both ends, as is the apparatus of the patent.

(2) The interior of the Burns drum is provided with a roof-shaped spreader. The structure of the patent has no spreader.

(3) It is contended that the flanges shown in the Burns patent are so arranged as to form "neutral zones," which fail to properly commingle the material. The apparatus of the patent in suit is said to possess no such "neutral zones."

The difference between the openings of the two mixers constitutes, in our opinion, the most important distinction between them. In the Burns mixer, as already pointed out, the inlet and outlet are at the same end of the drum, and a single chute serves for charging and discharging. The materials to be mixed are fed into the drum through the chute. The chute is then adjusted to close the opening, and the mixing operation goes on. When the materials are mixed, the chute is swung inside the drum, and receives and discharges the materials. In the Ransome mixer, as we have also seen, the drum has openings in both ends. The materials are put in through the inlet or charging opening. The openings in the drum are closed; the chute at the discharging end being swung to so as to practically accomplish such closure at that end. The mixing operation then goes on. When it is completed, the discharge chute is swung inside the drum, and receives and discharges the mixed materials.

But, while this difference in the construction and operation of the two mixers thus exists, it is by no means clear that it required invention to modify the Burns mixer, so that it could be charged and discharged at opposite ends of the drum. The only thing necessary to be

done was to take off the plate at the rear end of the drum, which was either bolted in place or connected with a flue, and feed the mixer through the opening thus obtained. Mechanical skill would seem to have been quite sufficient to accomplish this result. Moreover, it can hardly be said that invention would have been required to make an entirely new opening in the rear end of the drum. Mixers which received the materials at one end and discharged them mixed at the opposite end were old in the art at the time when the Burns patent was granted. Indeed, that form of construction seems to have been much more commonly used than the Burns form.

The advantage of an opening at each end of the drum is rapidity in operation. There is nothing in the testimony to show that there is any functional advantage, or that—assuming equal rapidity and the elimination of the shed and “neutral zones” to which we have referred—the Burns mixer would not mix concrete as well as the Ransome mixer. We present, then, to a skilled mechanic the problem of increasing the rapidity of the operation of the Burns mixer, so as to mix concrete materials in the face of their tendency to solidify. He knows that old concrete mixers received the materials at one end and discharged at the opposite end. He appreciates the delay caused by adjusting a single chute to both receive and discharge materials. While we recognize the difficulty of drawing a line between mechanical skill and invention, we think that the former should have been sufficient to teach this person skilled in the art to eliminate the double use of the one chute and to duplicate it at the opposite end—to go back to the old method of having separate inlet and outlet.

The next difference between the Burns mixer and that of the patent in suit which the complainant points out is the roof-shaped spreader, which appears in the former, but not in the latter. Burns says this of the spreader in his patent:

“In the drum is shown a stationary flange, or, as it might be called, a ‘roof-shaped spreader,’ s. This flange, s, is serviceable, since it tends to spread or scatter material falling from the upper part of the drum, whereby the mixing or blending is aided. This flange, s, also breaks the fall of material between the upper and lower portions of the drum. Such breaking of the fall is of advantage, for example, in the blending of tea leaves, since it is desirable to have the leaves injured or broken as little as possible.”

It is clear from the testimony that the spreader is especially designed to break the fall of delicate materials like tea. It might also cause a more thorough mixture of certain other materials. But it is not useful in mixing concrete as the different kinds of material in spreading would tend to segregate. The spreader, however, is merely an adjunct or appendage to the mixer, and only mechanical skill would be required to omit it. Indeed, the testimony shows that Burns himself did not include the spreader when making mixers for certain materials.

The final difference which the complainant contends exists between the Burns apparatus and that of the patent in suit lies in the creation of certain “neutral zones” in the former. These zones are said to be created by the following construction: In the drawings of the Burns patent each pair of flanges which extend convergently from the rear end of the drum toward the front end after meeting extend to the

front plate in lines parallel to the axis of the drum and make lifting pockets. These pockets are said to constitute "neutral zones" and to be objectionable. The patentee says in his testimony:

"Owing to the fact that the lifting pockets are parallel to the axis of the drum, an internal zone is created for a portion of the way across the drum that is not affected directly by the commingling blades. As a consequence, in mixing the material is carried by these lifting pockets and dropped, falls again upon the zone of the pockets, and is not, in my judgment, properly commingled with the matter in the other parts of the drum."

It may well be doubted whether the difficulty which the patentee points out would arise to any considerable extent in the actual operation of the Burns mixer, even if constructed precisely in accordance with the drawings of the patent. It would seem that, when the material falls from the lifting pockets, it would strike other material at the bottom and tend to move toward the rear of the drum. But, however that may be, there is nothing in the Burns patent to confine it to the precise arrangement of the cross-over blades shown in the drawings. And, if it were confined to such particular arrangement, a re-arrangement of them to obviate the defect of "neutral zones" would require no more than mechanical skill. Furthermore, it is by no means clear that the structure shown in the drawings of the Ransome patent is wholly free from "neutral zones." It does not appear that all the lifting pockets shown are affected directly by the commingling blades.

Therefore, while we appreciate the usefulness of that which the patentee has accomplished, we are constrained to hold that the differences between the apparatus of the patent in suit and that of the Burns patent do not involve invention, and, consequently, that the former patent is invalid.

The decree of the Circuit Court is reversed, with costs, and the cause remanded, with instructions to dismiss the bill with costs.

POPE MFG. CO. v. ARNOLD, SCHWINN & CO.

(Circuit Court, N. D. Illinois, Eastern Division. February 14, 1910.)

No. 27,035.

1. PATENTS (§ 69*)—ANTICIPATION—PRIOR PUBLICATION.

Under the rule that to constitute a prior publication which will invalidate a subsequent patent the publication must contain such a substantial representation of the patented device as would enable any person skilled in the art to make, construct, and practice the invention to the same practical extent as he would be enabled to do if the information was derived from a prior patent, a published illustration and description of a bicycle, showing every detail of a part subsequently patented by another, except that it did not show that a tube for containing the pedal shaft, shown by the patent to be without perforations, and so appearing in the illustration, may not have been perforated or cut away on the bottom or the opposite side not seen—there being, however, nothing to indicate that such was the fact—fulfills all the conditions of the rule, even conceding

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that there was a patentable difference between a perforate and imperforate tube used for such purpose.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 84; Dec. Dig. § 69.*]

2. PATENTS (§ 328*)—ANTICIPATION—BICYCLE.

The Smith patent, No. 392,973, for an improvement in bicycles consisting of a transverse tube for holding the pedal shaft, built rigidly into and made an integral part of the frame, in view of the prior art as disclosed in actual structures and prior publications in England, is void for anticipation and lack of novelty.

In Equity. Suit by the Pope Manufacturing Company against Arnold, Schwinn & Co. On final hearing. Decree for defendant.

Redding, Greeley & Austin, William B. Greeley, and William A. Redding (C. K. Offield, of counsel), for complainant.

Fred Whitfield (Dyrenforth, Lee, Chritton & Wiles, of counsel), for defendant.

KOHLSAAT, Circuit Judge. Complainant brings suit to restrain infringement of claims 1 and 6 of patent No. 392,973, granted to the assignee of William E. Smith, the patentee, on November 13, 1888, on application filed February 16, 1888, for improvements in bicycles. The claims in suit read as follows, viz.:

"1. In a rear-driving front-steering bicycle, the frame or reach provided with the rigid transverse tube, *c*, built rigidly into and forming an integral part of said frame and adapted, substantially as described, to receive the pedal shaft.

"6. In a frame for bicycles and kindred machines, a transverse shaft-receiving tube, *c*, provided with necks, *c*^s and *c*^s, to receive the front and rear ends of the frame or reach."

The gist of the invention consists in the combination with the reach or frame, of a transverse bearing-tube, *c*, supported by and integral with the reach, the whole forming a single rigid and integral structure.

It will be observed that, while both claims call for a rigid transverse pedal-shaft receiving tube in a bicycle, claim 1 is for a bearing-tube built rigidly into and made an integral part of the bicycle frame, irrespective of the means by which this is effected, while the means of claim 6 is limited to the bracket or bearing-tube having projecting necks whereby it may be built with, and become an integral and rigid part of the frame. The rigid and integral relation between the bracket and the frame may be effected by brazing or welding. The patentee at page 1, line 78, of the specification says:

"Heretofore the pedal-shaft has been carried in two bearings attached to the lower ends of a forked arm or standard depending from the frame, and owing to the severe strain exerted through the chain it has been found that the forked standard would twist, and by throwing the bearings out of line cause an excessive amount of wear and friction."

An examination of the prior art makes it plain that this statement is not justified by the facts. The Rover, Ranger, Raleigh, and other forms of bicycle and tricycle frames shown in certain prior English publications in evidence, and conceded to have been circulated in this country, clearly show rigid and integral bearings located in line, or in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

upper or lower contact with the reach. The patent provides that the bracket shall be centrally located, in a direct line—that is, between the rear and front portions of the reach or lower portions of the frame, or above or below the reach. It is evident that the combination with a rear-driving, front-steering bicycle called for in claim 1 is not of the essence of the invention, since this form of bicycle was old, and no invention could be predicated upon the application of the bracket to that particular device. The specification (lines 12 and 13, p. 1) says certain of the features are also applicable in machines of other forms. This would be true of the bracket. The defenses are (1) that Smith was not the first inventor; and (2) that the patent is in view of the prior art invalid.

The evidence relied on to establish the first defense is of weight only so far as it bears upon the second defense, therefore it is deemed necessary to consider only the latter. The patent was sustained by the Circuit Court of the United States for the Northern District of New York in a suit entitled *Pope Mfg. Co. v. H. P. Snyder Mfg. Co.*, on July 29, 1905. The record in that case for both parties is stipulated into this case. This, together with a large amount of new evidence, constitutes the record now before this court. As above noted, the patentee erred in stating the prior art as to the location of pedal bearings. In this, the Patent Office Examiners must have concurred, since the file-wrapper shows no suggestion of amendment in that respect. It would, therefore, seem to be a reasonable deduction to hold that in this proceeding the grant of the patent is not attended with that presumption of invention, which usually attaches to a grant. While some attempt was made to carry the date of invention back of February 16, 1888, when the application was filed, the evidence adduced in support thereof is not satisfactory, so that the date of filing of the application must be taken as the date of invention for the purposes of this hearing. The specification (page 2, lines 53 to 70) affords some discretion as to the location of the bracket with regard to the frame:

"The tube, c, is commonly brazed or cast or forged integral with tubular necks, one of which, c, rising therefrom enters and serves to support the lower end of the tubular seat-standard, J, and to which it is brazed or otherwise fastened. When the frame is made in the particular form herein shown, the bearing-tube, c, will also have two horizontal necks extending respectively forward and rearward, as shown at c^s and c^o in Fig. 14, to enter the front and rear portions of the frame. When thus constructed, the bearing-tube and its necks serve as a means for uniting the two parts of the main frame or reach. When, however, the frame is of the usual shape, it may be made continuous from end to end and the tube applied transversely to its upper or its under side."

To sustain its first contention, defendant introduced in evidence, among others, the testimony of one Alfred J. Gould, who was found through the medium of the publicity given in the Snyder Case. He testified that he was the son of an English manufacturer of bicycle parts in England, in which line of business he had been actively engaged since 1866, having ridden a bicycle over this country in 1874. In 1875 he returned to England and came back in 1876 in connection with the bicycle department of the Philadelphia exhibition. Thereafter, until 1885, he was back and forth between the two countries.

Smith, the patentee, was also an Englishman, having come to this country in 1882, and while in England, was acquainted with Gould in a business way. In 1884, Gould testifies he went to Smith's house, and that Smith knowing he was about to return to England requested him to bring back some bottom-brackets of the latest design and also some patterns from which to make castings here. On his arrival in England, Gould looked about for the newest form of bottom-brackets. He saw a drop frame (lady's form) at the place of business of a friend named Palmer, and explained the same to Smith later. At Gorton's place of business in Wolverhampton he found a bottom-bracket similar to that used by Smith, except that it had only one rear neck instead of two. At Coventry, he says he found the newest form of bottom-bracket at the place of William Hosier, one of defendants' corroborating witnesses, and obtained possession of it. He took it to his father's place at Wednesbury, and made a wooden pattern from it, changing the angle of the two rear necks or lugs from 45 degrees to 20 degrees above the horizontal. From this wooden pattern he caused to be made brass patterns, and two castings from each brass pattern. Defendant's exhibit "malleable cast bottom-bracket" is, he deposes, a substantial reproduction of Hosier's device. Defendant's exhibit "white metal cast bottom-bracket" is, he testifies, a substantial reproduction of the bracket cast from the brass patterns. Defendant's exhibit "pattern of bottom-bracket" is a substantial reproduction of the brass patterns, he says. These bottom-bracket patterns and castings he says he brought to this country as early as February, 1885. He exhibited them to a number of people, and took them to Smith shortly after the inauguration of President Cleveland. Thereafter, he worked nights for a week constructing a drop-frame in Smith's shop, using one of the brass castings. Smith was present, but did nothing toward the construction except to work the bellows, etc. Gould was an expert brazier. He simply embodied what he had seen in England, and never considered there was any invention. Smith suggested taking out a patent for the frame, but Gould thought it too old and involving nothing more than mechanical skill. He received no pay for his work. More than 30 witnesses have corroborated Gould's testimony in important particulars, among them the above-named Hosier, and the widow of the patentee. In addition, the record shows many corroborating coincidences, the recital of which would unduly expand this opinion. They all leave an impression of truthfulness. This evidence is controverted by a brother of Smith, who flatly denies Gould's statement as to the construction of the frame, including the bottom-bracket. It is also in evidence that Gould offered to testify for complainant for a consideration of \$50,000, which was, of course, rejected. An attempt is made to show that, at the time this offer was made, Gould was suffering from a mental disorder. Notwithstanding Gould's later obsession, the above statements, so far as they are corroborated, are reasonably convincing, and are deemed worthy of consideration for purposes of disclosing the state of the art at the time the patent was applied for. In support of its contention that the device of the patent in suit was made public and known in this country prior to the alleged date of invention, defendants introduced a number of publications showing bicycle parts

and bicycles. These were published in England, but were circulated in the United States as above stated. Attention is called to certain notices so published in 1887. Among others, there is produced the Rover type of bicycle. This bottom-bracket depended somewhat below the frame as Smith says his may. It is rigid and integral. The tube is cut away between the two end bearings. It lacks only the bracing effect of the tube walls between the bearings, and what little advantage exists in protection from dust. It is, as defendants' expert says, a mutilated tube. It is provided with a tubular sheet metal cover between the bearings, to exclude dust and the like. The transverse tubular pedal shaft was old. It appears in the patent to Latta, No. 360,101, granted March 29, 1887, on application filed February 12, 1886, and in a number of patents cited in the record. It is complainant's contention that nothing short of a closed tube-bearing or bottom-bracket anticipates the patent in suit; that any appreciable opening or perforation in the walls of the tube differentiates from its tube. Defendant's expert Wiles was of the opinion that the Rover frame constituted a complete anticipation, and that the complete tube involved nothing more than mechanical skill. The rigid, integral bracket is also shown in British patent No. 4,657 of 1878 to Starley for a tricycle, etc. This patent calls for a reach forged with a socket to receive the pedal crank-shaft. It will be seen that with the exception that claim 1 calls for a specific style of bicycle—a requirement which, as above stated, is no essential part of the invention—this tricycle bottom-bracket comes very close to, if it is not in fact, an anticipation of that claim.

The bicycle design cut shown on pages 12 and 13 of the publication, Griffin Yearbook, 1887, and called "The Ranger Centaur Dwarf Safety Ranger," shows a bottom-bracket in rigid connection with the reach, but having a tubular journal or transverse tube underneath the reach. The Ranger (not the dwarf ranger) shown at page 8 in the Centaur Cycle Co.'s catalogue for February 1, 1888, is accompanied by the following statement in said publication, viz.:

"We produce in one solid steel forging the crank-bearing bracket with connections for the bottom fork and main backbone."

Complainant's expert says as to this bottom-bracket:

"It is not stated what these connections are nor whether the crank-bracket is tubular. It might have been partly cut away for the sake of lightness, according to the ideas then generally prevalent or clamped connections of some kind might have been used."

The cut of the Ranger shown with the advertisement discloses a tube so far as the bearing is visible. This of itself would show absolutely a tube that was so nearly tubular all the way through as to be sufficiently guarded against wrenching out of alignment. It seems like a straining of the evidentiary effect of the cut, to say that the transverse tube may be cut away or perforated. The cut shows the tube to be centrally between the forward and rearward portions of the reach, and might well be taken for an illustration of the bicycle in suit.

The nearest approach to a complete anticipation and publication and disclosure of the principles of the device in suit will be found in the

Raleigh bicycle. These are shown in the *Bicycling News* of February 4, 1888. Illustrations of this bicycle show beyond question a rear-driving, front-steering bicycle, having what seems to be clearly a tubular bearing-support centralized between the reach and the rear forks of the machine, substantially as shown in the patent in suit. The forward end is plainly shown to have been brazed to a lug on the bracket. The diagonal strut or brace forming the seat-post of the Smith patent is not shown, but this omission is admittedly immaterial. In *Sturmeys Handbook* (which is stipulated to have been published to the bicycle trade on July 20, 1887, and to be a standard publication) is found the following descriptive matter in reference to Raleigh bicycles:

"Crank-bracket constructed solid with the frame;" "solid crank-bracket impossible to work loose."

There seems to be a concurrence of the experts who have testified in this case that "solid with" means substantial integrality. In corroboration of this view, we have the description of the rear-fork adjustment as "slotted fork end and screw adjustment"—showing that the chain adjustment of the rear wheel was made through slotted ends of the rear forks (as of course it must have been if there was substantial integrality of the crank-hanger with the frame). This reasoning also applies to the Ranger and other designs above named. The brazing of the lower end of the reach to a lug on the forward part of the bracket being plainly visible, there seems to be hardly a question, this being an old and well-known mechanical expedient, that the other parts of the tubular frame were also brazed to lugs on the bracket at their respective meeting places, and thus made "solid with the frame" as stated.

These cuts and descriptive matter make it clear beyond a reasonable doubt that the Raleigh safety, constructed mainly of tubing, had a centralized and rigidly built-in bottom-bracket. Whether the tubular axle-support was completely inclosed or imperforate does not appear from either descriptive matter or illustrations. So far as visible, this device was imperforate. What was on the under side is not shown. For all that is there shown it may have been partly open or perforated. As above stated, complainant insists that the word "tube" in the claim should be strictly construed to mean a completely inclosed or imperforate bearing-support, and that as this published showing of the Raleigh bicycle does not show that this axle support was not perforated it cannot be sufficient as a publication to invalidate the patent. The law as to what is a sufficient publication is laid down in *Seymour v. Osborn*, 11 Wall. 516, 20 L. Ed. 33, as follows:

"Patented inventions cannot be superseded by the mere introduction of a foreign publication of the kind, though of prior date, unless the description and drawings contain and exhibit a substantial representation of the patented improvement, in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains, to make, construct, and practice the invention to the same practical extent as they would be enabled to do if the information was derived from a prior patent. Mere vague and general representations will not support such a defense, as the knowledge supposed to be derived from the publication must be sufficient to enable those skilled in the art or science to understand the nature and operation of the invention, and to carry it into practical use."

This statement of the law is found reiterated in *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. 1073, 30 L. Ed. 1064.

The question is whether this published showing of the Raleigh bicycle is such a "substantial representation" of the patented device as would enable "any person skilled in the art * * * to make, construct, and practice the invention to the same practical extent as he would be enabled to do if the information was derived from a prior patent." With these illustrations and descriptive matter of the Raleigh bicycle before him, showing every detail of the claims in suit except whether or not there was a perforation or opening in the under side of the bracket, and with both perforate and imperforate axle-supports to choose from, it is the opinion of the court that any person skilled in the art could as certainly have produced a bicycle involving the subject-matter of the claims in suit as if he had the Smith patent before him. If he chose a perforated axle-support and found that it was objectionable, it is believed that, in view of the state of the art, the most ordinary mechanical skill would tell him to close the opening or adopt an old form of imperforate tube. With the state of the art in view, it is the opinion of the court that there was no patentable difference between the Smith bottom-bracket with a perforation in its under side and, a bracket of the same construction without a perforation. This brings the case within the rule stated in *Chase v. Fillebrown et al.* (C. C.) 58 Fed. 374, " * * * That if the prior publication contains an omission which would ordinarily be supplied by one skilled in the art, the omission will not avail a subsequent patentee"—citing *Cohn v. Corset Co.*, 93 U. S. 366, 23 L. Ed. 907; *Downton v. Milling Co.*, 108 U. S. 466, 3 Sup. Ct. 10, 27 L. Ed. 789. The claims in suit were evidently allowed by the examiner on the theory that tubular brackets were new—that the depending forked bracket represented the prior art.

Complainant's expert insists that the language of the specification at lines 67 to 70, p. 2, above quoted, does not apply to claims 1 and 6, and that the bottom-bracket before the court must be integrally constructed in a direct line with the forward and backward extending axes of the reach. He does not advise the court as to what other claims of the patent this language appertains. When we consider that the end to be attained by his device was the strengthening of the frame without increase, but rather with a decrease of weight, it would seem that this position is an afterthought of the expert, and not in the mind of the inventor at the time he filed his application. It appears from the record that for several years preceding the date of the filing of the application for the patent in suit, the bicycle world was very active, with England as its center. The safety bicycle had been reduced to practical shape.

Of the close commercial relations, the interchange of publications, as well as personal intercourse between individuals of this country and England, the court will take judicial notice. As above stated, there is also before the court the fully corroborated testimony of Gould as to his trips to and fro between England and this country, and his intercourse with manufacturers and dealers on both sides of the ocean. There can be little doubt at a time when the bicycle was becoming a

craze that manufacturers and dealers in this country keenly watched, quickly adopted, and closely followed every advance in the art on the other side of the water, for England at that time was acknowledged leader in bicycle manufacture. Indeed, we have direct evidence that this was the fact in the testimony of Mr. Kirk Brown, one of complainant's witnesses. The admission, therefore, that the subject-matter of the Smith claims in suit was in common use in England during the years 1886 and 1887, nearly three years before Smith's application, raises a strong presumption that some of the English machines may have found their way here, or have been copied by manufacturers in this country. The fact that English manufacturers had generally adopted the form of construction shown in the Smith claims in suit without evidently considering the change of sufficient importance or novelty to patent, also throws an important light upon the condition of the art at that time.

It follows that the patent is not valid, and cannot, in the light of the evidence as to the prior art, be sustained. The bill is dismissed for want of equity.

***SIMPLEX RAILWAY APPLIANCE CO. v. PRESSED STEEL CAR CO.**

(Circuit Court, S. D. New York. February 9, 1910.)

1. PATENTS (§ 165*)—CONSTRUCTION—CLAIMS.

An element not claimed therein cannot be read into a claim of a patent to impart to it patentable novelty.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CAR TRUCK BOLSTER.

The Bauer patent, No. 593,410, for a metallic car truck bolster, construed, and claims 1, 2, 4, and 5 held void for lack of patentable invention. Claim 6 held to disclose patentable novelty and invention as limited to the precise construction shown, and also infringed.

In Equity. Suit by the Simplex Railway Appliance Company against the Pressed Steel Car Company. On final hearing. Decree for complainant.

Philip B. Adams and Linthicum, Belt & Fuller (Charles C. Linthicum and J. Edgar Bull, of counsel), for complainant.

H. A. Knight, C. P. Byrnes, and Bakewell & Byrnes, for defendant.

HAZEL, District Judge. This action relates to the infringement of letters patent No. 593,410, granted November 9, 1897, to William V. Kelley for a metallic car truck bolster of which Carl E. Bauer was the inventor. The patentee assigned the patent to the complainant. In the specification the patent particularly refers to a prior patent to Waldo H. Marshall for a car truck bolster upon which the body of a railroad car is carried, said Marshall bolster consisting of a compression member of channel iron, a plate iron tension member, and a strut or king-post in the center separating them. The compression member extends in a straight line from one end to the other of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bolster, and the tension member extends straight from the strut or king-post to its ends, where it is connected with the compression member at an acute angle and then turned around the side edges of it. The Marshall bolster concededly was open to the fault of frequent bending or splitting of the web of the compression member owing to the fact that the load or weight of the car carried; but it was not properly distributed or apportioned. From experimental tests made prior to the patent in suit, it was learned that when the bolster was strained by the load it would become weakened at its lateral ends at the point where the tension member joined the compression member. In this situation it was the object of the patent in suit to overcome such defects by strengthening the Marshall bolster at its points of weakness. This could only be accomplished in the estimation of the inventor by transferring the strain from the sides of the tension member to the sides of the compression member. A further object of the Bauer patent was to increase the strength of the bolster by forming the metallic parts in such a way as to make the length of the truss less in proportion to its depth. The claims in issue read as follows:

"1. In a bolster, the combination with its compression member, tension member, and middle support; of a strengthening-piece around which the end of the tension member is bent, substantially as described.

"2. In a bolster, the combination with its compression member, tension member, and middle support; of a strengthening-piece placed between the end of said compression member and the bent-up portion of the tension member, substantially as described."

"4. In a bolster, the combination with its compression member, tension member, and middle support; of a strengthening-piece placed at the end of said compression member, and at its outer edge overlapping the web of the same, substantially as described.

"5. In a bolster, the combination with its compression member, tension member, and middle support; of a strengthening-piece having its outer edge rounded, and the bent portion of said tension member engaging said rounded edge, substantially as described.

"6. In a bolster, the combination with the middle support; of a compression member, and a tension member, the said compression member being bent upward near its ends in a line with said tension member, and the tension member being straight at its ends to the ends of the compression member, substantially as described."

The claims are for separate and distinct inventions, i. e., the character of the truss members, and, independently of such members, a strengthening-piece inserted or placed as described.

The principal defenses are: (1) Want of patentable invention in view of the state of the art; and (2) that the idea of the improvement was first disclosed by one Lindstrom, and that Bauer appropriated it. Regarding the latter defense, there was much testimony pro et contra which, after stripping the hull to get at the kernel, may be summarized. It appears that Mr. Kelley, the patentee, was commercially interested in the sale of the prior Marshall bolster, and, knowing of its weakness and straining from the load at the ends of the tension member, he requested the witness Lindstrom, a skilled engineer then in the employ of the Pennsylvania Railroad Lines, to make and submit a drawing and blueprint of a truck bolster which would remedy the imperfections of the Marshall bolster. Two designs, Nos. 1 and 2, in evidence, were prepared by Mr. Lindstrom and forwarded to Kelley on or about July

5, 1897, and received by him on the following day. In design No. 2 there is shown a bolster wherein the end of the tension member is bent or kinked at a point near the edges to join the compression member leaving a space at the ends in which a strengthening or filler piece is placed or inserted. On July 8th, answering Lindstrom's letter inclosing the designs and blueprints, Kelley, then in the employ of the Charles Scott Spring Company, disapproved of them and inclosed a drawing that Bauer, a mechanical engineer in the employ of the same company, had made and referred to it as a substitute for design No. 2, stating that he believed such design accomplished the purpose of remedying the defects in the Marshall bolster. Afterwards on July 21, 1897, Bauer applied for the patent in suit. Defendant claims that the Bauer improvement was fully disclosed by the Lindstrom design No. 2; that any differences in construction are mere modifications which any experienced mechanic could have made after having the said design exhibited to him. Complainant, however, has given testimony tending to show that Bauer, the inventor, on April 1, 1897, began making sketches and drawings of a truck bolster to improve the Marshall structure; that in the latter part of April Bauer exhibited a sketch and paper model to Kelley which disclosed the invention in suit.

The testimony as to the precise time when the Bauer invention was conceived and actually completed is not altogether free from criticism, but it nevertheless appears clearly enough from the evidence that the bolster in question in its essential details was completed by Bauer prior to the time when the Lindstrom designs were exhibited to him. This view would seem to find support in the fact that Lindstrom, after the Bauer patent was granted, applied for a patent to cover certain features of construction of a bolster following the design of the Bauer invention; but he did not then claim to have invented or originated such form of bolster or its equivalent. The patent in suit was cited by the Patent Office as anticipating his application, and he distinguished his improvement without attempting to antedate it. Indeed, he has never laid substantial claim of invention to the Bauer bolster, although he testified herein that such bolster is the equivalent of his design No. 2. It is evident from the proofs that at this time Kelley was commercially interested in improving the Marshall bolster, and in view of such interest and his desire to enlist Mr. Scott, who had confidence in Mr. Lindstrom, in the business of manufacturing the bolster, it is not strange that he should separately request both Lindstrom and Bauer to try to remedy the defects in the Marshall structure. Nor is it incredible, considering the narrowness of the field for patentable improvement in the bolster, that the draftsmen Bauer and Lindstrom should produce designs so nearly alike but unlike, as I think, from a patentable point of view. Both were bent on achieving the same purpose with the Marshall bolster before them, which obviously did not permit of many changes or alterations either in configuration or manufacture. Lindstrom approached the problem of strengthening the bolster at its web with a straight compression member and bent tension member. Bauer, however, believed that to kink or bend the tension member would not strengthen it or remedy its defects. He, accordingly, slightly inclined the compression member so as to joint a V-

shaped tension member near its ends so that both members extended parallel to their ends.

Does the patent disclose patentable invention? The defendant contends generally that shortening the truss by bending down the compression member to join the tension member, both members extending to the edges and to insert a strengthening-piece at the ends were obvious mechanical expedients. I think, however, that the specific improvement of claim 6 has merit and was patentably new and novel. I have examined the prior art, the patents to Marshall, Kittinger, Baker, Montz, and McCarty; but in none of them is suggested the elements of bending down the compression member to join the tension member and placing them parallel to the bent or curved portion of the tension member. True, it was old to make a V-shaped tension member and a compression member bent to turn upwardly or into line with it at the ends; but none of the prior patents disclose a method for strengthening the truss with a tension member of the kind described in the specification. The invention, concededly, was not a big discovery; but it is certainly shown that Bauer devised means to relieve the tension member from the stress of severe strain with the result that the imperfections of the Marshall metallic bolster was obviated. To this extent he advanced the art and by his adaptation achieved a new result.

The claims relating to the strengthening-piece have been carefully considered, and the question whether there was patentable invention is not entirely free from difficulty. That it was an important feature to impart a thickness and resistance to the web of the channel can scarcely be doubted; but thickening or strengthening two metallic parts joined by rivets is as old as ironmongery. To strengthen the truss member at points of weakness by adding or inserting a strengthening portion was not new or novel. In the Baker patent, No. 438,466, for a brake beam, a strengthening-piece is formed by lapping over or doubling the end. True, the prior art does not show a separate piece with lip overlapping the compression member; but to make such a strengthening-piece and place it over the compression member when its use became necessary was not, in my judgment, a patentable thing to do. It is not unlikely that by complainant's adaptation the bolster was materially improved; but to achieve the improvement by the mere use of a strengthening-piece over the compression member, fitted into a lip or hook, did not require the exercise of the inventive faculty. After disposing of the truss members as described in the specification, it undoubtedly became an obvious mechanical expedient to use such a strengthening-piece with a projecting lip to go around the compression member. Moreover, the said claims are not limited to separating the strengthening-piece from the truss members, and I think they must be held void unless the elements of claim 6 are read into them. To include such other elements in claims 1, 2, 4, and 5, however, would impart to them patentable novelty, and this the court cannot do. *McCarty v. Lehigh Valley Railroad Co.*, 160 U. S. 110, 16 Sup. Ct. 240, 40 L. Ed. 358.

The next question deserving mention is whether claim 6, read in

connection with the specification, can be broadened to include as an equivalent a truss with a straight compression member and a curved tension member at its ends. In view of the extreme narrowness of the art, the testimony of complainant is persuasive that a bent or kinked tension member to join the compression member near the side edges would be unable to remedy the defects of the Marshall bolster, and, therefore, it was not the mechanical equivalent of claim 6. Bauer's form of construction, as has already been said, was the first which was capable of obviating the imperfections of the Marshall bolster and in fulfilling the purposes of the invention. Complainant on the hearing, however, offered to disclaim any other construction than that specifically described; hence the court will require a disclaimer to be filed as a condition of the decree, notwithstanding what has been said herein regarding the impracticability of a kinked tension member to obviate the defects of the Marshall bolster.

The defendant employs in its structure a pressed steel channel compression member which extends straight from the king-post to the center line of support with its end slanting upwardly to the strengthening-piece. The tension member is a flat plate and extends straight from the king-post to the point near the side edge, where it is joined by the compression member, and from such point both members lie parallel to the point where the tension member is turned upwardly to form a loop. Such form of construction is an infringement of the sixth claim. But claims 1, 2, 4, and 5 are void for want of patentable novelty.

A decree, with costs, may be entered accordingly.

MALIGNANI et al. v. HILL-WRIGHT ELECTRIC CO.

(Circuit Court, S. D. New York. February 17, 1910.)

1. PATENTS (§ 36*)—SUIT FOR INFRINGEMENT—DEFENSES.

Where a patent relates to a complex subject, such as one dealing with the action of vapors and gases and electro energy with their resultant phenomena, a defense of lack of invention or of limitation should be supported by expert testimony.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 36.*]

2. PATENTS (§ 323*)—VALIDITY AND INFRINGEMENT—PROCESS FOR EXHAUSTING INCANDESCENT BULBS.

The Malignani patent, No. 537,693, for a process for producing a vacuum in the bulbs of incandescent lamps, was not anticipated, discloses patentable novelty and invention, and in view of its proved utility is entitled to a broad construction and a corresponding range of equivalents. Also *held* infringed.

3. PATENTS (§§ 229, 230, 231*)—INFRINGEMENT—PROCESS PATENT.

To reverse or transpose the steps by which a patented process is carried out or to substitute a chemical substance for another which is known in the art as the equivalent, or which by its chemical action performs similar functions, does not avoid infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 366-368, 369; Dec. Dig. §§ 229, 230, 231.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. PATENTS (§ 132*)—TERM—EFFECT OF INTERNATIONAL CONVENTION.

Article 4 bis, inserted in the International Convention for the Protection of Industrial Property of March 20, 1883, by the additional act of convention signed at Brussels December 14, 1900, proclaimed by the President August 25, 1902, 32 Stat. 1936, as controlled and construed by Act March 3, 1903, c. 1019, 32 Stat. 1225 (U. S. Comp. St. Supp. 1909, p. 1270), "to effectuate the provisions" of such additional act of convention, did not have the effect of changing the term of an existing United States patent as fixed by statute at the time of its issuance; and such a patent granted prior to January 1, 1898, and which is limited by the provisions of Rev. St. § 4887 (U. S. Comp. St. 1901, p. 3382), to the term of a prior foreign patent, is not extended by such additional act.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 188½–191; Dec. Dig. § 132.*]

In Equity. Suit by Arturio Malignani and the General Electric Company against the Hill-Wright Electric Company. On final hearing. Decree for complainants.

Richard N. Dyer and John Robert Taylor, for complainants.

A. Parker Smith, for defendant.

William Houston Kenyon, for New York Tanning Extract Co., as amicus curiæ.

HAZEL, District Judge. The complainants, who are respectively the patentee and licensee of the patent herein involved, charge the defendant with infringement of claim 1 thereof, which letters patent No. 537,693 were granted April 16, 1895, to Arturio Malignani for process of evacuating incandescent lamps. Prior to the issuance of the patent, on February 10, 1894, an Italian patent for the same invention was granted to the patentee. Said United States patent has been sustained by the Circuit Court for the District of New Jersey (Malignani v. Germania Electric Lamp Co. [C. C.] 169 Fed. 299), and recently the Circuit Court of Appeals for this circuit sustained and found infringed the patent No. 726,293, granted to John W. Howell,¹ which covers the Malignani process, and was an improvement of the pingcock for soldering the tube. Said decisions clearly indicate the nature of the process and the state of the art. It is therefore thought unnecessary to elaborately describe the invention and its achievement. Briefly stated, the production of a very high vacuum is necessary in the manufacture of an incandescent lamp. In fact an absolute vacuum is required to keep the carbon filament at a high standard of efficiency and from being wasted or destroyed. If a small quantity of air is permitted to remain in the lamp the carbon combines quickly with the oxygen and the filament is rendered useless for the purposes of illumination. Prior to the Malignani patent in suit there was a known method—by the use of mercury pumps—for securing a high vacuum in the lamp bulb, but the *modus operandi* was very slow in comparison with the method under consideration. The results attained by the mercury pump method were unsatisfactory, in that the health of the operators became impaired owing to the mercury fumes, skilled and expensive labor to exhaust the lamps was required, and there was frequent breakage of the bulbs. There were various processes practiced in the art at

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

¹ See General Electric Co. v. Hill-Wright Electric Co., 174 Fed. 996, 98 C. C. A. 566.

the date of the patent, but, according to the evidence in each instance it required in the neighborhood of 25 minutes to exhaust a lamp bulb. In this situation the Malignani process came into existence. The specification, after describing the manner in which the lamp may be connected with the vacuum pumps, and how the chemicals may be introduced to generate the desired vapors, says:

"Substances, adapted under certain circumstances to generate gases or vapors, such as arsenic, sulphuric or iodine are then introduced into the interior of the bulb A advantageously at about the center of the tube T. The gases thus generated are intended to combine with the gases generated by the filament of the lamp when brought to incandescence and form a liquid or solid precipitation."

It is proven that by the process in suit the complete evacuation or withdrawal of the air is secured within the period of a few minutes, first, by the introduction of chemicals which are put into the tubulure of the lamp and deposited in the inner side; second, using the pump for exhausting the bulb and thus securing a partial vacuum; third, securely closing the tubulure by fusing the glass and shutting off the pump; fourth, imparting to the filament by the use of electricity intensive incandescence to produce a blue haze, or so-called ionization; fifth, heating the tubulure to clear it of chemical substances; and, finally, fusing the tubulure and removing it from the pump. Such steps in the process are combined in claim 1, which reads:

"(1) A process for producing a vacuum in the bulbs of incandescent lamps consisting in first introducing into a tubular elongation of said bulb suitable substances capable of being gasified by heat and combining with the gases generated by the filament when brought to incandescence to form solid or liquid precipitations, then exhausting the said bulb by means of a pump; and sealing the said tubular elongation up; then bringing the filament to intensive incandescence and simultaneously heating the substance in the elongation aforesaid, and finally sealing off the said elongation in the manner and for the purpose substantially as described."

The essence of the process is found to exist in "the intensive incandescence of the filament in the attenuated atmosphere of the bulb at a time when the vapor of a suitable solid substance is present in the bulb, so that the precipitation of its gaseous contents is effected and the desired vacuum obtained." The usual defenses of anticipation, want of patentable novelty, and noninfringement are interposed in the answer, but the latter defense is particularly relied upon.

The prior patents in evidence do not anticipate the invention. Some of the processes were wholly useless, while others when used speedily became inoperative and impracticable. Certainly in none of them could a vacuum in a lamp be secured even approximately within the time in which it was produced by the use of the Malignani process. None of the prior patents disclosed the distinguishing feature of intense incandescence of the filament in the attenuated atmosphere of the lamp and though brought into the record to anticipate the patent in suit they have not been explained by any testimony and it is questionable whether they are entitled to much weight. All of them relate to a complex subject involving the subtleties of vapors and gases and electro energy with their resultant phenomena, and if claim 1 is in fact devoid of invention, or merely entitled to a strict construction, there

should have been introduced explanatory testimony to sustain the defense. *Waterman v. Shipman*, 55 Fed. 982, 5 C. C. A. 371; *Fay v. Mason*, 127 Fed. 325, 62 C. C. A. 159. The process possesses novelty and utility, and the patent removed the difficulties and inefficiencies of the prior art; it, having made a prominent step forward, is, I think, entitled to a broad construction with the corresponding right to invoke the doctrine of equivalents.

Does the defendant infringe the claim in controversy? It denies that its filament generates any gases; that in practice it uses phosphorus which vaporizes and unites with the oxygen remaining in the lamp; that its pump is left open until after incandescence of the filament, and generally that the steps employed by it to produce a vacuum are different from those in complainant's process and cause a different chemical reaction. If I am correct in believing that the patent is entitled to a liberal construction, it follows that a liberal use of equivalent means is permitted by which the result may be achieved, and any departure tending to evade its scope or the principle of operation will not deprive the patent of protection. The specification referring to the use of substances adapted under certain conditions to generate gases or vapors mentions arsenic, sulphuric, or iodine. The patentee, however, did not limit himself to the use only of such substances, and he was not required to specify all the known substances which might be advantageously used in the process. It is held that to reverse or transpose the steps by which a process is carried out or to substitute a chemical substance for another which is known in the art as the equivalent or which by its chemical action performs similar functions does not avoid infringement. *Malignani v. Germania Electric Lamp Co.*, supra; *Devlin v. Paynter*, 64 Fed. 399, 12 C. C. A. 188; *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968; *General Electric Co. v. Campbell* (C. C.) 137 Fed. 600. The proofs show that phosphorus (red or amorphous) is adapted to generate gases or vapors at a lower temperature than is required to fuse the substances in the tubulure, and therefore responds to the chemical element or substances mentioned in the specification. Even if defendant had been the first to use phosphorus or "paint" as an element which bettered the patentee's method, infringement could not be avoided simply on that ground. *Atlantic Giant Powder Co. v. Mowbray*, 2 Ban. & A. 442, Fed. Cas. No. 624; *United Nickel Co. v. Pendleton* (C. C.) 15 Fed. 739, 24 O. G. 704. It appears, however, that red phosphorus or "paint" has been used by complainant in its process in lieu of arsenic, sulphuric, or iodine since the grant of the patent, and that its equivalency was understood in the art. It makes no difference that such substance is placed by the defendant on the fine anchor wire inside the lamp bulb instead of in the tubulature. The patentee, as already indicated, is not confined to his specific means. Importance is attached to the testimony indicating that in defendant's process the pump connected with the lamp is not shut off to keep air from re-entering the lamp until after the exhaustion is completed. This difference in operation, however, cannot avail the defendant, as the period of closing the pump valves is not regarded as an essential step in the Malignani process. In my mind it is immaterial whether the

pump used by defendant was disconnected before or after precipitation of the gases. It is true, the patent specifies closing the lamp from the pump before precipitation, but, as stated by complainant's expert witness, the pump used by the defendant might have operated automatically as a closure, shutting off connection between the lamp and the pump after the desired exhaustion had been secured. It is not necessary to analyze the other steps taken by the defendant to completely exhaust the incandescent lamps. I have ascertained about them, and believe they are the equivalent of complainant's, and that the defendant substantially uses all the steps and none other by which the result of the Malignani process is achieved.

The defendant criticises the *prima facie* showing of infringement, and argues that the court should not credit it as it is claimed to be impossible for any one to say that the cause of a phenomenon is ascertainable merely from ionic action. The answer is that three competent witnesses have substantially testified that while they cannot state definitely as to the cause of the precipitation or in what manner the phosphorus combines with the gases or vapors, yet in their judgment the use of phosphate in connection with the various steps of the patent produce the desired functional result. Under these circumstances it may fairly be presumed that there was no essential difference between the two methods. If the steps employed by the defendant were based upon a different principle it should have been proven.

The next question which has arisen since the argument is whether the patent in suit remains in full force for the entire term of 17 years, as provided by section 23 of the patent act of 1870 (Act July 8, 1870, c. 230, 16 Stat. 201), or whether it expired with the prior foreign patent pursuant to section 4887, Rev. St. (U. S. Comp. St. 1901, p. 3382). The Circuit Court of Appeals for the Third Circuit has recently in *Hennebique Construction Company v. Myers*, 172 Fed. 869, considered this question, and reached the conclusion that article 4 bis provided by the International Convention for the Protection of Industrial Property of December 14, 1900, at Brussels, and which was ratified by the United States Senate March 7, 1901, proclaimed by the President to take effect on September 14, 1902, was self-executory; that the declaration of interdependence of foreign and domestic patents was by such article 4 bis completely abrogated, and the statutory limitations imposed on the term of domestic patents for inventions theretofore patented in foreign countries superseded. It was further held by Judge Archbald in his opinion that article 4 bis was not subsequently repealed by implication by the act of Congress of March 3, 1903, c. 1019, 32 Stat. 1225 (U. S. Comp. St. Supp. 1909, p. 1270). The effect of the decision in the *Hennebique Case*, if followed by this court, would be that the patent in suit, which supposedly has expired, in reality remains valid and enforceable for 17 years from April 16, 1895, and is wholly unaffected by the prior Italian patent or the term for which it was limited. A careful perusal of the opinions written by Judges Gray, Buffington, and Archbald indicates that the holding of Judge Archbald, in which Judge Gray concurred, was not actually necessary to a decision of the case, and in view of his later remarks in *Union Typewriter Co. v. L. C. Smith & Bros.* (C. C.) 173 Fed. 288,

wherein he states that his opinion upon this subject was not the opinion of the court, I do not feel bound to follow it. Moreover, I am persuaded by the additional briefs submitted by counsel bearing upon this question since the Hennebique decision was reported that article 4 bis, or the treaty, is not entitled to receive the construction given it. The article or treaty and the subsequent act of Congress of March 3, 1903, to effectuate the provisions of the additional acts of the convention have heretofore been passed upon and construed by the Circuit Court of Appeals for the First Circuit. *United Shoe Co. v. Duplessis Shoe Co.*, 155 Fed. 842, 84 C. C. A. 76. In that case it was unqualifiedly held that the act of March 3, 1903, did not alter or vary the terms of an existing United States patent as established by law at the time the patent was granted; that Congress by its enactment had declared by implication that article 4 bis of the treaty was without retroactive effect. I concur with the reasoning and conclusions of Judge Putnam, who wrote the opinion, and therefore it follows that the patent in suit has expired because of the expiration of the prior Italian patent for the same invention.

A decree may be entered, with costs in favor of complainant, holding claim 1 infringed by the process employed by the defendant, and for an accounting.

HESS-BRIGHT MFG. CO. et al. v. STANDARD ROLLER-BEARING CO.

(Circuit Court, E. D. Pennsylvania. March 10, 1910.)

No. 233.

1. PATENTS (§ 32*)—INVENTION.

The fact that an expert, with a patent before him and by the use of the information suggested thereby, is able to construct the patented device from that of a prior patent, does not overcome the presumption of invention arising from the granting of the later patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 35, 36; Dec. Dig. § 32.*]

2. PATENTS (§ 328*)—INVENTION—BALL BEARINGS.

The Conrad patents, No. 822,723, for a ball bearing, and No. 838,303, for a method of manufacturing and assembling such bearing, cover a device and mode of assembling the same which are novel and of great utility, and disclose invention.

In Equity. Suit by the Hess-Bright Manufacturing Company and another against the Standard Roller-Bearing Company. On final hearing. Decree for complainants.

See, also, 171 Fed. 114.

Dwight M. Lowrey and Robert Fletcher Rogers, for complainants.
Augustus B. Stoughton, for defendant.

HOLLAND, District Judge. Two patents, No. 822,723, granted June 5, 1906, and No. 838,303, granted December 11, 1906, to Robert Conrad, were transferred by him to the Deutsche Waffen und Munitions-Fabriken, a German Company, by assignment duly recorded in the United States; the Hess-Bright Manufacturing Company being

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the sole licensee in this country. Suit was instituted for the infringement of claims Nos. 2, 8, and 9 of the first and of claim No. 1 of the second. The defendant makes the sole defense of lack of invention. Hence the only question for the court is whether or not the three claims of the first and the one claim of the second patents are valid; that is to say, do they cover patentable subject-matter, and did it involve invention to produce the bearing in view of the prior art?

Patent No. 822,723 is for an improvement in ball bearings. There are two grooved rings, the grooves facing each other, so as to form a channel or raceway for the balls; the sides of the grooves are arranged to overhang the balls, so as to prevent the lateral displacement of the rings; and, further, that the sides of the grooves are uninterrupted throughout their circumference. The parts are interlocked with each other, so as to form a unitary structure, and at the same time all of the surfaces which are in rolling contact are continuous and uninterrupted, so that the wear upon the parts will be uniform. The balls are introduced by eccentric displacement; in fact, this seems about the only practical way it is possible to assemble the parts.

The claims, which the bill avers have been infringed by the defendant, are as follows:

"2. A ball bearing including two concentric rings having opposing grooves on their adjacent faces, the sides of said grooves engaging the balls to prevent substantial lateral movement, said sides being uninterrupted throughout their circumference and adapted to admit balls to the grooved space between them by displacement of the rings eccentrically to each other."

"8. A bearing comprising two concentric rings, balls between said rings, each ring having a groove both sides of which overhang said balls and are continuous and practically integral throughout their circumference, the number of balls being such that they can be inserted in the space between the rings when the latter are displaced from their normal position, and means for distributing the balls throughout the length of the groove, whereby the two rings are held together against axial displacement by the engagement of the balls with the overhanging walls of the grooves and the parts are held together so as to form a unitary device."

"9. A bearing comprising two concentric rings, a and b, balls, c, between said rings, each ring having a groove both sides of which overhang said balls and are continuous and practically integral throughout their circumference, the edges of said sides being separated so far from each other that by displacement of the rings eccentrically a limited number of balls may be inserted between them, and distributing devices adapted to be introduced between said edges and into the spaces between said balls when the rings are restored to concentric position, whereby the two rings are held together against axial displacement by the engagement of the balls with the overhanging walls of the grooves and the parts are held together so as to form a unitary device."

Many patents have been issued for ball-bearing devices, which have not been entirely satisfactory, for the reason that the tracks or ways were interrupted, and the balls consequently could not travel freely therein. It was old to have inner and outer rings with opposing grooves, but the sides of these grooves were interrupted in one way or another to permit the introduction of the balls. In some cases filling openings were provided, and in some instances these were filled up or plugged after the balls had been introduced in order to prevent their escape; but these prior devices were defective, in that the raceways would crumble or wear at the interrupted parts of the raceway, and

then the injured balls would cause undue wear to the remaining portions of the raceway, and thus the bearing suffered a rapid depreciation, and often an entire failure in a comparatively short time, and where the filling openings were plugged to prevent the escape of the balls the plugs could not be given precisely the same temper as the rings forming the remaining portions of the raceway, and unequal wear would ensue, which resulted in injury to the balls and raceway, and an undue shortening of the life of the bearings. These bearings could safely be subjected only to light loads, and were entirely unsatisfactory, and not fitted for use in heavily built, rapid-moving vehicles.

The Lechner patent, referred to and set up by the defendant as an illustration of the prior art, is a fair illustration of the attempt to produce a bearing with a continuous and uninterrupted raceway. The filling opening in this patent extends entirely to the bottom of the raceway, and the sides are interrupted by the filling opening cut therein. It does not satisfy the demand in the art for a continuous and uninterrupted raceway. And the Pettee patent, which is for a roller bearing, shows plainly upon its face that the inventor did not have in mind the principle embodied in the complainant's patent. The inventor undoubtedly was striving to construct a device for a roller bearing with a continuous and uninterrupted raceway for the rollers; but he failed, in that the outer casing is divided into two parts, in order that the bearing may be assembled, and this, of course, produces the interrupted raceway.

It is true the defendant constructed a model of the Pettee device, which can be assembled by eccentric displacement; but it was acknowledged on the part of the defendant's expert that it was not constructed in exact accord with the dimensions set forth in the patent, but had been adapted to be assembled in accordance with the method found in the complainant's patents. In other words, it is now ascertained that the Pettee device can be constructed and assembled in accordance with the methods of manufacturing and assembling the defendant's roller bearings, but only by the use of the information suggested by the complainant's patents. This alone, however, will not be permitted to invalidate the claims of complainant's patents.

In *McMichael & Wildman Manufacturing Co. v. Ruth et al.*, 128 Fed. 706, 63 C. C. A. 304, the court said:

"The fact that an expert, with a patent before him, might be able to build up the structure covered thereby, by selecting and adapting appliances theretofore known, does not overcome the presumption of invention arising from the granting of the patent, where neither the same combination in its entirety nor the same mode of operation had previously been described or known."

The patentee has evidently accomplished what others have been striving to attain, but have failed. As has been said, these patents have "converted a theory into a fact." It was apparently a very simple change, but it converted "imperfection into completeness." The advantages attained are aptly stated by complainant's expert:

"All of these disadvantages of the prior constructions are overcome by the improvement of the patents here in suit. By reason of the fact that the sur-

faces of the grooves on which the balls travel are continuous and uninterrupted, the wear of these surfaces is uniform, there are no edges to crumble or fracture or against which the balls may strike, the materials may be uniform and homogeneous throughout, and the rings may be uniform in cross-section throughout, so that they may be made relatively small in cross-section without danger of fracture. As a result the safe load-carrying capacity of the bearing is much greater, the life much longer, and the bearing can be mounted in any desired way, and is equally available whether the inner ring be stationary, or the outer ring be stationary, or both rings rotated. Moreover, the bearings do not have to be manufactured in sets having different features of construction adapting them for different situations or uses, and special care or skill does not have to be exercised in mounting them in particular ways with reference to the manner in which the load is to be applied; i. e., whether the inner ring or the outer ring is to be the stationary member and subjected to load only on one side. Furthermore, these bearings are capable of sustaining end thrust or a load applied in the direction of the axis from either side, as well as loads applied radially or at right angles to the axis."

The ball bearings manufactured in accordance with these patents have gone into use very extensively. It is conceded by all parties that it is the best device yet placed upon the market. The Pettie device has not been manufactured, which is one of the strongest facts to sustain the contention that it is not of much practical utility. However slight the difference, it is very evident that Conrad has solved the difficulties, and the objections to the ball bearings placed upon the market manufactured in accordance with the prior art, and he is entitled to the benefit of his invention.

The method patent, No. 838,303, was issued about six months after the article patented; the latter for a "method of manufacturing and assembling ball bearings." Claim 1 of this patent, which is infringed by the defendant, is as follows:

"1. The method of manufacturing and assembling a ball bearing into a unitary structure, the parts of which hold each other together, which consists in forming inner and outer rings having opposing grooves the sides of which are uninterrupted throughout their circumference, and which are separated by a distance less than the diameter of the balls when the rings are concentric, placing said rings eccentrically to each other to widen the space between said edges at one side to a width greater than the diameter of the balls, introducing through said space a limited number of balls, extending when in contact with each other only partly around the raceway formed by said grooves, and restoring the rings to concentric position and introducing spacers between the balls to distribute them substantially entirely around the raceway so as to prevent the rings from returning to the eccentric position."

It is very evident that the manufacturing and the assembling of this ball-bearing device by eccentric displacement is entirely new, as no other ball bearing has ever been made which could be entirely assembled in this way, resulting in making practical a continuous and uninterrupted raceway. The idea is novel and of great utility, involving invention.

It is ordered that a decree be entered for complainant, with costs to be taxed by the clerk.

SIEBER & TRUSSEL MFG. CO. v. CHICAGO BINDER & FILE CO.

(Circuit Court, N. D. Illinois, E. D. March 19, 1910.)

No. 28,721.

1. PATENTS (§ 290*)—SUIT FOR INFRINGEMENT—DEFENSES.

The improper joinder of applicants for a patent is a purely technical defense in a suit for its infringement, and should not be favored, especially after the patent has been assigned.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 290.*]

2. PATENTS (§ 328*)—NOVELTY—LOOSE-LEAF BINDER.

The Nelson, Dawson, and Trussel patent, No. 806,702, for a self-locking loose-leaf binder, while covering a device of utility, is merely for an improvement of an old combination by adopting an improved locking device from the related art of automatically locking boxes, and is void for lack of novelty.

In Equity. Suit by the Sieber & Trussel Manufacturing Company against the Chicago Binder & File Company. On final hearing. Decree for defendant.

Gillson & Gillson, for complainant.

Dyrenforth, Lee, Chritton & Wiles, for defendant.

SANBORN, District Judge. Suit for infringement of patent No. 806,702, issued to Nelson, Dawson, and Trussel December 5, 1905, for a self-locking loose-leaf binder. Defendant's device is nearly the same as complainant's, so that infringement is reasonably clear if the patent is valid. Two reasons for avoiding it are urged upon the record: (1) Improper joinder of applicants for patent; (2) want of novelty. As to the first ground, I think the evidence shows joint invention. It is far from satisfactory, but the manner in which the binder was brought out, the purpose of producing it, and the relations of the parties, all lead me to think it was the invention of all the patentees. This point may be passed because the second one I think decisive of the case against the complainant. But it may be properly said that improper joinder is a purely technical defense, and should not be favored especially after the patent is assigned.

Novelty in the patent in suit seems to be entirely negated by the prior art, particularly by the Lehy patent for a box fastening, No. 335,822, issued Feb. 9, 1886. That defendant has adopted and greatly profited by complainant's device clearly appears. Its conduct is said to have been quite unfair, and there seems to be sufficient support for the charge. But, if this was within its technical right, complainant must submit.

The patent is for a combination of the end plates of a loose-leaf binder with an automatic locking device, easily used, working with precision, readily opened and shut. Its utility is manifest. A number of prior inventions were in use, having all the elements of the patent but one. The common features of these binders may be described as follows: Two binder plates, hinged longitudinally on one of their edges by a continuous rod known as the piano hinge, are armed with

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

overlapping prongs to pass through holes in the leaves when the book is shut, and to allow the leaves to be taken out when it is open. End plates are attached to the binder plates for the sole purpose of holding them together when closed. The edges of these end plates slip by each other just like shears, and mounted on these edges is some form of locking device. Several of these binders had been patented, and defendant had acquired three of the patents. The trouble with all of them was in the locking device. Most of them used spring latches, varied, but generally similar to each other. A common form was to fasten a push button or stud to a leaf spring, much like the blade of a penknife, and mount the spring on one of the end plates in a position so that the stud would drop into two registering holes in the plates when the shutting of the binder registered or brought the holes opposite each other, and thus lock the binder. By pressing upon the push button the spring was forced back and the latch released, in order to open the binder. There were several forms of locking device using the leaf spring, but the principle of operation was quite similar.

There were various disadvantages in these prior devices which were overcome by the patentees. The end plates were not securely locked together when closed, so that strain by weight of leaves or overloading came on the spring, and there was a tendency in the binders to open, and the end plates to get out of place. There were no guides to carry the stud into the slot or hole in the end plate, and thus keep the plates in proper alignment, and prevent their warping out of proper relation to each other. These disadvantages were to a great extent overcome by the patentees in the following manner: Instead of a hole or slot within the body of the plates for the stud to enter, a slot is cut in the edge of one of the end plates wide enough to admit the shank of a push button or stud. After the slot is carried inward a short distance, it is enlarged so as to admit the enlarged end of the shank or leg when forced into it by a spring. The slot is thus made T-shaped. The stud and its shank are similar to the ordinary quarter-inch bolt, the head representing the push button, the nut the enlarged shank portion or leg, and the two being connected by the shank, which is designed to enter the neck of the T-slot. A leaf or narrow flat spring is mounted at one end on the end plate opposite the one carrying the slot, and the other end carries the stud. The enlarged part of the shank, which is designed to enter the enlarged portion of the slot, and lock snugly therein, is beveled on the side opposite the spring, so that, when the binder is closed, the approaching edge of one end plate will slightly change its direction and force the stud against the resistance of the spring by a cam-action. This brings the smaller portion of the shank in line with the throat of the slot. As soon as the shank enters the slot, and the enlarged part of the shank registers with the larger part of the slot, the spring will snap the shank into such larger part, and securely lock the binder. This locking mechanism was taken bodily from a kindred art and adapted to the binder art, as explained later. In this way the lack of firmness in prior binders was overcome. Guiding the shank into the throat of the slot and there strongly holding it in the inner portion tends to stiffen the binder, and is especially useful for large, heavy ledgers such as are used in the govern-

ment printing office, and also when the binder is bulged out with an overload. There would be no doubt of patentability, in my opinion, if the device as an entirety were new. Both claims in suit are for a combination in end plates and locking device, and, though both are old, the patent would be good, like thousands of other similar combinations, if the combination itself were new. There is undoubtedly an improved result, but the combination shows improvement only, and not invention, for the following reason: With a number of existing combinations of end plates and locking devices operating by forcing a stud into a slot, the patentees adopted an improved locking device from the related art of automatically locking boxes, shipping cases, etc. The precise lock is found in the Lehy patent, with the T-slot, beveled lug, smaller shank portion, push button and all. The sole difference is that Lehy specifies a coiled spring and not a leaf spring. The result is that the patentees have not invented a new combination of old devices, but have merely improved an old combination.

All the cases cited by complainant's counsel, as I read them, related to new combinations. This seems true of *Bates v. Coe*, 98 U. S. 31, 25 L. Ed. 68, *Imhaeuser v. Buerk*, 101 U. S. 647, 25 L. Ed. 945, *Parks v. Booth*, 102 U. S. 96, 26 L. Ed. 54, *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275, and *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586. In the last case the Supreme Court went as far as possible in sustaining a combination having one element borrowed from another art, but the earlier machines did not, as here, possess an inferior or less complete method for doing the same work. The machine itself was sufficiently novel to satisfy the rule that a patentable combination of old things must itself possess novelty.

The Lehy patent and the one in suit call for almost exactly similar operation. There is the telescoping or shears action, the guiding of the shank into the slot neck, by cam-action, and the snapping of the lug into locking combination with the box surfaces by spring action. It is like putting the ordinary door lock into a new place, or using a lock buckle on a saddle girth or stirrup strap, and claiming for the result a patentable combination. In the new binder there is an old combination considerably improved, and a better result; but an old operation by old means.

The third claim of the patent, not in question here because not infringed, calls for a push rod running from one end of the binder back to the other, connecting the locking studs placed on both ends, and unlocking them with a single pressure against one end of the push rod. This would seem to be a good combination possessing novelty, although the question is in this case of no importance.

A decree should be entered dismissing the bill, with costs.

KEEPERS v. AMERICAN ELECTRIC FUSE CO.

(Circuit Court, S. D. New York. February 14, 1910.)

1. PATENTS (§ 23*)—INVENTION—UNITING OF PARTS.

Invention is not disclosed by merely making in a single piece a device or connection which previously had been made of separate parts.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 25; Dec. Dig. § 23.*]

2. PATENTS (§ 328*)—CONSTRUCTION AND INFRINGEMENT—METHOD OF CONNECTING ELECTRIC WIRES.

The De Mott patent, No. 521,018, for a connection for electric wires, is limited to the precise structure shown. As so construed, *held* not infringed.

In Equity. Suit by William M. Keepers against the American Electric Fuse Company. On final hearing. Decree for defendant.

W. P. Preble, Jr., for complainant.

Peirce, Fisher & Clapp and Kerr, Page, Cooper & Hayward (George P. Fisher, Jr., and Drury W. Cooper, of counsel), for defendant.

HAZEL, District Judge. The patent in suit, No. 521,018, issued to James Y. De Mott, on June 5, 1894, relates to a connection for electric wires. It is not deemed necessary to enter into a lengthy discussion of the questions involved, and I will state briefly my conclusions.

In view of the prior state of the art, the scope of claim 1, in controversy, must be restricted to an open joint, which is formed by turning a single piece of metal to form a substantial loop, leaving the edge open so that jointure may be made by crimping or pressing after the wires have been run through the tubing. It was old at the date of the invention to run electric wires through two rigid tubes or sleeves joined together. Such a device for inserting the ends of telegraph wires was first shown in the McIntire patents, Nos. 291,211 and 347,625. It was old to use an open joint connection made out of a single piece of metal, as may be ascertained by an examination of drawing, Fig. 7, of McIntire patent, No. 347,625, and the patents to Coleman, No. 468,293, and Hering, No. 379,221. The patent to Smith, No. 198,471, suggests the idea of turning the ends of the metal into a central rib or web of the plate to make double tubes. Moreover, it has been held that invention is not disclosed by merely making in a single piece a device or connection which previously had been made of separate parts. *General Electric Co. v. Yost Electric Co. (C. C.)* 131 Fed. 874, affirmed 139 Fed. 568, 71 C. C. A. 552.

The file wrapper of the De Mott patent, in evidence, indicates that originally there were broad claims insisted upon by the patentee; but eventually he accepted narrow claims, which in my estimation restrict the invention to the precise method described—i. e., forming an open joint at the inner edge of the tube out of a single piece of metal. The De Mott patent has not gone into use, and its novelty cannot be tested by its success. But, assuming novelty and a limitation of the claims by the Patent Office, the defendant does not infringe claim 1, for it

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

uses a closed tube, as distinguished from one that is open for the purpose of making a joint after the wire is imbedded in the tube. The edges of the tube and the rib are brazed, and when the wires have been run through the tubes are twisted to tightly inclose and hold them.

A decree may be entered dismissing the bill, with costs.

IN re LANDSBERGER.

(District Court, N. D. Georgia. March 4, 1910.)

No. 2,339.

BANKRUPTCY (§ 140*)—ASSETS—OWNERSHIP—CONSIGNMENT.

Evidence held to warrant a finding that intervenor's consignment of goods purchased at a sale in bankruptcy in prior proceedings to the bankrupt was fraudulent as against the bankrupt's subsequent creditors, and that the price of the goods which the bankrupt agreed to return to intervenor had been paid, so that intervenor was not entitled to recover from the trustee, in a subsequent proceeding as against the bankrupt's creditors, the goods consigned and remaining unsold or their proceeds.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

In the matter of bankruptcy proceedings against A. Landsberger. On the intervening petition of M. G. Samuels to recover from the trustee certain goods alleged to have been consigned to the bankrupt for sale at an advance of 25 per cent. of the inventory price. On review of referee's decision denying petition. Affirmed.

Slaton & Phillips, for trustee in bankruptcy.

Wimbish, Watkins & Ellis, for intervenor and bankrupt.

NEWMAN, District Judge. This case arose on the intervening petition of M. G. Samuels, doing business under the name of M. G. Samuels & Co., as a merchant at 19 Bond street, New York City.

In his intervening petition Samuels claims that at the time of a former proceeding in involuntary bankruptcy against Landsberger, commenced in May, 1908, he bought Landsberger's stock of merchandise at the sale by the trustee in bankruptcy, on June 29, 1908, and that, after adding some goods to the stock so purchased and selling off some, he consigned what was left, by a contract in writing, to A. Landsberger. The consignment agreement is as follows:

"City of Baltimore, Md.

"This agreement, made and entered into between M. G. Samuels, of the city and state of New York, and A. Landsberger, of the city of Atlanta, state of Georgia, witnesseth:

"That the said M. G. Samuels has consigned to the said A. Landsberger the merchandise set forth and fully described on the attached inventory. Said merchandise is to be and remain the property of said Samuels, and said Landsberger is to have no right nor title therein other than the right to sell the same upon a commission of twenty-five per cent. over and above the cost price as shown on said inventory. Promptly upon sale of each article thereof the said Landsberger shall remit to the said Samuels the purchase price thereof, less the commission allowed. Said Landsberger agrees during the time said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

goods remain in his possession under this consignment that he will keep the same insured for the benefit of the said Samuels.

"In witness whereof, both parties have hereunto set their hands and seals this the ——— day of August, 1908. [Signed] M. G. Samuels. [Seal.]

"[Signed] A. Landsberger. [Seal.]

"Signed, sealed, and delivered in the presence of:

"[Signed] John R. L. Sniffin.

"Sworn to and subscribed before me on this the 22d day of September, 1908.

"[Signed] John R. L. Sniffin,

Notary Public No. 88, Kings County.

"[Seal.]

"Certificate filed in New York county."

The goods appear to have been turned over to Landsberger on August 4th; but, as will be seen, the contract was not signed until September 22, 1908. Probably no particular significance is to be attached to this, however, as it appears that Landsberger left Atlanta on the 4th or 5th of August and went north to buy goods.

An inventory is attached to the consignment contract showing goods consigned of the value of \$15,411.80, and fixtures of the value of \$1,098. These goods appear to be a general stock of dry goods and clothing, including hats, caps, shoes, etc., also, apparently, a lot of millinery.

Landsberger left Atlanta, as stated, on the 4th or 5th of August, and went north to buy goods to replenish the stock. He bought about \$23,000 worth of new goods and shipped them to Atlanta, and they were placed in stock with these old, consigned goods. The goods were bought by him in his own name and shipped to him in that way. They were put in the same store and mingled, necessarily, with the old goods.

At the time of the purchase by Samuels of Landsberger's stock of goods in June, 1908, or at least about the 1st of July, 1908, a man who had been associated in business with Samuels, in New York, one Isaac Shafarman, came to Atlanta and took charge of the business for Samuels. After the consignment on August 4th, he continued in the store and was there until the 29th of September, 1908, at least.

Immediately after this fire another proceeding in involuntary bankruptcy was filed against Landsberger; that is, the proceeding in which the present intervention is filed by Samuels.

This fire in November, 1908, according to the proofs made to the insurance company, caused the entire destruction of \$6,276 worth of goods and damage to the remainder of the stock amounting to \$11,795. Some objection appears to have been made by the insurance company to settling the loss, and it was finally compromised by the trustee in bankruptcy, with the apparent consent of all parties, for \$12,000, in full of total loss and damages.

An agreement was entered into after the fire, between the trustee in bankruptcy and Landsberger, by which Samuels was allowed to take steps to have his goods remaining in the store identified and an apportionment made between the goods consigned and the new goods, and a further agreement that the insurance loss should be considered as having been in the same proportion as this identification made between the consigned goods and the new goods.

The trustee in bankruptcy denies that the consignment by Landsberger to Samuels was in good faith; indeed, it is urged that, before this written contract of consignment was entered into, Landsberger had repaid Samuels the amount paid by him for the stock of goods at the sale in June, 1908, \$12,600. It is claimed that there were large sales of goods, more than acknowledged by Samuels, from the time he re-opened the store, about the 1st of July, until August 4th, and enough to have paid Samuels back a large part of the purchase money of the stock at the bankrupt sale.

On August 4, 1908, Landsberger received his discharge in the first bankruptcy proceeding and immediately went to the Fourth National Bank in Atlanta and borrowed \$5,000, of which he gave to Samuels \$4,500. The evidence shows without question that Samuels was to pay certain bills for Landsberger, which seem to have reduced the amount left in Samuels' hands to about \$3,000. Over this \$3,000 there is a sharp contention as to whether it was given back by Samuels to Landsberger, or whether Samuels retained it.

Then it is said that, adding the \$23,000 worth of new goods to the old stock, makes \$37,000 or \$38,000 worth of goods, in the aggregate, in the store after the alleged consignment on August 4th, up to the date of the fire. The goods in the store at the time of the fire amounted to approximately \$22,000.

Samuels claims that of the goods sold during this period, from August 4th to the date of the fire, he did not receive one dollar, although the consignment contract provided that he should receive the cost price as shown by the inventory as the same were sold and upon each article sold.

Shafarman was in the store all the time as the representative of Samuels, and it is urged that it is absurd to say that, with this contract and with Shafarman in the store all the time, Samuels received no part of the proceeds from the goods disposed of, but that, on the other hand, he must have received enough, together with the sales from July 1st to August 4th, and with the \$3,000, to have more than paid his debt.

In addition to the payments insisted on as above, it is claimed that one Philip Elson obtained from Landsberger about \$8,000 worth of goods at 65 cents on the dollar of their original cost, and that he paid this money, five thousand and odd dollars, to Samuels. There is considerable evidence and much contention about the giving of certain notes in this connection.

The admissibility of a large part of the evidence as to this transaction is based upon the claim of counsel for the trustee that there was a conspiracy which originated in May, 1908, between Leon Eplan, Philip Elson, Landsberger, and Samuels, which, anticipating that Landsberger was about to fail and go into bankruptcy shortly thereafter, contemplated that Samuels would buy Landsberger's stock when it was sold by the trustee in bankruptcy, and put Landsberger back into business in Landsberger's own name, and Landsberger would then go on to the eastern markets and buy a large stock of goods and fail again, when Eplan and Elson would buy the stock.

Eplan did business next door to Landsberger and was a tenant of

Landsberger's, who leased the two stores from Joel Hurt. The lease from Hurt had some time to run and was considered valuable.

Just before the first failure in May, 1908, Elson, after a conference with Eplan, went to see Landsberger and got Landsberger to agree to transfer the lease of the store occupied by Landsberger to Eplan, and then they obtained the consent of Hurt to this transfer; the purpose being, and the promise being, according to the evidence, that, when Samuels bought the stock back for Landsberger, the lease should be retransferred to Landsberger, which would enable him to state to the persons from whom he desired to buy a new stock of goods that he had a valuable lease in his own name and had gone back into business in his old place.

Leon Eplan, in his testimony, after stating that he did business at 44 Decatur street, Atlanta, Ga., and that Landsberger's store was next door to his, was asked this question:

"Q. Mr. Eplan, I will get you to state whether some time prior to the 11th of May, 1908, you had any conversation with Philip Elson or A. Landsberger in reference to the lease on the premises then occupied by A. Landsberger. * * *

"A. Two or three days before the failure of Mr. Landsberger—the first failure; yes, sir—me and Mr. Elson were walking home. We had been neighbors for years, and friends for 20 years, and naturally, as usual, we knew that it was going to happen, as far as the failure was concerned, and we were talking about it, what made him fail, and so on, and I told Mr. Elson if I could get hold of that stock I would not mind going into business. That store done from \$75,000 to \$90,000 a year. Mr. Elson says: 'I will tell you, Mr. Eplan, I have already spoken to Mr. Landsberger, and he says he will not remain here in business under no conditions, and that he will go out of town as soon as he settles his failure, and he promised me the store.' So I says: 'Mr. Elson, it seems like your opinion and my opinion about the store is equal. How would you like for us to go in together in that business?' He said: 'It would be perfectly satisfactory. My business does not pay me, and I am dealing with my customers, that are mainly small men, and my money is all the time tied up with other people. Landsberger does a better retail business than I do wholesale, and I would not mind going in with you.' And by the time we got through with that (we lived right opposite each other) I went in to dinner. Coming out from dinner, usually I take a car, but I saw Mr. Elson, and says: 'Let's not take that car. Let's walk up town once.' And so we did. We were talking, of course, about this Landsberger matter, and I said: 'The first thing we will have to do is to secure the lease, so the lease would not go into the bankruptcy court, because, if the stock is sold with the lease and all, naturally it will bring a bigger price. I can't get the lease from Landsberger because Landsberger came pretty near fighting me before, and he owed me money, and refused to pay me. You also know he tried to get from me \$2,000 a week or so before he left for New York, and I didn't give it to him. I told him the reason I couldn't give it to him was because he and Mr. Ottley had a fight, and I didn't want to go to Mr. Ottley for money, and I didn't, because I wanted to get out of the loan.' So the reason I wanted to get out of the loan—Landsberger always owed me from \$4,000 to \$5,000—was because I went once to the bank to deposit a check of his, and the receiving teller took Landsberger's check for \$200, and went to the books to see whether the amount was good. This was something that had never happened before, and that gave me some suspicion; so I wanted to get out as best I could without making any more loans. 'Well,' Elson says, 'leave that to me. Landsberger will give me that lease, and you can attend to the transfer from Mr. Hurt.' The property belongs to Joel Hurt. We figured out that it would take us \$15,000 to do business in that store, do it legitimately, and that was all the money we needed. We also figured that neither one of us would attend to the business directly. Elson claimed that he could buy goods cheaper than Landsberger did, some goods 15 per cent. to 20 per cent. cheaper. We decided that Mr. Elson would

be the buyer, and I would be the financier of the business. By the time we reached the store, and separated—it didn't take more than a couple of hours—Mr. Elson came back with the lease in his pocket.

"Q. What did it have on it when it came back?

"A. Just as you see it, with the exception of the transfer.

"Q. What did you do with it then?

"A. We went up to see Mr. Ellis on Mr. Elson's advice, and we asked Mr. Ellis a point in regard to the lease, and he says, 'I will represent Mr. Landsberger, and I would rather you would leave the transfer to somebody else.' So we went off. I went up to Mr. Herbert Haas, and he made that transfer, and Mr. Landsberger signed it. I went up to Mr. Hurt, and told him about it. He says: 'Eplan, I can't conform to it. Mr. Landsberger has been a tenant of mine so many years, and I had rather see him first.' So Mr. Hurt sends down his man to see Mr. Landsberger in the Kimball House. Landsberger refused to go up there. * * * I went up to Mr. Hurt afterwards, and Mr. Hurt transferred the lease.

"Q. After Landsberger had signed it?

"A. Yes, sir.

"Q. What day was that?

"A. Well, the 11th, I guess.

"Q. Do you recall how many days afterwards the bankruptcy happened to Landsberger?

"A. Maybe a day or two days—something like that."

After some other testimony not so material, Eplan's testimony proceeded as follows:

"Q. Didn't you confer with Elson in regard to selling the lease, and didn't Elson tell you that he promised Landsberger that, if Landsberger desired to enter the business again, he would not interfere with his plan?

"A. Yes, sir.

"Q. Didn't Landsberger tell you he had arranged with Samuels, to whom he was considerably indebted, to buy the stock of goods for him?

"A. Yes, sir.

"Q. And that Samuels would put Landsberger back into business?

"A. Yes, sir.

"Q. And he told you that he didn't want you to interfere with this plan?

"A. Yes, sir.

"Q. You told him you would not?

"A. I told him I would not as long as Mr. Elson agreed to let him have the store.

"Q. Afterwards you saw Samuels, and he confirmed that statement?

"A. Yes, sir.

"Q. When Samuels bought the goods, then he began to have a big, fine bankrupt sale down there?

"A. Yes, sir.

"Q. And moved part of these goods to Peachtree street?

"A. Yes, sir.

"Q. Now, the—you wanted to let them have it by the month?

"A. Yes, sir.

"Q. Then they stated to you that that was not agreeable, that they wanted a lease for a year in order that, when Landsberger went back into the market, it would appear that Landsberger had gone to the market, because he had bona fide gone back into business?

"A. Yes, sir.

"Q. Then Samuels and Landsberger stated to you that they didn't expect this business to run for more than four or five months?

"A. A short while.

"Q. But that they wanted the written lease, as they wanted to show that Landsberger was in business?

"A. Yes, sir.

"Q. Elson told you to let them have it for the little while, and you would be able to buy the next stock—that was the next Landsberger failure?

"A. Yes, sir.

"Q. That was what he had reference to—that Landsberger was going to fail again, and you would buy that stock?

"A. Yes, sir.

"Q. Now, then, Landsberger, he told you, didn't he, that he and Samuels agreed that the business should be turned over to him (Landsberger)?

"A. Yes, sir; he told me that, as soon as Mr. Samuels drew out enough money to reimburse him, he would have it.

"Q. And that Landsberger would go into market, and buy as many goods as possible?

"A. Yes, sir.

"Q. That he had made a satisfactory adjustment of his affairs, and that this bankruptcy sale had paid off most of the indebtedness?

"A. Yes, sir."

The referee, after reciting the testimony of the various witnesses, states this:

"The referee heard all of the witnesses at length except Landsberger, and carefully observed their manner during the course of the delivery of their testimony, and from the conflicts in evidence that have been given in reference to the transaction, and from the entire complexion of this case, as disclosed by a very lengthy record, the referee is satisfied that the evidence does demonstrate that a conspiracy existed as between Samuels and Landsberger for the purpose of defrauding creditors; that in pursuance of this conspiracy a contract of consignment was made, and at the time no such sum was due Samuels; that on the 4th of August, 1908, he was paid the sum of \$4,500 by check, which Landsberger succeeded in obtaining from the Fourth National Bank under the statement that he was the owner of the stock of goods, and of which sum Samuels retained at least \$3,000; that, while Shafarman was in charge of the store, goods of the value of nearly \$23,000 were received from bona fide creditors; that most of these goods were disposed of, and no satisfactory account has been given of the proceeds arising therefrom by any of the witnesses; and it is from these goods that the referee believes Samuels received the proceeds to a large extent, especially on the Elson transaction. The referee finds that the notes of Elson, discounted by the New York banks, were not accommodation discounts, but were payments made to Samuels for goods out of the Landsberger stock. Further, that, prior to the fire, any sum which might have been due Samuels by Landsberger had long since been satisfied, and the referee is of the opinion that, in fact, no bona fide consignment was in existence either at the date it purports to have been made, or at any time subsequent thereto, and that its existence has been, at all times, a mere cover for the purpose of defrauding creditors.

"According to the contention of Samuels, from the date the goods were turned over, August 4, 1908, until after the fire, he received nothing from Landsberger. Can it be possible that Samuels would have permitted Landsberger to remain in possession of a consigned stock of goods from August 4th, on to some time late in November, without obtaining the proceeds from the sale of such consigned goods, especially during the period when his man Shafarman was in possession, from August 4th, to September 29th? The referee cannot believe that any man would have permitted such a course of dealings. Samuels knew personally, as well as through his said representative, Shafarman, that goods were being disposed of, and why did he not demand his money or his goods? The other special representative, Jacobs, came down to investigate, and, after having been in town only a few hours, was seized with his usual 'comfortable feeling' as to the conduct of the business, and immediately left the city for Wilmington, N. C. Jacobs' investigation didn't touch the books, or the cash account, and only amounted to an inquiry as to the general condition of the business. The only thing that Samuels, or his representatives, did on their visits here was in reference to the change of the fire insurance policies, all of which Landsberger had put in his own name; he stating to Hatcher that he owned the stock.

"Counsel for intervenor were forced to take the position that Landsberger, the bankrupt, has not accounted for some \$14,000 of cash sales. The referee

is of the opinion that the evidence is conclusive that, instead of Landsberger having this \$14,000, it is accounted for to a large extent by the Elson transaction, who paid for goods to the extent of over \$5,000, and this on a basis of about 65 cents on the dollar, which would account for some \$8,000 of goods, and that the balance, if any, came into Shafarman's hands, while in charge of the store from August 4th to September 29th, and that Shafarman was at all times simply the representative of Samuels.

"The referee therefore is of the opinion that no bona fide contract of consignment exists; that Samuels has received in excess of the amount advanced by him on account of his purchase of the stock of goods; that he has no interest in the goods or the proceeds arising from the sale thereof; that the same belong to the bankrupt, Landsberger; that no bona fide claim on the part of this intervener exists; that there is no genuine basis for this intervention; and that the same should be denied. And it is so ordered."

The referee evidently believed that there was an understanding between Samuels, Landsberger, Elson, and Eplan from the time the first failure of Landsberger was contemplated, by which all were to be benefited, and that the purpose was not only to defraud the existing creditors of Landsberger, but those who should become his creditors in the future by the purchase of new goods, and that consequently all the testimony of Eplan should be considered; that is, as to what he did and what all the other parties to the alleged conspiracy did and said.

Whether this be true or not, there is enough testimony of Eplan, if it is to be believed, as to what he was told by Samuels and Landsberger, to justify the referee in concluding that this consignment was not in good faith and was fraudulent as against those from whom Landsberger intended to buy goods, and who are the creditors proving claims in this bankruptcy proceeding.

Undoubtedly the referee was justified in believing that the consignment was not in good faith in the sense that Samuels expected these goods to be sold and the proceeds derived from the sale of these particular goods to be paid over to him. It is perfectly clear that the purpose must have been to pay Samuels from the sales made, without reference to whether they were consigned goods or new goods, even assuming that the consignment was really made and that at that time Landsberger was still indebted to Samuels. It would have been a practical impossibility to have kept a separate account of the sales of consigned goods and at what they were sold, and there is not the slightest evidence to show that this was attempted.

I think the referee was fully justified, also, in concluding that, even if Samuels had not been paid back on August 4th the amount advanced by him for the purchase of the stock in June, he had certainly been fully paid before the fire. In their brief, counsel for Samuels concede that Landsberger has not accounted for \$14,000 of cash sales. If, as the referee finds, Philip Elson got \$8,000 worth of goods, for which he paid Samuels, and Samuels received, through Shafarman, \$6,000 of the proceeds of goods sold while Shafarman was in charge, this would be the easiest and most natural way to account for this discrepancy.

I do not think the conclusions reached by the referee were, as contended by counsel for Samuels, based on mere suspicion, but they seem to me to be based on facts that appear in the record. That is, taking the fact that Shafarman was there in charge of the new stock as it

arrived and was being sold out, as Samuels' representative, and the fact that the consignment contract provided that the goods should be paid for as each article was sold, and then the fact of the failure to account for the \$14,000 of goods or of cash received, one or the other, is it unfair to conclude that, notwithstanding Samuels' and Shafarman's denial, Samuels did receive this \$14,000? That is a conclusion from the conceded facts. In view of Shafarman's presence in the store as the representative of Samuels, and his relation to the business, it would be almost as if the goods were turned over to Samuels in person, to the amount of \$37,000, and \$14,000 of them were missing, and his only reply was, "I don't know what became of them." This certainly would not be accepted in any court.

My conclusion is that the referee was justified in determining this matter as he did. If Samuels had not been paid in full on the 4th of August, it is perfectly clear from the evidence, to me, that he had been paid a considerable part of it, and, in view of the sales made afterwards by Landsberger which are unaccounted for, it is reasonable and fair to conclude, under all the evidence, that the goods, or the proceeds of the sale of the goods, must have gone to Samuels.

The well-recognized rule is that the conclusions of the referee on questions of fact will not be interfered with unless clearly and manifestly erroneous. This cannot be said of the conclusions of the referee in the present case. The referee had before him all these witnesses except Landsberger, saw them while being personally examined and cross-examined, and was far better able to get at the truth of this transaction than is the court, from the record. This of itself would prevent the court from interfering with the referee's finding; but I have gone through the record with considerable care, and the evidence is not only sufficient to support the finding of the referee, but seems to me to require it.

The action of the referee in finding against Samuels' intervening petition is confirmed and approved.

LAWS v. FLEMING et al.

(Circuit Court, N. D. West Virginia. April 5, 1910.)

1. COURTS (§ 323*)—PLACE OF RESIDENCE—EVIDENCE.

Evidence *held* sufficient to establish that a complainant was a resident of New Jersey, and merely had a temporary domicile in West Virginia, on an issue of diverse citizenship.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 885, 886; Dec. Dig. § 323.*]

Diverse citizenship as a ground of federal jurisdiction, see note to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

2. COURTS (§ 262*)—EQUITY JURISDICTION OF FEDERAL COURTS—ADEQUATE REMEDY AT LAW.

Rev. St. § 723 (U. S. Comp. St. 1901, p. 583), prohibiting suits in equity in federal courts, where plain, adequate, and complete remedy at law can be had, does not deprive equity of jurisdiction if the remedy at law is doubtful, difficult, not adequate to the object, nor so complete as in eq-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

uity, nor so efficient and practicable to the ends of justice and its prompt administration.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 797, 798; Dec. Dig. § 262.*]

3. COURTS (§ 334*)—REMEDIES—EQUITY—FEDERAL COURTS.

The West Virginia rule that, where usury has been paid and the transaction is closed, the borrower may recover the usury paid in assumpsit for money had and received, but, if the debt or any part of it on which usury has been paid remains unpaid, a court of equity may be appealed to, which in stating the account between the parties will credit on the principal of the unpaid part whatever usurious interest has been paid, and give the lender a decree for his debt with legal interest only, is enforceable in federal courts sitting in that state under the rule that the public policy of a state with respect to contracts made within it is obligatory on federal courts, whether acting in equity or at law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 899, 910; Dec. Dig. § 334.*]

4. USURY (§ 117*)—EVIDENCE.

Evidence held to require a finding that a transfer of corporate stock to defendant in consideration of defendant's services in assisting in the construction and financing of a railroad was in fact a mere cover for usury contracted to be paid on a loan of money made by defendant to complainant.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 328-340; Dec. Dig. § 117.*]

Suit by William M. Laws against Thomas W. Fleming and another.
Decree for complainant.

William M. Laws, alleging himself to be a citizen of New Jersey, has filed his bill against the defendants Thomas W. and Allison S. Fleming, charging: That in October, 1908, he was the owner of a majority of the capital stock and bonds of the Fairmont & Mannington Railroad Company, a West Virginia corporation, operating an electric railway between the cities of Fairmont and Mannington, in Marion county, W. Va., and was engaged in the financing and construction of the road. That defendant Thomas W. Fleming was at the time a stockholder and director of this railroad company, and his son, the defendant Allison S. Fleming, was its secretary and treasurer. That it became necessary in the construction of the road to raise immediately a sum of \$30,000, and plaintiff entered into an agreement with said Thomas W. Fleming, whereby the latter agreed to furnish \$18,000 in cash and to indorse plaintiff's note or notes for \$12,000. To secure this sum and the indorsements aforesaid, plaintiff was to deliver to said Thomas W. Fleming, as collateral security, 50 of the first-mortgage bonds of said railroad company of the par value of \$1,000 each, and, further, as an usurious consideration for said loan and indorsements, he agreed to deliver to said Fleming 1,500 shares of the capital stock of said company; the par value of such stock aggregating \$150,000. It is then charged that Thomas W. Fleming on October 12, 1908, did, in accord with this agreement, deliver to plaintiff \$18,000, and for this sum and the further one of \$5,000 at a prior period secured from him plaintiff executed his note payable, with interest, six months thereafter for \$23,000, and delivered the same with 50 of the railroad bonds as collateral security to said Thomas W. Fleming; that in further execution of said agreement, and without further consideration, he delivered to him 1,500 shares of the capital stock of the railroad company.

The bill then charges that this note for \$23,000, when it became due, was renewed for a period of four months, \$690 interest being paid; that the defendant Thomas W. Fleming refused to indorse notes for the \$12,000 or any part thereof as agreed, caused his son, as secretary and treasurer of the company, to transfer to him the 1,500 shares of capital stock, has refused to surrender the same, retains 38 of said first-mortgage bonds (having surrendered 12 thereof upon payment of certain sums set forth), and has caused said 1,500

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

shares of capital stock to be assigned on the books of the company to his son, the defendant Allison S. Fleming, wholly without consideration, and with full notice on the part of said Allison S. Fleming of all the facts and conditions under which the same was obtained by him, the said Thomas W. Fleming. It is then charged that the \$23,000 note is not due, that plaintiff is able and anxious to pay when due, but that the consideration thereof was usurious to the extent of the value of said 1,500 shares of stock, which it is charged said Flemings are seeking to sell and dispose of, and the prayer is for an injunction restraining the transfer of said note and bonds and the selling of such stock for an ascertainment of its value and credit therefor upon such note, and for general relief.

On May 25, 1909, a temporary restraining order was granted and the cause set down for hearing on June 8, 1909, upon plaintiff's motion for injunction. Upon this hearing, defendants filed their demurrer to the bill, and on September 24th following this demurrer was overruled, whereupon defendants filed answer, to which replication was filed, the defendants moved a dissolution of the restraining order, which motion was overruled and time was fixed for parties to take proofs. The defendants moved to require additional bond of plaintiff, which motion was sustained and additional bond was required to be given in 10 days, but plaintiff was allowed within that time to pay into court said \$23,000, with its accrued interest, if he preferred doing so to giving additional bond. Six days after the plaintiff paid into court the sum of \$23,632.50, the principal and interest due upon said \$23,000 note, and on October 6, 1909, a consent decree was entered directing the deposit for surrender to plaintiff of the 38 bonds held by Fleming to secure this note, the deposit of the 1,500 shares of the capital stock held by Allison S. Fleming which was to abide such disposition as the court should by future decree make, whether by way of abatement or surrender, in case the court should hold it to have been an usurious exaction. And thereupon such stock and bonds were deposited, said bonds surrendered to plaintiff, and the \$23,632.50 paid into court was directed to be paid to said Thomas W. Fleming.

The material allegations of the answer filed are a denial of the agreement as stated in the bill, and especially as to Thomas W. Fleming's obligation to indorse plaintiff's notes for \$12,000. On the contrary, it is stated that at the time of the transaction Laws owed Fleming a note then due for \$5,000; that, in addition to this, Fleming was indorser for Laws upon two notes, aggregating \$7,600, for which he held 22 of the railroad company's bonds for security; that he, in fact, loaned Laws \$18,000 in cash, and for this and the \$5,000 note due Laws executed to him the \$23,000 note, and delivered to him 28 additional bonds. It is then alleged that "in consideration of said defendant Thomas W. Fleming remaining his accommodation indorser for said notes aggregating \$7,600, and in consideration of the indebtedness of said plaintiff to said Thomas W. Fleming for valuable services before that time and thereafter to be rendered by said Thomas W. Fleming to said plaintiff," Laws was to deliver to him the 1,500 shares of stock. It is admitted that subsequently the \$7,600 indebtedness for which Fleming was indorser was paid by Laws, and that he surrendered on account thereof 12 of the 50 bonds held by him to Laws.

At the January term, 1910, at Parkersburg, the defendants filed a motion to dismiss, alleging plaintiff to be a resident of West Virginia, and not of New Jersey, affidavits were filed as to this, and the cause was submitted upon this motion and the merits.

E. M. Showalter, L. S. Schwenck, and Harry Shaw, for complainant.
Reese Blizzard, John Marshall, and W. S. Meredith, for defendants.

DAYTON, District Judge (after stating the facts as above). The controversy here resolves itself into three questions: First. Was plaintiff, Laws, at the time of the institution of this suit in fact a citizen of West Virginia, and not of the state of New Jersey? Second. Has this federal court of equity jurisdiction to determine this matter

of usury charged by the bill, or was the remedy at law? Third. Were the transactions set forth in fact usurious?

The first question arises upon a motion to dismiss made at the time the cause was argued and submitted, but with leave to defendants to file depositions or affidavits in support of such motions within 10 days and to plaintiff within 10 days thereafter to file depositions or affidavits in rebuttal. The defendants, in support of this motion, have filed the single deposition of a state court stenographer, who testifies that in a trial had in November, 1909, in a state court in Marion county, her notes show that the plaintiff, Laws, was asked the question "When did you first make Fairmont your home?" and replied, "About the first of the year." In opposition to this, the plaintiff in his bill charged himself to be a citizen of New Jersey, which bill is sworn to by him. The answer of defendants filed states that they are advised that the plaintiff is a citizen of New Jersey, and this answer is sworn to by both of them. In addition to this, plaintiff has filed his affidavit under the leave given and within the time limited, in which he asserts his citizenship to be in New Jersey, where he is a registered voter, pays his poll tax, has a furnished house temporarily closed, and that because of his connection with the building of this railroad requiring most of his time on the ground he in May, 1909, brought his family to Fairmont, boarded a month with them at a hotel, then secured a furnished house which he rented by the month, in which he has temporarily resided, but with no intention whatever of establishing his citizenship there or changing it from Jersey City, and that his answer to the question referred to in the state trial referred solely to his temporary residence in Fairmont, and not to his citizenship in New Jersey. Under these circumstances this motion must be overruled.

The second question arose upon and was disposed of by the overruling of the demurrer, but is again relied on upon this final hearing. It would seem that this defense was waived by the consent decree of October 6, 1909, whereby the bonds and stock were deposited in court by the defendants, the principal and interest of the \$23,000 note were also deposited by the plaintiff, the bonds were delivered over to the plaintiff, the money to the defendant T. W. Fleming, and the stock alone was retained to abide the future decision of this court as to whether the contract between the parties was usurious or not. However this may be, a careful review of the question involved has confirmed my opinion, held on demurrer, that this bill could be maintained. While it is true section 723, Rev. St. (U. S. Comp. St. 1901, p. 583), prohibits suits in equity in federal courts where a plain, adequate, and complete remedy at law can be had, it is also true that, construing this statute, the courts have held that the remedy at law must not only be plain and adequate, but it must also be complete, and, if the remedy at law is doubtful, difficult, not adequate to the object, not so complete as in equity, nor so efficient and practicable to the ends of justice and its prompt administration, then equity will take jurisdiction. *Whitehead v. Shattuck*, 138 U. S. 151, 11 Sup. Ct. 276, 34 L. Ed. 873; *Spokane Mill Co. v. Post* (C. C.) 50 Fed. 431; *Smith v. Am. Nat. Bank*, 89 Fed. 840, 32 C. C. A. 368; *Rumbarger v. Yokum* (C. C.) 174 Fed. 55. That an action at law to recover for the usury paid is not a

plain and adequate one has been recognized by the courts of Virginia and West Virginia for more than a hundred years. Section 7, c. 96 (section 3432), of the Code of this state, taken from the Code of Virginia of 1860 (chapter 141), expressly provides:

"Any borrower of money or other thing may exhibit a bill in equity against the lender and compel him to discover upon oath the money or thing really lent, and all bargains, contracts, or shifts relative to such loan, and the interest or consideration of the same; and if it appear that more than lawful interest was reserved, the lender shall recover his principal money or other thing *with six per cent. interest only but shall recover no costs*. If property has been conveyed to secure the payment of the debt, and a sale thereof is about to be made, or is apprehended, an injunction may be awarded to prevent such sale pending the suit."

The first part of this section was embodied in Acts Va. 1796 (chapter 16, § 3), except there appears therein in lieu of the words I have italicized the words "without interest, and pay the costs of suit."

For 40 years in Virginia, beginning with the case of Marks v. Morris, 4 Hen. & M. 463, a great controversy was waged over the operation of this statute upon the security held by the lender of a usurious debt. Marks v. Morris was reversed by the Supreme Court of Appeals (2 Munf. 407, 5 Am. Dec. 481), and its reversal was finally overruled in Bell v. Calhoun, 8 Grat. 22. Without reviewing this controversy and its final settlement through the numerous cases and by statute, because such review has been made by Green, Judge, in Davis v. Demming, 12 W. Va. 246, it is sufficient to say that the practice in Virginia and West Virginia is now very clearly laid down in Norvell v. Hedrick, 21 W. Va. 523, where it is held:

"Where usurious interest has been paid and the transaction closed, the borrower may recover back from the lender the excess so paid beyond the legal rate, in an action of assumpsit for money had and received; but if the debt, or any part of it, on which such usurious interest has been paid, remains unpaid, a court of equity in stating the account between the parties will credit upon the principal of such unpaid part whatever usurious interest has been paid, and give the lender a decree for his debt, with legal interest only."

From this and other decisions in this state the rule is well established that a borrower can do one of two things: First, pay his debt and the usurious interest and then in an action at law recover back the usury; or, second, before payment of the debt, bring his bill in equity, and by an accounting have the usury ascertained and credited upon the debt as of date of such usurious payments.

But it is insisted that this rule does not apply to federal courts, and that they should not adopt the state practice. It would seem clear that the reason for the state rule has been because the remedy at law was not plain and adequate. A borrower who for years has paid usury might upon accounting had and credit given on his debt for such usury paid be entirely able, without sacrifice of his property, to pay the balance of the debt, while, to compel payment of the debt before he could obtain relief, might effect his financial ruin. As we have seen, the rule is just as well settled in federal practice as in state practice that, where the remedy at law is not full, complete, and adequate, resort can be had to equity, and no reason can be shown why the enforcement of a substantive state statute relating to usury should be an exception to the

rule. In fact, if I have rightly comprehended the federal decisions, they expressly hold to the contrary.

In *Missouri, Kansas & Texas Trust Co. v. Krumseig*, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474, it is said:

"Usury is, of course, merely a statutory offense, and federal courts in dealing with such a question must look to the laws of the state where the transaction took place, and follow the construction put upon such laws by the state courts [citing *De Wolf v. Johnson*, 10 Wheat. 367, 6 L. Ed. 343; *Scudder v. Union National Bank*, 91 U. S. 406, 23 L. Ed. 245]."

And again:

"The public policy of a state with respect to contracts made within the state and sought to be enforced therein is obligatory on the federal courts, whether acting in equity or law."

In that case an usurious contract was involved, suit was brought by the borrower in equity for relief against such usury, and such relief was granted. See, also, *McIlwaine v. Iseley* (C. C.) 96 Fed. 62, and *Union M. B. Co. v. Hagood* (C. C.) 97 Fed. 360, the opinions in both which were rendered by the late Circuit Judge Siminton of this circuit.

This brings us to the final question, a question solely of fact, whether or not the contract here involved was in fact usurious. It has been held:

"Where, upon a loan of money, the lender besides his principal contracts to receive, in lieu of interest, something which may be worth more than legal interest, though it may perhaps prove to be worth less, as the dividends on bank stock, the contract is usurious." *Smith v. Nicholas*, 8 Leigh (Va.) 330; *Bank v. Stribling*, 7 Leigh (Va.) 26.

And:

"A sum allowed a creditor 'for services rendered and settled' (but not specified) amounting to 9 per centum per annum was considered usurious; it appearing that the pretended services were rendered only in exertions to secure the debt for the creditor's own benefit." *Stone v. Ware*, 6 Munf. (Va.) 541.

And again:

"This statute (against usury) contemplates substitutionary colorable arrangements, and the various shifts and devices that are often used to cover up the usury; but law requires the lender on oath to discover the money really lent, and all bargains, contracts, or shifts relative to such loans, and makes them ineffectual, no matter how complicated they be. The law evidently intends that the search for usury shall penetrate to the substance." *Crim v. Post*, 41 W. Va. 397, 23 S. E. 613.

Also:

"The Legislature in their later statutes, giving up the vain pursuit of usury in its particular forms, and striking at the root of the evil, have forbidden the taking exorbitant interest directly or indirectly; thus throwing upon the ministers of the law the duty of detecting and defeating every attempted evasion of it. Well may these ministers exclaim, 'Quo teneam vultus mutantem Protea nodo?' Yet are they bound to pursue this Proteus through all his changing forms; and the law has given them ample powers." *Whitworth v. Adams*, 5 Rand. (Va.) 333.

See, also, *Watkins v. Taylor*, 2 Munf. (Va.) 424, 5 Am. Dec. 486, opinion of Roane, Judge, reported in 3 Munf. 595; *Bank v. Kirby*, 100 Va. 498, 42 S. E. 303; *Ware v. Bankers' Loan, etc., Co.*, 95 Va. 680,

29 S. E. 744, 64 Am. St. Rep. 826; Nat. M. Bldg. Ass'n v. Ashworth, 91 Va. 706, 22 S. E. 521; Vangilder v. Hoffman, 22 W. Va. 1.

As briefly as we can, sifting the facts involved here, we find that this Fairmont & Mannington Railroad Company was organized by defendant Thomas W. Fleming and others without any substantial contribution to its capital stock; each one of the seven promoters subscribing for one share of the par value of \$100. Fleming was elected president of the company, and his son, the defendant Allison S. Fleming, was at first elected secretary, and subsequently in addition treasurer of it. These positions were held by them for nearly five years, until May 10, 1909. The authorized capital was \$1,000,000 and a bond issue of \$600,000 was also authorized. Thomas W. Fleming and his associates who may be hereafter designated the promoters, as well as the then officers and directors, adopted some of the very common methods of stock manipulation which are so justly causing complaint and condemnation throughout the country. These promoters were voted by the company \$93,000 of the capital stock for their compensation as such, and the defendant Thomas W. Fleming became one of a syndicate which undertook to secure the rights of way for which this syndicate was to receive \$24,000 of the bonds subsequently increased to \$34,000. In addition to this, an underwriting syndicate was formed to take \$100,000 worth of the bonds in denominations of \$1,000 each at \$850 per bond, and for each bond so taken \$3,000 worth of stock was to issue to the one taking the bond. T. W. Fleming, under this arrangement, had subscribed for ten bonds and had actually taken and paid for five of them, so that it will be seen that he had a substantial interest in the successful building and operation of the road by reason of both his stock and bondholdings. In January, 1906, a contract was made by the company with one W. R. Brown, whereby he was to receive \$423,000 of its bonds and 9,993 shares of its capital stock in consideration of his building and equipping the road from Fairmont to Mannington, a distance of about 14½ miles. Brown commenced February following and continued work until the fall of 1906, when he became financially embarrassed, and had to stop. At the instance of A. L. Pearson and C. I. Shannon, who had purchased from Brown a large number of bonds, a corporation was formed, known as the Buffalo Construction Company, and about April 1, 1907, a contract was entered into between the railroad company and this construction company for the completion of Brown's contract by the latter. The plaintiff, Laws, became the substantial owner of the construction company's interests under this contract, and in its name undertook to complete the road. He began work in June, 1907. He became the owner of the bonds and stock issued to Brown not disposed of by the latter. On or about October 11, 1909, Laws became in urgent need of \$30,000 to carry on the work. He applied to C. W. Watson in New York for a loan of this amount. Watson agreed to secure him this sum if he would secure defendant T. W. Fleming to indorse the note, and would assign to him, Watson, absolutely \$100,000 of the capital stock. Laws went to Fairmont, and, while walking over the line of the road, informed Fleming of Watson's proposition. Flem-

ing at once condemned it as unreasonable. Later in the day Fleming and Laws entered into the verbal contract in controversy. Distinct conflict exists as to what the terms of this contract were. Laws insists that by it Fleming was to furnish him \$18,000 in cash, and was to indorse for him paper to the amount of \$12,000 additional, for which he, Laws, was to, and did, execute his note for \$23,000 payable in six months, which included besides the \$18,000 cash the sum of \$5,000 which he, Laws, at the time owed Fleming. For this loan and promised indorsement Fleming was to have \$50,000 of bonds as collateral security and an assignment of 1,500 shares of the capital stock. Laws insists that, after the execution of the \$23,000 note, Fleming refused to indorse for the \$12,000 and that the stock which he estimates to be now worth 30 cents on the dollar, or \$45,000, was given as a usurious consideration for the loan of \$18,000 and the promised indorsement for \$12,000. On the other hand, Fleming insists that at the time he held Laws' overdue note for \$5,000 and was indorser for him upon two notes (which he admits were subsequently paid) for \$5,000 and \$2,600, respectively; that he loaned him the \$18,000 in cash, took the note for \$23,000, which included the \$5,000 overdue note which was secured by the bonds; that, after this arrangement was made, he called Laws' attention to the fact that in June, 1907, in New York City, he, Laws, had said to him, Fleming, that he would depend upon him (Fleming) to assist him (Laws) in the undertaking, and would see that he (Fleming) "was properly cared for." Quoting Fleming's language:

"I said: 'I have been indorsing paper for you and have been doing a great deal of work for you, and have given my entire time on this road, looking after its construction and aiding you in every way possible, and I think now it is a good time for us to have an understanding with reference to what I am to be paid for my services.' He wanted to know if I would be willing to accept \$100,000 of stock. I said I should have \$150,000 worth of stock; that the stock so far as the value was concerned it was of no value, but I felt that I had rendered sufficient services that I was entitled to that stock. Mr. Laws says: 'All right, Mr. Fleming, I will agree to give you \$150,000 worth of this stock.'"

Fleming in this statement is corroborated by his son. Laws denies that the question of "services" was discussed in connection with the transaction, or that he ever agreed "to take care of Fleming," or that the services rendered by Fleming were other than those performed by him as president of the railroad company and interested financially in its success.

I have studied this evidence long and carefully, and I am driven to the conclusion that the issuing of this stock to Fleming was in fact an usurious shift or device forbidden by the statute. Without entering into an extended discussion of the evidence, it seems to me to be clear that Laws at the time was laboring under great financial stress and had to have money. He could procure it from Watson only upon condition that Fleming would indorse or become surety for it and Laws would give him \$100,000 stock. Fleming had clearly indicated in the morning walk along the line of road that his indorsement could not be obtained. Laws was clearly at the end of his rope. It was under such conditions that Fleming agreed to let him have \$18,000, and, as-

suming his statements to be entirely true, brought up the subject of "his being taken care of." It cannot be denied that at the time he did so Laws did not have in hand the promised \$18,000; that was not to be delivered until a morning or two after. Fleming, he knew, could refuse to furnish it still if he, Laws, did not accede to his demands. He had to have the money, so he acceded. Touching these services claimed to be rendered, it is to be noted that Fleming had never demanded or mentioned compensation for them before. So far as shown, he had kept no account of them on book or otherwise, had rendered no account thereof, and this evidence discloses that they were of such character as might well have been expected of the president of a road who had large pecuniary interests personally at stake in its building and equipment alone upon watered stock and a greatly inflated bond issue. It seems to me the case comes under the principles laid down in *Stone v. Ware*, 6 Munf. (Va.) 541.

By reason of the terms of the consent decree of October 6, 1909, the procedure herein will be greatly simplified. It will only be necessary to direct the clerk and registrar of this court to deliver to the plaintiff the 1,500 shares of stock deposited to abide this decision, and confirm his right to have the same retransferred to him on the books of the company. A decree to this effect will be entered.

AUERBACH v. INTERNATIONALE WOLFRAM LAMPEN AKTIEN GESELLSCHAFT.

(Circuit Court, S. D. New York. March 16, 1910.)

1. ATTACHMENT (§ 102*)—CAUSE OF ACTION—AFFIDAVIT—SUFFICIENCY.

Under Code Civ. Proc. N. Y. § 636, providing that, to entitle plaintiff to a warrant of attachment, he must show by affidavit to the satisfaction of the judge that one of the causes of action specified in the preceding section exists against defendant, and, if it is an action to recover damages for breach of contract that plaintiff is entitled to recover a sum stated therein above all counterclaims known to him, it is not sufficient that plaintiff alleges a cause of action, but, in order to sustain his attachment, he must show a cause of action to the satisfaction of the judge with reasonable certainty.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 263-272; Dec. Dig. § 102.*]

2. BROKERS (§ 71*)—SERVICES—CONTRACT—CONSTRUCTION.

Where a contract for brokers' services provided that, in case of a sale of certain patent rights, plaintiff's assignor should receive a commission in case the owners utilized or called for the assignor's assistance or services at the sale or in proceedings leading up to the same, such agreement did not contemplate a payment of commissions for the owners' use of the assignor's previous services.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 56; Dec. Dig. § 71.*]

3. BROKERS (§ 10*)—EXCLUSIVE AGENCY—UNILATERAL PROMISE—REVOCATION.

A contract giving a broker an exclusive agency for a definite time for the sale of certain patent rights is but a unilateral promise, revocable by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the owner notwithstanding part performance, whether the owner commits a breach of contract in so doing or not.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 11; Dec. Dig. § 10.*]

4. ATTACHMENT (§ 105*)—AFFIDAVIT—CAUSE OF ACTION—DAMAGES.

Under Code Civ. Proc. N. Y. § 636, regulating attachment and providing that, if the action is to recover damages for breach of contract, the affidavit must show that plaintiff is entitled to recover a sum stated therein, an attachment was not authorized in a suit for alleged breach of a broker's contract of employment, in the absence of some allegations showing that plaintiff in any case would have made a sale and been entitled to compensation.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 276-279; Dec. Dig. § 105.*]

5. BROKERS (§ 13*)—EMPLOYMENT—ACTS OF PRINCIPAL.

In the absence of a provision in a broker's contract of employment giving him an exclusive agency, the principal may act independently of the broker.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 12; Dec. Dig. § 13.*]

6. BROKERS (§ 86*)—SERVICES—PROCURING CAUSE—EVIDENCE.

Facts held insufficient to show that a broker was the procuring cause of a transfer of certain patent rights so as to entitle the broker's assignee to recover on a quantum meruit.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 116-120; Dec. Dig. § 86.*]

Action by Julius Auerbach, as assignee of J. Walter Douglass, against the Internationale Wolfram Lampen Aktien Gesellschaft. On motion to vacate an attachment. Granted.

See, also, 173 Fed. 624.

This is a motion to dissolve an attachment levied by the plaintiff upon a contract between the defendant and the General Electric Company. The defendant is a corporation organized under the laws of the kingdom of Hungary, and having its principal place of business in the city of Budapest. The plaintiff, a resident of New York, is the assignee of one J. Walter Douglass, who is, in fact, the real party in interest here, and who is referred to herein after as the plaintiff.

A history of the events as they are detailed in the papers is as follows: In the month of February, 1908, the plaintiff, a Philadelphia lawyer, was acting as attorney for Alexander Just and Fritz Hanaman, two Hungarian inventors, who are the predecessors in interest of the defendant company, to which they have assigned all their patent rights. At that time Just and Hanaman had patents pending in this country for certain improvements in Tungsten filament lamps. One Victor Tischler, of Vienna, was their local attorney, and on February 18th the plaintiff wrote a letter to Tischler, proposing to Just and Hanaman the sale of their patent rights in this country to the General Electric Company. It is quite clear from this letter that the plaintiff merely suggested to Tischler that the General Electric Company would be a very advantageous purchaser for them. Tischler answered on March 5th, saying that he had urged upon Just and Hanaman the proposition, and that they would entertain it, "provided you act at once," suggesting that the General Electric Company send their representative over to talk with the European parties. On April 17th the plaintiff answered that he had had a further interview with the General Electric Company, and that he had "opened broadly the way." The letter concludes as follows: "I shall now leave this whole matter to you to work out, having paved the way for the investigation you thought necessary, and quickly have I got it to the heads, for your interests, as counsel purely in the matter, unless a deal is made and then the commission between us can be arranged." On April 10th and May 4th and 5th

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

he wrote, suggesting that there be a combination of all the interests in the patent, which could be together sold to the General Electric Company. The General Electric Company sent over two representatives on May 20th to Europe, who called upon Just and Hanaman on July 5, 1908, but after whose report the company declined at that time further to consider the subject, owing probably to certain criminal proceedings at that time pending in America against one of the American claimants. In the fall of 1908 the plaintiff was in constant communication with Tischler, attempting to get Just and Hanaman to allow him to try to combine all the interests in the patent into an American syndicate. These interests included, not only those of Just and Hanaman, but also in Europe those of Kuzel, Von Bolten, and in this country those known as the Teeter-Heany claims. This appears from the plaintiff's letters of November 2, November 18, December 8, 1908, and also Tischler's letters of December 18, 1908, and January 5 and 15, 1909. None of these letters contains any suggestion of a contract with the General Electric Company. In the plaintiff's letter of November 18th occurs the following language: "With the General Electric Company in the field now, with its allied companies, working in this locality under it, you all are losing thousands of dollars in America daily. This could all be prevented, if the broad or basic patent were issued and proposed company control such patent." Again, on December 8th: "That would end also all the 'little fry' cropping up daily—because all their doings and patents would be dominated by the Syndicate Companies' patent rights, including the General Electric Company's acts and their allied companies' acts in Ohio and elsewhere." Tischler wrote on December 18th: "I am directed to write to you that your program is considered to be acceptable and that six months' commission, first of January, 1909, will be given to you and to you exclusively to realize your program." This referred to a "six months' option" which the plaintiff had been asking for. On January 5th Tischler writes: "None want to fight to put the proposed consolidated interests into shape for business." On January 15, 1909, Tischler writes a letter in which he incloses "suggestions for financing Just and Hanaman and Kuzel interests in U. S. A." On the 14th of January Just and Hanaman wrote a letter in German to the defendant, the important parts of which are as follows: "We intrust you for half a year, that is, until July 31st, 1909, with our representation for the purpose of negotiations towards the sale of the American Just and Hanaman patents and patent applications. * * * In case we actually conclude before July 31st, 1909, a contract in whatever form for the sale of our American patents and patent applications or of a portion of the same with a buyer brought by you you are to receive as a remuneration for your efforts and expenses a thirty per cent. commission on all cash monies, shares or benefits of whatever name. * * * If your intervention passes without results, that is, if by July 31st, 1909, no contract actually is concluded between us and a buyer brought by you, you have no claim either for a share or reimbursement for any outlay, expenses, etc. * * * The above stipulated commission is due you also in case we should dispose of the patents referred to above before July 31st, 1909, to persons not brought by you provided that we have made any claims upon your co-operation in the sale or the negotiations in any manner whatsoever." Upon receiving this letter, the plaintiff continued actively trying to procure a combination of all the interests in these patents, but on February 28th the defendant without notice to him gave an option to the General Electric Company for the sale of all its interests in the United States, and this was subsequently followed on April 15, 1909, by the conclusion of a contract which included Kuzel's interests, and under which the General Electric Company agreed to pay the defendant \$250,000, of which they were to pay down \$125,000 at once and \$25,000 upon the 15th of April on each following year until the whole had been paid. This contract contained covenants requiring the defendant to perform various acts, such as disclosing all information relating to the patent, assigning all future inventions of a similar character, giving further assurance, refusing to enter the field in competition with the General Electric Company, and in other ways obligating itself for a term of 17 years. None of these obligations, however, were formally constituted conditions upon the General Electric Company's obligations. Upon learning of this contract and

that further negotiations looking towards a combination into a syndicate were fruitless, the plaintiff on May 21, 1909, wrote to the defendant demanding his commissions of 30 per cent. under the agreement of January 14, 1909, particularly upon the ground that the General Electric Company was a purchaser brought in by him, and that he had been prevented from carrying out his efforts of forming a combination. Failing in this, he brought an action in the Supreme Court of the state of New York on the 18th of August, 1909, by levying an attachment upon the interest of the defendant in the contract with the General Electric Company. That action was removed to this court, and on October 18, 1909, the defendant moved to vacate the attachment upon a technical ground. The attachment was vacated by Judge Ward on October 28, 1909. On October 29, 1909, the defendant assigned all its interest in the contract to a Hungarian Savings Bank by an instrument in writing which recited the consideration of \$125,000, or its equivalent in Hungarian money. This instrument was properly legalized in accordance with the civil law, and there was also proof of the payment of the consideration. Hanaman, but not Just, is a director in the Savings Bank. A new attachment was levied out of this court on the 1st day of November, 1909, and it is to vacate this attachment to this order to show cause passed on January 19, 1910.

Three questions are raised under this motion: First. Whether a cause of action is stated by the plaintiff against the defendant. Second. Whether there are conditions in the chose in action which has been attached which permit it to be attached at all. Third. Whether the transfer of the chose in action to the Savings Bank is illegal and fraudulent.

Joseph M. Proskauer, for plaintiff.

Arthur C. Fraser and George C. Holton, for defendant.

HAND, District Judge (after stating the facts as above). It is the settled law of the state of New York that the plaintiff must show a cause of action to the satisfaction of the judge with reasonable certainty. Section 636 of the New York Code; *Ladenburg v. Commercial Bank*, 87 Hun, 269, 33 N. Y. Supp. 821. It is not enough that the complainant merely alleges a cause of action. *Wallace v. Baring*, 21 App. Div. 477, 48 N. Y. Supp. 692. Of the four causes of action the three first are based upon the contract of January 14, 1909, and the fourth is upon a quantum meruit. The first cause of action is based upon the plaintiff's performance of the contract, especially upon performance of the phrase:

"The above stipulated commission shall be yours * * * if we have in any manner whatsoever utilized (or made call upon) your assistance or services at the sale or in the proceeding leading up to the same."

The plaintiff does not assert that he had anything to do with the negotiations with the General Electric Company after January 14, 1909, which resulted in the contract. He asserts that he is entitled to his commissions because the defendant utilized his former assistance and services at that sale and in the proceedings leading up to the same. I do not think it necessary to determine whether the phrase "in Anspruch genommen" means "utilized" or whether it means "called upon," for I am not satisfied that it contemplated past acts of the plaintiff, or that the defendant meant to pay him if it made use of any of the work which he had hitherto done.

The second cause of action is upon the theory that he did assist in the sale because it was through him that the Kuzel interests were brought into the combination. I find no evidence in the correspond-

ence that this is true, and certainly no intimation that anything he did happened after January 14, 1909. Kuzel was in Europe and on December 8, 1909, the plaintiff writes as follows:

"What Dr. Just ought to do personally is to take up my plan of consolidation direct with the Von Bolten and Kuzel interests if it is possible to get them to consent to the plan * * * and this should be done as soon as possible."

On January 15th Tischler wrote:

"As to tactics, you will understand that Just and Hanaman have completed an agreement with Kuzel to co-operate."

It is true that prior to this, and on November 2, 1908, plaintiff had written, "I can get the Kuzel interests in line"; but it nowhere appears that he did "get him in line," or at least that he did so after January 14, 1909.

The third cause of action is for the breach by the defendant of the contract in taking up the negotiations with the General Electric Company at a time when the plaintiff had their exclusive agency. It is a vexed question whether an agency of this sort, which is fixed in time, may or may not be repudiated by the principal in the absence of an express promise by the agent to perform any services. It is, of course, obvious that, in the absence of some implied promise at the inception of the contract, it is only a unilateral promise and the principal may withdraw his offer, whenever he pleases; and it is well settled that, where the contract is not for a fixed time, he may do so. *Rees v. Pellow*, 97 Fed. 167, 38 C. C. A. 94; *Sibbald v. Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441. When the contract is for a given time, the authorities differ. In *Milligan v. Owen*, 123 Iowa, 285, 98 N. W. 792, where the agency was not exclusive, it was held it might be revoked, and so it was held in *Green v. Cole*, 103 Mo. 70, 15 S. W. 317, provided no work had been done under it. In *Bathrick v. Coffin*, 13 App. Div. 101, 43 N. Y. Supp. 313, the broker had expended large sums of money in the sale of the land, but it does not appear whether the contract originally contemplated this or not. In several of the cases the matter is confused with the revocation of a power of attorney, coupled with an interest, a totally different subject. The power of the agent is certainly revocable whether the principal commits a breach of contract in so doing or not. In principle I am very clear that the agent makes no implied undertaking, and that the promise is unilateral. It is an error to suppose that the subsequent part performance of the conditions of a unilateral promise create an obligation. Either it is given at the outset for a counterpromise or it is given for the performance of the acts specified. Although the results are often unjust, they should not pervert the rectitude of such fundamental principles of law as those controlling the creation of contract obligations.

However, I am not satisfied in any event that the plaintiff has shown any damages, if there was a breach. It is necessary to prove substantial damages under the section in question, the terms of which are:

"If the action is to recover damages for a breach of contract the affidavit must show that the plaintiff is entitled to recover a sum stated therein."

In the absence of some allegations from which it would appear that the plaintiff would have in any case made the sale, there is no evidence of damages. His letters indicate that all negotiations with the General Electric Company were assumed to be off, nor can I say that his negotiations elsewhere would have been successful.

I have assumed that the contract with Just and Hanaman created an exclusive agency between the defendant and the plaintiff, and the ground for this is contained in Tischler's letter to him of December 18, 1908, in which he says:

"I am directed to say to you that your program is considered to be acceptable and that six months' commission, first of January, 1909, will be given to you and to you exclusively to realize your program."

However, the letter of January 14th does not in terms give the plaintiff an exclusive right, and I do not wish to say that the two are necessarily to be read together or to construe the contract as giving him an exclusive right. I am simply giving the plaintiff the benefit of this doubt, because it is well settled that without such a provision the principal could act independently. *Faulkner v. Cornell*, 80 App. Div. 161, 80 N. Y. Supp. 526; *McClave v. Paine*, 49 N. Y. 562, 10 Am. Rep. 431; *Chilton v. Butler*, 1 E. D. Smith, 150.

The fourth cause of action is upon a quantum meruit. This depends upon the theory that it was through the plaintiff's efforts that the contract was obtained. It is well settled that a broker's services consist in procuring the purchaser, and that, unless he does induce in him a state of mind through which he is ready and willing to make the contract, he has failed. Probably the plaintiff procured the trip to Europe of the two representatives of the General Electric Company, and, had the contract been consummated at that time, he would possibly have earned his commissions, whatever they were worth. That question would depend upon his original employment by the defendant for that purpose, a question not wholly clear in the papers. If he was a volunteer, and had not been employed, he could not recover. In the view I take of the other facts, it is not necessary to determine whether or not he was ever employed as broker before January 14, 1909.

From the correspondence in the fall and winter of 1908, it appears that the parties supposed the negotiations with the General Electric Company were over, and that they were negotiating for combination of all the interests into an independent syndicate, which would, when formed, either compel the General Electric Company to come to terms, or stop its infringements. I certainly am not satisfied that the subsequent negotiations and completion of the contract between February 28 and April 15, 1909, were in any sense a continuation of the original negotiations of the summer, or procured by the plaintiff, and I am fortified in this conclusion, in that his chief reliance is the contract of January 14, 1909.

Of course, when the plaintiff comes to present his case in a tribunal which has jurisdiction of the defendant, it may well be that he can succeed in clearing up any of the difficulties which I have suggested, but where, as here, it is necessary that he should satisfy the judge in

advance that he has a cause of action, I can only say that he has failed to do so, and that that jurisdictional requisite under the Code does not exist. It is unnecessary to consider the other two points which have been raised.

I must therefore grant the motion, and vacate the attachment.

In re MONARCH CORPORATION.

(District Court, D. Connecticut. March 2, 1910.)

1. BANKRUPTCY (§ 250*)—COURTS—JURISDICTION—ASSESSMENT ON STOCKHOLDERS.

Where the affairs of a bankrupt corporation were being administered in a court of bankruptcy, such court had jurisdiction to grant a petition of the trustee to levy an assessment against stockholders on unpaid stock; the corporation's officers, directors, and stockholders being amenable to the court's authority, at least so far as their dealings with the corporation were concerned, regardless of their residence.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 250.*]

Jurisdiction of federal courts of suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

2. BANKRUPTCY (§ 250*)—CORPORATIONS—POWER OF TRUSTEE.

The trustee in bankruptcy of a corporation has all the powers originally invested in the board of directors, and may ask for an assessment on the corporation's unpaid capital stock to such an amount as will be needed to pay debts and expenses, regardless of the original terms of the stock issue.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 250.*]

3. BANKRUPTCY (§ 250*)—CORPORATIONS—LEVY ON STOCK—JURISDICTION.

That a plenary suit may be brought by the trustee of a bankrupt corporation to recover unpaid installments on the corporation's stock without a specific levy on an assessment by the bankruptcy court does not prevent such court from making such a levy on petition of the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 250.*]

In the matter of the bankruptcy of the Monarch Corporation. On petition of Norman Leeds, trustee, for an assessment on stockholders. Petition granted.

The following is the petition referred to in the opinion:

That the said bankrupt was a corporation duly organized and existing under the general incorporation laws of the state of Connecticut. Said corporation was organized about January 13, 1906, and began its business operations soon thereafter, continuing until March 1, 1908, when said corporation became so financially embarrassed that it was compelled to suspend its business, being unable to meet its liabilities as they became due. Whereupon, on March 16, 1908, an involuntary petition in bankruptcy was filed against said corporation in the District Court of the United States for the District of Connecticut, and thereafter, on the 14th day of April, 1908, said corporation was duly adjudged a bankrupt by said District Court.

Your petitioner at a meeting of creditors called on the 12th day of May, 1908, was elected trustee of the estate and effects of the said bankrupt, which election was duly confirmed by John W. Banks, Esq., referee in bankruptcy, and your petitioner qualified as such trustee on the 13th day of May, 1908.

Your petitioner since said May 13, 1908, has been and is now the duly elected acting and qualified trustee of said bankrupt.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The general purposes and objects of said corporation were the manufacturing of and dealing in appliances, apparatus, machinery, and devices of all kinds for fighting fire and chemical compounds used for the purpose of extinguishing fire.

At the date of the adjudication of said corporation as a bankrupt, its outstanding capital stock was \$500,000, all of which at that date was subscribed for, taken, and held. Said capital stock was divided into 5,000 shares of \$100 each, of which 2,500 shares were preferred, and 2,500 shares were common. Said stock was held and owned almost entirely by the organizers and original stockholders of said corporation, who had from time to time acted as directors of said corporation, elected its officers, and who held and owned said stock as stock in a corporation represented and published to the world as having a stock of \$500,000, upon the faith of which it was enabled to and did create large liabilities for the carrying on of the business of manufacturing fire extinguishers.

Your petitioner attaches to this petition, and prays that it may be made and considered a part hereof, a certain statement marked "Exhibit A," showing who the said stockholders are, the amount of stock held by each, how acquired, etc. The said stockholders, and each of them, held and owned, and do now hold and own, certificates of stock for their shares of stock in said corporation, executed by affixing the seal of the corporation and the signatures of the president and treasurer thereof.

Of said capital stock, amounting to \$500,000, \$25,000 was issued for cash; the remainder, amounting to \$475,000, was issued for and in consideration of the assignment to said corporation of two certain United States patents, No. 545,351 and No. 610,127, as more fully appears in the vote passed at the meeting of incorporators of said corporation, held on January 16, 1906, and a vote of the meeting of directors held upon said date, which votes are as follows:

"Vote of Incorporators: Whereas, George H. Carpenter offers to cause to be transferred to this company, for and in consideration of the issue to himself and his associates, of \$475,000.00 of the full-paid nonassessable capital stock of this company, certain patents covering certain inventions relating to the use of carbonic acid gas and apparatus for containing carbonic acid gas, which are more particularly described as follows: United States patent No. 545,351, dated August 27, 1895, and United States patent No. 610,127, dated August 30, 1898, both issued to Victor Durafort, for the development of which patents this company is organized: Now, therefore, be it resolved, that the stockholders of the company declare the said patents to be in their judgment of the reasonable value of \$475,000.00; and further be it resolved, that the directors of the company be authorized to issue capital stock of the company, full-paid and nonassessable, to the extent of \$475,000.00, to said George H. Carpenter, William C. Hill, Harlan W. Brush and Leonard D. Baldwin, for and in consideration of the assignment to this company of said patents.

"Vote of Directors: Whereas, the incorporators and subscribers for the capital stock of the company have examined into the value of the Durafort inventions and the United States patents covering the same, and have, in a resolution duly adopted, at the first meeting of the company, expressed their assent that the same should be acquired for the purposes of the company, and that \$475,000.00 of the capital stock of the company should be issued as full-paid and nonassessable against the said patents in said resolution described; and whereas, each of the members of the board of directors has for himself investigated the value of such inventions: Now, therefore, be it resolved, that the board of directors adjudge and declare said patents, to wit, certain patents covering certain inventions relating to the use of carbonic acid gas, and apparatus for containing carbonic acid gas, which are more particularly described as follows: United States patent No. 545,351, dated August 27, 1895, and United States patent No. 610,127, dated August 30, 1898, both issued to Victor Durafort, to be of the fair and reasonable value of \$475,000.00; and further be it resolved, that the company issue its full-paid and nonassessable stock to the extent of \$475,000.00 in consideration of the transfer of said patents to the Monarch Corporation. The secretary reported that George H. Carpenter and William C. Hill had executed an assignment of certain patents

covering certain inventions relating to the use of carbonic acid gas and apparatus for containing carbonic acid gas which are more particularly described as follows: United States patent No. 545,351, dated August 27, 1895, and United States patent No. 610,127, dated August 30, 1898, both issued to Victor Durafort, referred to in the foregoing resolution, to the Monarch Corporation, and had filed with him copies of such patents and of the assignments of the same, to the said George H. Carpenter and William C. Hill, together with a written direction that the capital stock of the company to be issued against the assignment of said patents be issued to the following named persons in the amounts set opposite their respective names, to wit: George H. Carpenter, \$175,000.00; William C. Hill, \$175,000.00; Harlan W. Brush, \$100,000.00; Leonard D. Baldwin, \$25,000.00."

The following resolution was regularly made, seconded and unanimously adopted:

"Resolved: That the officers of the company be directed to issue \$475,000.00 of the stock of the company in the amounts set opposite the names of the respective persons named in the written direction of George H. Carpenter and William C. Hill heretofore filed with the company in satisfaction of the subscriptions made by said George H. Carpenter, William C. Hill, Harlan W. Brush and Leonard D. Baldwin for stock of the company, to be paid in property."

At said meeting of incorporators, of the five incorporators and subscribers to the capital stock, George H. Carpenter, Harlan W. Brush, Joseph O. Roe, and William C. Hill were present in person; Leonard D. Baldwin was present by proxy; and at the said directors' meeting held January 16th, the said Joseph O. Roe, William C. Hill, George H. Carpenter, Harlan W. Brush, and Leonard D. Baldwin were all present, constituting the entire board.

Thereafter, and for the consideration of the assignment of said patents as aforesaid, the capital stock of said corporation to the amount of \$475,000 was issued to the said George H. Carpenter, Harlan W. Brush, Joseph O. Roe, Leonard D. Baldwin, and William C. Hill.

From time to time, certain shares of said capital stock have been transferred by said original stockholders, and thereupon new certificates have been issued for the same, as more fully appears in Exhibit A.

As to these assignees of stock, your petitioner is not informed as to whether they received their stock with knowledge of the facts and conditions under which it was originally issued, or whether they or any of them are bona fide purchasers without notice.

Said United States patents, No. 545,351 and No. 610,127, have never been transferred or assigned to said Monarch Corporation, or to your petitioner, as trustee, although he has made demand for the same upon all the stockholders whose names appear upon the books of said corporation as holders of certificates of capital stock.

Your petitioner represents that while said stockholders, as more fully appears in Exhibit A, hold certificates of stock amounting in the aggregate to \$500,000, they, or either of them, have not paid to the corporation or its trustee said \$500,000, or any part thereof, except the sum of \$25,000 aforesaid, nor have said stockholders assigned or transferred to said corporation, or its trustee, said United States patents, No. 545,351 and No. 610,127, but that said capital stock to the amount of \$475,000 was issued without any consideration whatsoever.

Your petitioner attaches hereto Exhibit B, and prays that it may be made and considered a part of this petition, showing the amount of stock held by each stockholder and the amount due on the same.

Your petitioner claims that by the charter of said corporation the laws of Connecticut and the general principles of law governing corporations, upon the failure to transfer to the corporation said United States patents, Nos. 545,351 and 610,127, said stock and subscriptions thereto became payable in cash, and that all of said stockholders have a liability resting upon them to pay your petitioner for the benefit of the creditors of said corporation such part of the amount unpaid by them on said stock as may be necessary to pay such part of the debts and liabilities of said corporation as cannot be dis-

charged and paid off by the available assets in the possession of your petitioner.

Your petitioner represents that at the date of said adjudication the affairs of said corporation were in a very embarrassed and complicated condition, and much time has necessarily been consumed and considerable expense incurred in liquidating and collecting the assets of the corporation, and in enforcing its contracts, and in opposing claims attempted to be established in said bankrupt court. The property of the corporation on hand at the date of adjudication in bankruptcy has been disposed of as rapidly as seemed consistent to the interest of all concerned, until at the present time no property remains on hand not reduced to cash, except 2,200 unfinished extinguishers of the appraised value of \$67.22, the title to which is in controversy before said bankrupt court.

Your petitioner is informed and believes that in other cases similar to this the bankrupt courts have made assessments on the capital stock upon an approximate showing of the bankrupt's financial condition, which can now be done by your petitioner with reasonable certainty.

Of the said stockholders, as your petitioner is informed, a majority live in the states of New York and New Jersey. Your petitioner is also informed and believes that a majority of these stockholders are men of pecuniary responsibility, and intend to oppose all efforts made to enforce the liability claimed by your petitioner, which opposition will render necessary suits in the states of New York and New Jersey and other jurisdictions to recover any assessments made by this court.

The entire assets, including the aforesaid 2,200 unfinished extinguishers at their appraised value, amount approximately to \$572.51; the debts proved and unpaid amount to \$54,783.32. This leaves \$54,210.81 to be paid, together with the costs of your petitioner in administering and settling the affairs of said bankrupt, which may be a considerable amount in case these proceedings should be contested, as well as the suits against each individual stockholder to recover the assessments. These said costs, expenses, and attorney's fees your petitioner estimates at \$25,000, which sum may be increased or diminished according to the amount of litigation necessary in collecting said assessments. This makes a total of \$79,210.81 to be assessed against said stockholders.

Your petitioner believes that an assessment of 20 per cent. upon the par value of each share of stock in said corporation, if credited with the amount paid on said capital stock, would equalize the burden upon the stockholders and at the same time bring into the hands of your petitioner a sufficient amount to pay the debts of the corporation.

Your petitioner, therefore, prays that he may be authorized and directed to make a call and assessment of \$20 upon each share of capital stock, crediting any amount paid by any such stockholder upon his respective shares, and only requiring the stockholders to pay the difference between said call and assessment and the amount paid thereon, and to make a call and assessment for said difference.

Your petitioner further prays that the court will order and direct the details of such call and the service of notice upon each stockholder, if such notice be required, and this without prejudice to a further call and assessment upon said stock if the same should become necessary.

Seymour & Day, for trustee.

Martin Conboy, for Harlan W. Brush, a stockholder, etc.

PLATT, District Judge. The petition will precede this memorandum.

Two objections are urged against it: First. Lack of jurisdiction over the stockholders who reside in other states. Second. Lack of power to grant the request for a specific assessment upon the capital stock, which is said to be in large part unpaid for.

The first objection is easily disposed of. The bankrupt corporation

is within the jurisdiction of this court, and its officers, directors, and stockholders, in so far as their dealings with the bankrupt are concerned, must to that extent, surely, be amenable to its authority.

As to the second objection: The trustee in bankruptcy has all the powers originally invested in the board of directors. He can ask for an assessment upon the capital stock to such an amount as shall be needed to pay debts and expenses, provided the stock shall be found to be in fact partly unpaid for, no matter what the original terms of issue were.

It is alleged that the stockholders have obtained full-paid, nonassessable stock by paying a trifle in cash and agreeing to pay the entire balance in patents, and that the patents have not been delivered to the corporation.

Whether or not, by reason of such failure to deliver the patents, that portion of the stock which the patents were to pay for remains unpaid, is a question of law to be settled when the report from a master on the facts comes in.

I find nothing relevant to the present situation in *Babbit v. Read et al.* (C. C.) 173 Fed. 712, except an expression of opinion that a plenary suit can be brought in the New York jurisdiction without a specific levy of assessment upon the stock in the court having jurisdiction over the bankrupt. There is no ruling that the latter forum was without power to make such a levy, and my respect for Judge Ward is so great that I cannot suspect him of harboring such a thought, with *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968, *In re Remington*, 153 Fed. 345, 82 C. C. A. 421, and *Munger Vehicle Tire Co.*, 168 Fed. 910, 94 C. C. A. 314, lying open on the desk before him.

The prayer of the petition will be granted.

The court has notions of its own about the proper person to act as master, but will be pleased to receive suggestions from the parties interested on that subject, if they desire to make them.

THE MINNIE

THE SAGAMI.

(District Court, E. D. New York. February 5, 1910.)

SHIPPING (§ 81*)—INJURY TO TOW BY STRIKING ROCKS—LIABILITY OF MEETING VESSEL.

The tug *Minnie*, with seven barges in tow on hawsers in two tiers, the first tier being 130 feet or more in width, had passed through Hell Gate, going up East River, when she met a transfer tug with a car float on each side, which was followed by the steamship *Sagami*. The transfer stopped some 150 feet from the Ward's Island shore to permit the tow to pass, and also gave a warning signal to the *Sagami*, but the latter failed to stop, although the tow was then in sight, and proceeded alongside the transfer on the outer side, throwing the *Minnie* and her tow to the southward of the middle of the channel, which is 700 feet wide. The place was dangerous for tows at the time, owing to the flood tide which sets toward the rocks on the Long Island side, and, although the tug immediately turning across astern of the *Sagami* toward the opposite side, the tow swung

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

so near the shore that one of the barges struck the rocks, and was injured. *Held*, on the evidence, that the Minnie was not negligent, but that the fault was solely that of the Sagami, which should have stopped, as she might have done when warned by the transfer.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 81.*

In Admiralty. Suit by the Philadelphia & Reading Railroad Company against the steam tug Minnie and steamship Sagami. Decree against the Sagami.

Armstrong, Brown & Boland, for libellant.

Carpenter, Park & Symmers, for the Minnie.

Convers & Kirlin, for the Sagami.

CHATFIELD, District Judge. On the afternoon of March 23, 1907, the day being clear and no breeze of consequence interfering, the Rhode Island (a barge laden with coal, and towed with six others by the Minnie) struck what is known as the Steep or Scaly Rocks at the south side of the channel, immediately east of Hell Gate, in the East River. Some dispute exists as to the time of the accident and the hour of flood tide, but the testimony of several witnesses is to the effect that the tide was running at the rate of over two knots an hour. Even if there were less tide, as is suggested by the witnesses for the Sagami, her speed through the water must have been less, and she should have been able to stop within a shorter distance; thus increasing her responsibility under the circumstances. The difference in fixing the time of the accident can be satisfactorily explained from the fact that the Sagami, which had traveled substantially half around the globe, was using sun time, while the difference in estimating the time of high water is due to the fact that the place in question is just west of where the flood tide up the East River and the flood tide west through Long Island Sound meet. The flood tide to the east is also affected by the tide coming down through the Harlem River and turning up the Sound, in the direction in which the Minnie and her tow were proceeding.

The Minnie is an ocean-going tug, some 120 feet in length. She was proceeding with a hawser, not less than 25 fathoms in length, to each of the outside barges of the first tier, while between the first and second tier of barges short hawsers of 12 or 15 feet were used. Four barges were towed alongside in the first tier, and three in the second tier. The tow passed through Hell Gate and substantially over or very close to Pot Rock, which is about in the middle of the geographical channel between Negro Point on Ward's Island and the Astoria shore on Long Island. The deep water extends within a very short distance of the Ward's Island Shore at Negro Point, and a tow of barges must keep toward the western or port side of midchannel as much as is possible or safe when proceeding up the river with a flood tide around this point, in order to keep the barges from swinging over against the Long Island shore, inasmuch as the junction of the flood tide coming up the East River and that coming out of the Harlem River causes a current to set from Pot Rock directly toward the Long Island shore, at

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

what is known as the Steep or Scaly Rocks, although it is admitted by all the witnesses that a barrel or small object borne by the tide over Pot Rock would be carried first toward Long Island, and then swung by the tide up the Sound, without striking the shore. It needs no argument to show that a wide tow of barges could not be handled in the path in which a small object would float, and the situation is obvious.

On the day in question the first boat to reach this particular locality which affected the situation was one of the transfers of the New York, New Haven & Hartford Railroad Company, which was proceeding down the East River with a loaded car float on each side, the tug being between the two floats, and the captain in the pilot house which projected above the tops of the cars and gave a clear view of the river. Upon rounding Negro Point Bluff on Ward's Island, the captain of the transfer saw the Minnie and her tow passing through Hell Gate, and still below Pot Rock or Negro Point. He thereupon lay to and remained in a position some 150 feet from shore, and just to the eastward of Negro Point. Immediately behind the transfer was the Sagami, an ocean steamer, bound at the time from Boston to New York, and under the direction at the time of a City Island pilot, licensed for the waters in question. The transfer gave what is called an alarm whistle to the Sagami. This signal was observed by the officers and pilot of the Sagami, and was interpreted by the pilot to mean that it would be dangerous for the Sagami to attempt to pass the transfer at the time in question. This signal gave the Sagami to understand that it would be dangerous to pass the transfer, and put the Sagami on guard, but, of course, could not indicate the precise danger or whether other boats were also in the way. But, inasmuch as the Sagami could see that the transfer was lying still and that there was sufficient room to pass, while by this time the Minnie with her tow must have been in sight, it must be held that the Sagami was thus apprised of the entire situation, being from that time on in the position of a steamboat proceeding against the flood tide, under such conditions as to be bound by the rule in the case of *The Day Spring*, decided August 31, 1894, in this district.

The Sagami is some 370 feet long by 50 feet wide. She was moving over the ground at some five or six knots an hour. The testimony shows beyond dispute that she stopped her engines, and at some time before she passed the transfer reversed. Her officers state that she lost way entirely and proceeded back, either under the reverse movement of her engines or the tide. But inasmuch as she continued to pass the transfer, and before she started up reached a position some one-half her length beyond the bow of the floats which the transfer was towing, it would seem to be necessary to conclude that during all or the greater part of the time in question she was proceeding against the tide, and had considerable way on, even if her engines had ceased to operate, after the alarm signal by the transfer. Some distance behind the Sagami was the Pathfinder, a government boat, which slowed up and remained in the neighborhood of Negro Point Bluff, and whose witnesses do not, to any extent, contradict the testimony of the libellant upon the material points of the case. Another vessel, the *Santiago*, was

back of the Minnie coming up the river, and passed the Sagami to starboard opposite Hallet's Point, after the various occurrences. The witnesses from the Santiago, as well generally give a similar version of the occurrences.

The first tier of the Minnie was comprised of 4 boats at least 30 feet in width, while the second tier was narrower by one boat, but the boat in the rear tier furthest to port was nearly on a line behind the outside port boat of the forward tier. The engines of the Minnie were stopped and a signal exchanged with the transfer some time before the alarm signal of the transfer to the Sagami; and under the influence of the tide the tow drifted, without much deviation from the course it had been pursuing, past Negro Point, but with a corresponding slackening of the hawser between the tug and the barges. As the tug reached a position opposite the transfer and apparently near the center of the channel, or possibly slightly to the Long Island side of the center, the Sagami had reached a point where she lay between the tug and the transfer with its floats, and was slowly passing to the westward. The witnesses upon the Minnie and upon the barges in the tow are of the opinion that as the Sagami felt the influence of the tide sweeping around Negro Point, her bow fell off to port, while the witnesses upon the Sagami are certain that the movements of her reversed screw and her helm kept her stem in line or swung her somewhat to the Ward's Island shore. But, however that may be, as the first tier of barges reached a point alongside of the port bow of the Sagami, some slight contact occurred, and the outside barge rubbed along the side of the steamer, but no damage resulted to either craft. The second tier of barges also seems to have been far enough to the north so that the outside barge came in contact with the side of the Sagami. The witnesses upon the barges estimate that the last tier of barges was swung to the south, through an arc of some 25 feet, while several of the Sagami's witnesses did not know that any actual contact resulted, and some of the witnesses on the other boats testify that the barges were not moved at all by the passage of the Sagami alongside. The Sagami, at the time she cleared the last barge, had worked far enough to the west to be able to port her helm and get underway across the bow of the car floats. She then, passing the Santiago to port, proceeded down the river with no knowledge of the subsequent occurrences to the barges, except a remark by the captain to the effect that the barges would get into trouble if they did not look out; this observation having been made when the Sagami was some distance down the river and turning the bend at Hell Gate.

The captain of the Minnie, considering that the set of the tide toward Long Island would carry his tow ashore, headed his tug under the stern of the Sagami, substantially across the river for Ward's Island, and thus drawing the barges into a position diagonally across the channel, at this point some 700 feet in width. The entire length of the tow was some 560 feet from the bow of the tug to the stern of the last barge, and it is evident that, if the Minnie was in midchannel at the time she started this maneuver, she would not have room to turn her tow in the southerly half of the channel, but that the last tier of

barges would certainly strike upon the Long Island shore, unless gotten underway and drawn across the tide a sufficient distance from the shore to avoid contact. The tendency caused by the set of the tide toward the Scaly Rocks would increase the effect of the rotary or pivot motion around the bitts of the forward barge upon the starboard side, which would be the center of rotation in such a maneuver; and, while the entire tow could in this way be started most quickly away from the shore and toward Ward's Island, it would seem, under the circumstances, that the stern of the starboard barge in the rear tow would be likely to strike, even if the entire tow were drawn away to a point where the other barges might be safe. The various witnesses called as experts, when questioned with reference to this maneuver, agreed in the opinion that the Minnie pursued the quickest method of withdrawing her tow from dangerous proximity to the shore, and these witnesses also agree that, if a straight course with the tide had been pursued, the entire tow would have gone ashore on the Long Island side of the channel. It will be seen that allowing 150 feet space between the car floats and the shore, with a width of 140 feet for the car floats, some 60 feet between the floats and the Sagami, and 50 feet for the width of the Sagami, the point of contact between the Sagami and the outside barge must have been about 400 feet from the Ward's Island shore, or at least half way across the channel; and the width of the barges, 130 feet more, taking into account also their course abruptly toward Long Island, makes it apparent that the Sagami was responsible for the situation in which the tow found itself, and must be held at fault for putting them in that situation, not only because she had plenty of opportunity and sufficient signals to warn her, but because she saw fit to run by the car floats after having received an alarm signal, and without waiting to find out if such maneuver would be safe.

The Sagami had a pilot who was used to those waters, and she must be held responsible for his failure to realize that the set of the tide and the size of the approaching tow would not leave room for the barges to pass through safely if he proceeded into a position in the middle of the channel at that precise point. A reference to the chart used on the trial and marked by the witnesses makes the situation quite apparent. While the Sagami did stop and did reverse, she does not seem to have made any attempt to avoid running alongside of the car floats and into a situation out of which danger resulted, and there is nothing to indicate that she could not have prevented the entire occurrence by greater caution. The Minnie is shown to have had sufficient power to handle her tow. The size and shape of the tow does not seem in any way to have been of itself dangerous, except in so far as any large or unwieldy tow may become dangerous in Hell Gate, if other vessels do not observe the necessary care due in that locality; and while the precise accident, namely, the striking of the rear barge, may have been the result of the Minnie's movements as a choice of evils, nevertheless there seems to be no negligence on her part, nor even any error of judgment, which caused the injury or contributed thereto. But the most that can be said is that her maneuvering shifted

the danger from one point to the other, and, in the absence of carelessness or fault on her part, she cannot be held responsible for any inability to extricate herself entirely from the situation of danger caused by the fault of the Sagami.

The libelant may have a decree against the Sagami, and the libel against the Minnie will be dismissed.

BROWN v. STREICHER.

(District Court, D. Rhode Island. March 10, 1910.)

No. 1,223.

BANKRUPTCY (§ 303*)—PREFERENCES—EVIDENCE.

In an action by a bankrupt's trustee against an indorser of the bankrupt's notes, alleged to have been paid by the bankrupt during four months prior to the adjudication on an involuntary petition, on the theory that such payments constituted an invalid preference, in that they relieved the indorser from liability, evidence *held* sufficient to sustain a finding that the bankrupt was insolvent when he paid the note, that the indorser had knowledge of his condition, and that the payments were made by his procurement and advice, that he might be relieved.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 462; Dec. Dig. § 303.*]

At Law. Action by William J. Brown, as trustee in bankruptcy of the Lazarus & Griess Company, against Mark Streicher. On defendant's petition for a new trial and motion in arrest of judgment. Petition and motion denied.

Wm. J. Brown, for plaintiff.

J. J. Hahn and Thos. A. Carroll, for defendant.

BROWN, District Judge. The plaintiff is trustee in bankruptcy of the Lazarus & Griess Company, a corporation. The defendant Streicher was indorser upon notes of the bankrupt that were paid by the bankrupt during the period of four months prior to December 24, 1907, the date of adjudication upon the involuntary petition.

The action is based upon section 60, cls. "a", "b" of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), relating to preferences, and the plaintiff relies especially upon *Kobusch v. Hand*, 156 Fed. 660, 84 C. C. A. 372, 18 L. R. A. (N. S.) 660, and *Landry, Tr., v. Andrews*, 22 R. I. 597, 48 Atl. 1036, to support his contention that the above provisions of the bankruptcy act are applicable to an indorser of the bankrupt's paper.

Payment by the bankrupt of notes indorsed by the defendant to the amount of \$8,182.02, whereby the defendant was relieved as an indorser, was proved to have been made within the four months period; this proof being principally admissions made by the defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The principal questions upon the defendant's petition for a new trial relate to the sufficiency of the proof to show:

(1) The insolvency of the Lazarus & Griess Company at the time of the payment of the notes.

(2) Streicher's knowledge of the bankrupt's condition.

(3) That the payments were made by the procurement and advice of Streicher, in order that he might be relieved as indorser.

Although the testimony as contained in the stenographic report is in a very confused and unsatisfactory condition, owing in part to the very imperfect and improper bookkeeping of the bankrupt corporation and in part to the manner in which the plaintiff's proofs were presented, yet upon a review of the entire testimony I am of the opinion that each of these points was sufficiently proved.

An indebtedness to the amount of \$62,655.60 is amply proved both by the plaintiff's testimony and by the defendant's, and upon the question of insolvency the only difficulty is as to assets. Griess, the treasurer, and Lazarus, both testified to the taking of an inventory some three or four weeks prior to the bankruptcy, which showed assets in excess of \$70,000. Upon a consideration of the entire testimony of Lazarus and Griess, I am of the opinion that the jury was warranted in regarding it as exaggerated and most inaccurate. A rejection of their bare statement that \$20,000 worth of old goods was carried over from the previous season was warranted by the testimony of Mr. Brown, the trustee, that the amount had previously been stated as from \$10,000 to \$12,000; and a rejection of the statement that they had \$28,000 of pledged goods was required by the proof that the actual amount was less than \$14,000. A deduction of at least \$22,000 or \$23,000 upon these two items alone would show, instead of a favorable balance of upwards of \$10,000, a deficit of a similar amount.

There were many circumstances relating to the evidence as to taking this inventory, as to the books from which it was derived and the method of taking it, which in my opinion would have warranted the jury in attaching to it very slight weight, or even in rejecting it. Moreover, there is other testimony considered at length upon the plaintiff's brief that warrants the conclusion that throughout the period of four months prior to the date of adjudication the corporation was in an insolvent condition. There is very strong evidence to show Streicher's intimate acquaintance with the affairs of the bankrupt. He conducted a business as a private banker, and the bankrupts kept an account with him. With the bankrupts he was engaged in extensive kiting of checks. He was the person employed to go to New York to secure an extension for the bankrupt, and there was evidence that through his procurement the bankrupt made extensive pledges of goods to secure loans at rates of interest of from 3 to 6 per cent. per month, by which funds were raised which were available for the taking up of at least a portion of the notes indorsed by the defendant, Streicher.

While the condition of the books of the bankrupts rendered it difficult, if not impossible, to present an exact and accurate account of

all its dealings with the defendant, Streicher, yet enough was shown as to particular transactions to justify the general findings which the jury must have made in order to reach their verdict. There is, in my opinion, no sufficient ground for granting the motion in arrest of judgment.

Petition for new trial denied; motion in arrest of judgment denied.

HARRIS v. UNITED STATES.

(Circuit Court, D. Massachusetts. January 7, 1910.)

No. 232 (1,931).

1. CUSTOMS DUTIES (§ 82*)—REVIEW OF REAPPRAISEMENTS—WHAT CONSTITUTES RECORD.

Reappraisal proceedings under Customs Administrative Act June 10, 1890, c. 407, § 13, 26 Stat. 136 (U. S. Comp. St. 1901, p. 1932), are separate and distinct from protest proceedings under section 14, 26 Stat. 137 (U. S. Comp. St. 1901, p. 1933); and where the legality of a reappraisal is challenged by proceedings under the latter section, the entire reappraisal record does not become a part of the record in the latter proceedings, unless expressly admitted.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 82.*]

2. CUSTOMS DUTIES (§ 85*)—APPEAL—RETURN OF RECORD.

In Customs Administrative Act June 10, 1890, c. 407, § 15, 30 Stat. 138 (U. S. Comp. St. 1901, p. 1933), the provision that, on appeal to the Circuit Court, the Board of General Appraisers shall return "the record and the evidence taken by them," does not require the return of evidence which was excluded.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 85.*]

3. CUSTOMS DUTIES (§ 85*)—EXCLUDED EVIDENCE—EXCEPTIONS.

Under Customs Administrative Act June 10, 1890, c. 407, § 15, 30 Stat. 138 (U. S. Comp. St. 1901, p. 1933), where it is desired that evidence excluded by the Board of General Appraisers should, on appeal to the Circuit Court, be passed on by the court, it is requisite either that an exception should have been taken to the Board's ruling excluding the evidence, and the matter brought before the court in the assignments of error, or that the evidence should have been offered as additional evidence in the manner provided in said section.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 85.*]

On Application for Review of Decisions by the Board of United States General Appraisers.

Walter Evans Hampton, for importer.

D. Frank Lloyd, Deputy Asst. Atty. Gen. (William A. Robertson, Sp. Atty., of counsel), for the United States.

COLT, Circuit Judge. The present hearing in this customs case was on the motion by the United States to vacate the following order of this court made on September 14, 1909:

Ordered, that the Board of United States General Appraisers transmit to this court the originals, or certified copies, of all the evidence, documentary and oral, letters, papers, other documents, memorandum, and whatsoever informa-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion of any nature said Board of Appraisers had before it in deciding certain reappraisements hereinafter mentioned, covering importations of wool imported by William H. Harris, importing plaintiff in this action.

Reappraisement No.	Invoice No.	Reappraisement No.	Invoice No.
35058	9720	34767	9061
34707	9533	34765	9058
34766	9059	34763	9063
34788	9220	34769	9064
35940	10773	35941	10515

Le Baron B. Colt, United States Circuit Judge.

Form assented to:

William H. Garland, Assistant United States Attorney.

The evidence called for by the order (except as to invoice No. 10,773 and invoice No. 10,515, which are covered by another protest) was offered by the importer at the hearing before the Board of General Appraisers and excluded, as appears from pages 23 and 24 of the record returned by the Board to this court:

By Mr. Tompkins: I'll offer in evidence, then, the reappraisement records pertaining to the importations covered by this particular protest.

Mr. Robertson: You mean all the evidence taken before the reappraisement board as to the values?

Mr. Tompkins: As to these particular shipments which were under reappraisement and which we are attacking the validity of the reappraisement pertaining to these particular invoices.

Judge Waite: You offer the records?

Mr. Tompkins: Yes; the reappraisement records.

Judge Waite: I understand those are the official papers.

Mr. Tompkins: I understand by that the word "record" means the evidence as taken by the importer as well.

Judge Waite: We do not consider the evidence as taken before reappraisement as a record of the reappraisement. It is not the whole evidence taken before the Board.

Mr. Robertson: No; the importer's evidence.

(Objection sustained. Evidence excluded.)

The proposition upon which the importer relies is that the evidence described in the order of September 14, 1909, constituted a part of the record in this case before the Board of General Appraisers, and that it should have been included in the return by the Board to this court under section 15 of the customs administrative act (Act June 10, 1890, c. 407, 26 Stat. 138 [U. S. Comp. St. 1901, p. 1933]), which provides that the Board shall return "the record and the evidence taken by them."

Stated in another way, the proposition of the importer is that, in a case like the present one, where the legality of the reappraisement proceedings under section 13 of the customs administrative act is challenged in the subsequent protest proceedings under section 14, the entire record in the reappraisement proceedings becomes a part of the record in the protest proceedings, and that such evidence should be returned to this court under section 15 as a part of the record before the Board, and, if not so returned, that this court may order its transmission.

I fail to find anything in the statute, or the practice under it, or in any adjudicated case in support of the importer's contention. The reappraisal proceedings under section 13 are separate and distinct from the protest proceedings under section 14, and the record in each proceeding is separate and distinct, and, so far as appears, has always been so considered. *United States v. Passavant*, 169 U. S. 16, 20, 18 Sup. Ct. 219, 42 L. Ed. 644.

Nor is there anything in the point that the Board, under section 15, should include in their return evidence which they have excluded. Section 15 provides that they shall return "the record and the evidence taken by them."

If the record in the reappraisal proceedings is admissible as evidence in this protest proceeding (a question which is not before this court at this time), the importer in the present case might have adopted two courses: He might have excepted to the ruling of the Board and brought the question before the court in his assignments of error, or he might have offered this record as additional evidence taken in this court under the provisions of section 15.

The motion to vacate the order of September 14, 1909, is granted.

TWENTY-THIRD ST. RY. CO. v. METROPOLITAN ST. RY. CO. et al.

(Circuit Court, S. D. New York. March 21, 1910.)

EQUITY (§ 148*)—BILL—MULTIFARIOUSNESS.

A lease of complainant's road to defendant railway provided that, whenever the lessee deemed it necessary to extend the line or make betterments, etc., the lessor would execute and deliver negotiable bonds for the amount required to meet the expenditures, the proceeds to be applied solely to such betterments. Complainant alleged that, while its affairs were under control of the officers and directors of defendant railway company, a majority of whom constituted complainant's directorate, complainant's note was executed to defendant trust company, ostensibly to reimburse defendant railway company for such expenditures, and charged that the amount of the note was largely in excess of the amount advanced, praying that the true amount be ascertained, bonds issued therefor, and that the note be canceled. The bill also charged that, when the note was issued, defendant railway company and its lessee were indebted to complainant for breach of covenant in the lease, in that the lessees failed to pay taxes, and to pave the streets, as required by law, for all of which complainant sought to recover. *Held*, that while the court in the proceeding to determine the amount equitably due on the note could properly construe the lease, and determine whether the amount actually expended by the lessee should be reduced by any facts existing at the time the note was executed, the charges of waste, breach of covenant to repair, and failure to pay taxes down to the commencement of the suit, rendered the bill multifarious.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 341-367; Dec. Dig. § 148.*]

Bill by the Twenty-Third Street Railway Company against the Metropolitan Street Railway Company and others. On demurrer to bill. Sustained, with leave to amend.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Parker, Hatch & Sheehan, for complainant.

Richard Reid Rogers, for defendants Interborough Metropolitan Co., Metropolitan St. Ry. Co., N. Y. City Ry. Co., and Metropolitan Securities Co.

LACOMBE, Circuit Judge. The subject-matter of this suit is a promissory note, in the usual form, dated April 30, 1907, in the amount of \$2,204,929.29, payable to the Mercantile Trust Company. This note was signed by the president and treasurer of complainant, under authority of a resolution of its board of directors, at the instance of the Metropolitan Street Railway Company, in accordance with whose request the trust company, instead of itself, was named as payee. The Metropolitan Company had for some years prior to the date of the note held complainant's road under a lease which provided that, whenever the lessee deemed it necessary to extend the line, make betterments, or change the motive power, the lessor should upon request execute and deliver negotiable bonds secured by mortgage for the amounts required to meet the expenditures necessary to do such work, the proceeds of such obligations to be applied solely to the betterments for which the same are issued. This note was issued, as alleged, ostensibly to reimburse expenditures by the Metropolitan of the character above set forth.

The note is negotiable, and is not yet due. The bill charges that the amount of the note is largely in excess of the amount advanced by its lessee for betterments, and that this was well known at the time to lessor and lessee, and to the payee. It prays cancellation of the note because, as is charged, when it was made the affairs of the complainant were under the dominion and control of the officers and directors of the Metropolitan, a majority of whom constituted a majority of the directorate of complainant. In other words, breach of trust is charged against complainant's directors, knowledge thereof is charged against the trust company, cancellation of the note is prayed, and to prevent its passing in the meantime to a bona fide holder for value, injunction against its transfer is asked for. This sets out a cause of action in equity, and it is not understood that demurrants contend otherwise. Complainant, moreover, sets forth that, coming into a court of equity, it is prepared to do equity, and therefore asks that the court determine the true and correct indebtedness for which under the terms of the lease bonds should have been issued, professing its willingness thereupon to issue such bonds. Stated thus briefly, this investigation and determination by the court is a mere incident to the main relief prayed. The precise question presented will be best presented by an excerpt from complainant's brief:

"Complainant claims that the note is issued for an amount largely in excess of the amount advanced by the Metropolitan Street Railway Company, or its lessee, the New York City Railway Company, for such purposes. It also claims that at the time this note was issued the Metropolitan Street Railway Company and its lessee, the New York City Railway Company, were indebted to complainant in the sum of \$1,000,000 for breach of covenant of lease, in that the lessees had failed to keep the railroad and roadbed in proper condition as required by the lease, had failed to pay taxes, and failed to pave the streets as required by law. The demurring defendants make no objection to the bill so

far as complainant seeks to have the note reduced to represent the true and correct amount expended by the Metropolitan Street Railway Company for betterments and the like; but the objection is on their part that the complainant is not entitled in a court of equity or in this suit to have a further deduction made on account of the damages sustained by reason of breach of covenant, on the broad general ground, raised by their demurrers, that such claimed deduction for damages is predicated upon a cause of action at law, and the same is unliquidated, the complainant not having recovered a judgment thereupon against the said railway companies, or either of them."

If the situation were as printed in the above quotation, there would be no difficulty in disposing of the demurrer. Should the court find for the complainant on the main charge—breach of trust or bad faith on the part of directors, with knowledge thereof brought home to the payee—and should it thereupon proceed to determine what amount of bonds the complainant ought to issue as an equitable condition for the cancellation of its note, it will have to construe the lease, and may with propriety determine whether or not on April 30, 1907, it would have been proper to reduce the amount actually expended by the lessee, and for which it was to be reimbursed, by reason of any facts then existing. All such questions are germane to the main subject of controversy, viz.: To what amount should bonds have been issued? But the bill goes far beyond the statement in the brief. It charges waste, breach of covenants to keep in repair, failure to pay taxes, not only against the lessee (and sublessee) down to April 30, 1907, but afterwards, and also against receiver, certainly down to the date of commencement of the suit. This is a totally different cause of action from the one first above set forth, and on which the equity powers of the court are invoked.

The bill is plainly multifarious, and demurrer is sustained to the specified paragraphs, with leave to complainant to amend, so as to confine the prayers for relief within the limits of the excerpt from the brief, *supra*.

UNITED STATES v. STERN.

(District Court, E. D. Pennsylvania. March 7, 1910.)

No. 9.

1. WITNESSES (§ 6*)—PLACE WHERE ATTENDANCE MAY BE REQUIRED—FEDERAL COURTS.

Except by act of Congress, neither the District Court nor one of its commissioners has power to summon a witness at his residence in another district, whether his presence be desired before the court itself or before the commissioner.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 9; Dec. Dig. § 6.*]

2. WITNESSES (§ 6*)—SUBPENAS—CRIMINAL CASES—PLACE OF ATTENDANCE.

Rev. St. § 876 (U. S. Comp. St. 1901, p. 667), provides that subpoenas for witnesses required to attend a court of the United States in any district may run into another district, provided that in civil cases the witnesses living out of the district in which the court is held do not live more than 100 miles from the place of holding the same. *Held* not to authorize either a District Judge or a United States commissioner to summon a wit-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ness in a criminal case beyond the state to appear at a preliminary hearing before the commissioner, such hearing not being one of the stages of the case before the court; nor is such authority conferred by Act Pa. 1722 (1 Smith's Laws, p. 138, § 8; Pepper & Lewis' Dig. p. 2574, par. 86), regulating the service of subpoenas in state court proceedings.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 9; Dec. Dig. § 6.*]

3. WITNESSES (§ 10*)—SUBPOENAS—ISSUANCE—VALIDITY.

A subpoena issued by a United States commissioner, but not in his official capacity, is invalid.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 11; Dec. Dig. § 10.*]

Hearing before a United States commissioner in a criminal proceeding. On motion of Joseph Stern to set aside service of a subpoena. Granted.

John C. Swartley and J. Whitaker Thompson, for the United States.

Samuel J. Gottesfeld, for witness.

J. B. McPHERSON, District Judge. The general rule is that the power of a District Court of the United States may be exercised only within a defined territorial area. Its process may not be validly executed in another district. *Toland v. Sprague*, 12 Pet. 328, 9 L. Ed. 1093. And what is true of the court is true also of its subordinate officers, the United States commissioners, while they are exercising their authority as committing magistrates in criminal cases. Except by virtue of an act of Congress, neither the District Court nor one of its commissioners has the power to summon a witness at his residence in another district, whether his presence be desired before the court itself or before the commissioner. But legislation exists upon this subject enlarging the power of both tribunals. So far as the court is concerned, section 876, Rev. St. (U. S. Comp. St. 1901, p. 667), provides as follows:

"Subpoenas for witnesses who are required to attend a court of the United States in any district may run into another district; provided, that in civil cases the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same."

The District Court, therefore, may issue a subpoena that must be obeyed, no matter in what district of the United States it may be served; but such a subpoena is only authorized, first, when the witness is required to attend upon the court itself, and, second, in such cases only as are not "civil cases." In a criminal case—with which alone we are now concerned—a subpoena from the District Court that will run throughout the United States is lawful, when the witness is required to appear at some stage of the case before the court itself. But a preliminary hearing is not one of these stages. It does not take place before "a court of the United States," as the Supreme Court has expressly decided (*Todd v. U. S.*, 158 U. S. 278, 15 Sup. Ct. 889, 39 L. Ed. 982); and it seems to follow, therefore, that a District

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Court has not yet been authorized by Congress to issue a subpoena that will run throughout the United States and compel a witness to appear at such a hearing before a commissioner.

The subpoena under consideration was not issued by the commissioner in his official character. In that event its invalidity could not have been doubted, and the witness now complaining would have been clearly justified in disobeying it; for it shows upon its face that the commissioner was conducting the preliminary hearing of a criminal case in the city of Philadelphia, while the witness was summoned in the city of Lawrence, in the state and district of Massachusetts. But in my opinion the process is equally invalid, although it was not issued by the commissioner in his official character. He is also clerk of the District Court, and he issued what is known as a "court subpoena," namely, a process that purports to go out under the authority of the judge of the District Court, attested under the hand of the clerk, with the seal of the court affixed. It is in the proper form of a valid subpoena from the court, except that it directs the witness to attend, not before the court, but before the commissioner, at a hearing to take place on a specified date. This exception, however, raises the vital question in the case, in connection with the place of service; and, as I have already said, the process could not be lawfully executed in the city of Lawrence. I understand the government to concede in effect that no statute or decided case can be found to support the service. United States commissioners are now appointed under the act of 1896, as amended in 1901 (1 U. S. Comp. St. 1901, p. 499), and many of their powers and duties are summarized by the Supreme Court in *United States v. Allred*, 155 U. S. 591, 15 Sup. Ct. 231, 39 L. Ed. 273. The most direct reference to their powers upon a preliminary hearing in a criminal case is contained in section 1014, Rev. St. (U. S. Comp. St. 1901, p. 716); and it is this section that may indirectly empower them to summon a witness outside their respective districts, but within their respective states. The statute provides that for crimes or offenses against the United States the offender may be arrested and imprisoned or bailed by any commissioner of the United States, or by certain officials of any state where he may be found, "agreeably to the usual mode of process against offenders in such state." In *United States v. Beavers* (D. C.) 125 Fed. 778, Judge Holt decided that under this provision a commissioner sitting in New York as a committing magistrate had the same power to issue a subpoena for witnesses as was given by the state to its own magistrates; but he also held that the subpoena could only be served where and as the New York statutes authorized, and need not be obeyed if the service did not accord with these requirements. In Pennsylvania the only legislation upon this subject that has been brought to my attention is the act of 1722 (1 Smith's Laws, p. 138, § 8; Pepper & Lewis' Dig. Laws, p. 2574):

"It shall and may be lawful to and for the said justices and every of them, to issue forth subpoenas, and other warrants, under their respective hands and seal of the county, into any county or place of this province, for summoning and bringing any person or persons to give evidence in and upon any matter or cause whatsoever, now or hereafter examinable, or in any way triable, by

or before them, or any of them, under such pains and penalties as subpoenas, or warrants of that kind, usually are or ought to be granted or awarded."

Assuming this statute to apply, it evidently does no more—and, indeed, it could do no more—than authorize the issuing of a subpoena to run throughout the state, and furnishes no warrant for a process to be executed beyond the boundaries of the commonwealth. It is unnecessary to inquire further into "the usual mode of process" before the committing magistrates of the state; for it is certain that no attempt is ever made to serve their subpoenas outside of Pennsylvania at the farthest.

No doubt it may sometimes be inconvenient to stop at a state line when a witness is needed; but this restriction at least seems clearly to exist, and it must be recognized. Personally, I think it might be well if Congress should permit a subpoena to be served in case of a preliminary hearing within say 100 miles, even if a state line should intervene, leaving the local practice to govern within the state. The subject, however, is not judicial, but wholly a matter for legislative consideration.

The service of the subpoena is set aside.

MERCK & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 21, 1910.)

No. 5,462.

CUSTOMS DUTIES (§ 38*)—CLASSIFICATION—ICHTHYOL SODIUM—COMMERCIAL USAGE—"ICHTHYOL."

Inasmuch as, technically and commercially, the term "ichthyol" includes no other ichthyol compounds than ichthyol ammonium, the unqualified enumeration of "ichthyol" in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 626, 30 Stat. 199 (U. S. Comp. St. 1901, p. 1685), should not, in the absence of words indicating an intention to include such compounds, be held to include ichthyol sodium.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 19-30; Dec. Dig. § 38.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

In the decision below the Board of General Appraisers affirmed the assessment of duty by the collector of customs at the port of New York.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel, and Charles A. Darius, on the brief), for importers.

D. Frank Lloyd, Deputy Asst. Atty. Gen. (Charles D. Lawrence, of counsel), for the United States.

MARTIN, District Judge. The merchandise in question is ichthyol sodium, a medicinal preparation. It was assessed for duty at 25 per cent. ad valorem under paragraph 68. The importers claim that it is on the free list under paragraph 626 (Act July 24, 1897, c. 11, § 2, 30

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Stat. 199 [U. S. Comp. St. 1901, p. 1685]). The Board of Appraisers sustained the collector, and the importers now appeal to the court for review.

The word "ichthyol" appears on the free list in paragraph 626 with other items of merchandise. There is no amplification or limitation, simply the word "ichthyol." Ichthyol is a crude oil obtained from the distillation of the bituminous rock containing fossil fish, and found in the Tyrol Mountains of Europe; and, as I understand it, technically speaking, the word covers and includes that and nothing else. Ichthyol salts are the salts of ichthyol-sulphonic acid, obtained by the treatment of the raw ichthyol distillate with sulphonic acid and subsequently neutralized with sodium or ammonium carbonate. If prepared with carbonate of sodium, it becomes ichthyol sodium; if with carbonate of ammonia, it is ichthyol ammonium. Precipitating egg albumen with ichthyol, and prolonged washing of the precipitate until the ichthyol odor and taste are removed, makes a product known as ichthyol albuminate, and there are other combinations resulting in other ichthyol products.

From the chemist's point of view, any of the preparations, aside from the distillation of the bituminous shale of the Tyrol, is a medicinal preparation of the component material of ichthyol. Ichthyol ammonium is just as much a medicinal preparation as ichthyol sodium and ichthyol albuminate, and there is no logic in legislating that one shall be free and the others pay a duty of 25 per cent. Any chemist may import ichthyol—the distillation of the bituminous shale of the Tyrol—free, and then prepare ichthyol ammonium, sodium, albuminate, or other compounds of ichthyol.

The question is: Did Congress intend, by the unlimited use of the word "ichthyol" in paragraph 626, to include any medicinal preparation of the compounds of ichthyol, and thus limit the scope of paragraph 68, which provides that medicinal preparations not specifically provided for shall be assessed 25 per cent. ad valorem? If one compound of ichthyol is free, why not the others? The only answer is that ichthyol ammonium, although a compound and a medicinal preparation, is by usage in the trade designated as ichthyol, and therefore ichthyol ammonium should be admitted free, while the other compounds of ichthyol must pay a duty.

The evidence shows that the trade designation includes ichthyol ammonium, and this evidence is confirmed by authorities on pharmaceutical chemistry. This appeal, however, does not call for a decision of the court as to whether or not ichthyol ammonium is on the free list. It only involves ichthyol sodium.

I think the most reasonable construction of the statute is that ichthyol sodium was not intended to be included in the word "ichthyol," without some descriptive words, like "all compounds of ichthyol" or "the different products of ichthyol," and therefore it was correctly assessed under paragraph 68 at 25 per cent. ad valorem, and the decision of the Board of General Appraisers is affirmed.

SHEPPEY v. STEVENS.

(Circuit Court, N. D. New York. March 24, 1910.)

1. COURTS (§ 372*)—RULES OF DECISION—PUBLIC POLICY.

Whether a contract is contrary to public policy is a question of general law, not dependent solely on any local statute or usage, so that in determining the question federal courts are not bound by state law, but will exercise their own judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 977-979; Dec. Dig. § 372.*]

State laws as rules of decisions in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

2. CONTRACTS (§ 61*)—CONSIDERATION.

Plaintiff and defendant, expecting to be beneficiaries of the will of B., who had formed an alliance with a number of women of questionable character, and was contemplating marrying one of them, agreed that defendant should look after B.'s spiritual welfare, and that plaintiff should use his best endeavors in breaking up the alliance between B. and the women, in attempting to influence him to cease his relations with them and induce him not to marry the one intended, and that, in consideration thereof, plaintiff and defendant would equalize any legacy received under B.'s will. *Held*, that such agreement, if otherwise valid, was not nudum pactum; the use of plaintiff's best efforts to terminate B.'s relations with the women and to prevent the marriage being a sufficient consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 252, 253; Dec. Dig. § 61.*]

3. CONTRACTS (§ 111*)—VALIDITY—PUBLIC POLICY—RESTRAINT OF MARRIAGE.

Such agreement was void as contrary to public policy in restraint of marriage, regardless of the character of the woman B. intended to marry.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 515-520; Dec. Dig. § 111.*]

4. CONTRACTS (§ 111*)—PUBLIC POLICY—DETERMINATION.

Whether a contract to prevent marriage is contrary to public policy must be determined by its general tendency at the time it is made, and, if such tendency is opposed to the interests of the public, the contract is void, however good the intent of the parties, and even though no harm has resulted or would result in the particular case.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 515-520; Dec. Dig. § 111.*]

5. CONTRACTS (§ 71*)—PROBATE OF WILL—CONTRACT NOT TO OPPOSE—CONSIDERATION.

A contract by which plaintiff agreed not to oppose the probate of a will in consideration of defendant's agreement to pay plaintiff a sum of money was without consideration, in the absence of a showing that plaintiff was related to testator in any degree, or had any right to contest.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 297, 316-324, 327; Dec. Dig. § 71.*]

Action by John V. Sheppey against Ezra H. Stevens. On demurrer to complaint. Sustained.

H. & W. A. Hendrickson (G. M. Palmer, of counsel), for plaintiff.
Fowler & Schenck (Henry J. Cookinham, of counsel), for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

RAY, District Judge. The substance of the complaint is as follows:

(1) In September, 1898, Ezra G. Benedict, a relative of the plaintiff and also of the defendant, formed an alliance with a number of women of questionable character, and had expended and was expending large sums of money on them, and was contemplating marriage with one of them.

(2) In September or October of that year the plaintiff and defendant entered into an agreement whereby the defendant here agreed to look after the spiritual welfare of the said Benedict, and the plaintiff here agreed to use his best endeavors in breaking up the said alliance between said Benedict and said women, and in influencing and attempting to influence said Benedict to cease and discontinue his relations with said women, and, in consideration thereof, the plaintiff and defendant further agreed that, if either of them should receive less than the other under the will of said Benedict, the party receiving the most thereunder would divide the excess so received by him equally with the other.

(3) In compliance with such contract, the plaintiff did what he agreed to do, and fully performed on his part.

(4) November 20, 1902, Benedict died and left a last will and testament wherein and whereby defendant was made sole executor thereof and was given a large legacy determined on the settlement of the estate to be \$1,538,244.91, and such sum or legacy was paid over to the defendant, said will having been duly proved and the estate administered.

(5) By said will the plaintiff herein was not remembered as devisee, legatee, or otherwise, and was not entitled to receive, and did not receive, anything thereunder.

(6) Thereafter plaintiff demanded of the defendant the one-half of such sum so received by him as a legacy under the said last will and testament of said Benedict, but the defendant has neglected and refused to pay same, except the sum of \$300 paid on account thereof about March, 1903, and there is now due and owing plaintiff from defendant by reason of such facts the sum of \$768,822.45.

The fact will be noted that it is not alleged that either the plaintiff or the defendant were of the heirs at law or next of kin to said Benedict and entitled to share in his estate in case of intestacy. There is no allegation that Benedict was imbecile or unable to care for himself or his property.

The defendant insists that these allegations fail to state a cause of action.

(1) That the alleged agreement was void as contrary to public policy, as one to interfere with and prevent a proposed marriage.

(2) That it was an agreement to dispose of or transfer the property of another in which the contracting parties, so far as appears, had no right or interest present or prospective contrary to the will of the testator, and hence void.

(3) That there was no moral or legal, good, or valuable consideration for the agreement.

(4) That the alleged contract was a wagering contract and void.

(5) That the alleged contract was void for indefiniteness and for want of mutuality, and is unconscionable.

As between themselves, Sheppey and Stevens agreed that they would interfere in the private life and conduct of Benedict, their relative. It may be assumed that they had an interest in the good name of Benedict, as his disgrace would to some extent affect all his relatives. It cannot be assumed they or either of them had any actual pecuniary interest, present or prospective, in his conduct or expenditures, or use of his money, as there is no allegation to that effect. The one was to look after his spiritual welfare while the other was to use his best efforts to break up existing alliances between Benedict and "women of questionable character," one of whom he contemplated marrying. He had expended money on such women, and was then expending money on them. But it was his own money and he had the right to expend it as he pleased, so far as the plaintiff and defendant and the public were concerned, provided he violated no law.

Was Benedict's conduct and the control of it by his relatives the subject-matter of a valid contract or agreement by and between such relatives? If the conduct and associations of A. are such that they tend to bring disgrace on B., a relative of A., and B. agrees with C. that C. shall do all he can and use his best efforts to break up such associations and cause such conduct to cease, and that he will, in consideration of such efforts and expenditure of time and thought, pay C. the sum of \$5,000, and there is a time limit for performance, and C. fully performs on his part, can there be any doubt that C. may recover the consideration agreed to be paid? I think not. It is not necessary that the promisor in such a case receive an actual benefit by way of the success of the efforts of C. It is all-sufficient that he has had the benefit of the efforts of C. in a matter which interested him, B. True, B. had no legal or moral duty to interfere with the movements or associations of A. as between himself and A., or as between A. and the public, but it is all-sufficient that he had an interest in the conduct and associations of A., and that his interference in the way mentioned was not immoral, or illegal, or in any way forbidden by law or a sound public policy. But it is said that another element enters into this contract, viz., an agreement on the part of Sheppey, the plaintiff, to use his best efforts to prevent the marriage of Benedict to a woman "of questionable character," and that the law favors marriage and makes no distinction between marriage to or with a woman of good character and marriage to or with one of "questionable character"; that, in either case, a contract for services to be performed in preventing a marriage and for which a compensation is agreed to be paid is illegal as opposed to a sound, public policy, and therefore not enforceable; that this would be true in case such efforts were expended pursuant to the contract and met with full success. A contract to pay money for procuring a marriage is void, and the payment cannot be enforced. *Marshall v. Baltimore, etc., R. Co.*, 16 How. 314, 333, 14 L. Ed. 953.

Conditions "in general restraint of marriage" are void "as contrary to public policy and the common weal and good order of society," said Andrews, Ch. J., in *Hogan v. Curtin*, 88 N. Y. 162, 170, 171, 42 Am. Rep. 244. In *Conrad v. Williams*, 6 Hill (N. Y.) 444, 451, the defendant promised the plaintiff he would "marry her if he ever married,"

and the court held the contract void as in restraint of marriage, and that an action for its breach could not be maintained.

The proposition is that relatives should not be at liberty to contract to prevent the marriage of one whose marriage to a particular person may be distasteful, or, in their opinion, may disgrace the family or relatives, or deprive those making the agreement of a possible share in the property of the prospective bride or bridegroom, as the case may be. The law ought not, it is urged, to encourage, or recognize, or enforce such contracts. In *Lowe v. Peers*, 4 Burr, 2225, a man agreed to pay a woman a certain sum of money if he married any one but her, and the agreement was held void. Here the plaintiff contracted with the defendant that he, the plaintiff, would use his best endeavors or efforts to break up the alliance between Benedict and the women mentioned, with one of whom he contemplated marriage, and use his best endeavors to induce Benedict to cease and discontinue his relations with said women. This, of course, included the one he contemplated marrying, and the result of such endeavors, if successful, would have been to prevent a marriage of Benedict with said woman.

Other cases to the effect stated are *Bostick v. Blades*, 59 Md. 231, 43 Am. Rep. 548; *Waters v. Tazewell*, 9 Md. 291; *Sterling v. Sinnickson*, 5 N. J. Law, 756; *Chalifant v. Payton*, 91 Ind. 202, 46 Am. Rep. 586; *Maddox v. Maddox*, 11 Grat. (Va.) 804. Here, however, the contract itself was not in restraint of marriage, not to marry, or to marry on conditions only, but, in effect, that Sheppey would use his best endeavors to prevent the contemplated marriage of a third person, Benedict. In short, Sheppey, for a consideration to be paid by Stevens, which was to come out of the estate left by Benedict if paid at all, agreed to use his best endeavors to prevent Benedict from marrying the woman he had in view. It was an agreement by him to prevent, if he could, a contemplated marriage. Its execution was intended to be, and was necessarily, in restraint of marriage. Can the law sanction such contracts by outside parties; that is, by persons other than the ones contemplating, or who might contemplate marriage? If it recognizes and enforces such contracts, then they are encouraged, and the law has lent its sanction to contracts for all sorts of "endeavors" short of illegal acts by outside parties and by relatives and friends to break up and prevent contemplated marriages. Jealousy, hatred, malice, and interest will induce the hiring of the dissolute, or the irresponsible, or the evil-disposed, to use their "best endeavors" to break up contemplated marriages, and such "endeavors" might consist of slander and many other illegitimate practices injurious and detrimental to the well-being of the community and of the public generally. In 9 Cyc. 518, the rule is stated in this language:

"Restrictions on marriage are contrary to public policy, and therefore agreements or conditions creating or involving such restrictions are illegal and void."

Here Sheppey was to use "his best," most strenuous, "endeavors" to break up the alliance of Benedict with these women, and to cease and discontinue his relations with them, which included his contemplated marriage, and the means to be resorted to were left to the discretion of

Sheppey. At the same time, Stevens was to practice upon the moral and religious nature of Benedict, possibly to the same end. If both were remembered in Benedict's will and to an equal amount, no compensation was involved or to be paid. If, however, one was remembered with a devise or a legacy and the other not, the one remembered was to share equally with the other. If both were remembered but unequally, then the legacies were to be added together and the sum total equally divided. The defendant says this was a wager contract and void as against public policy. Each was to operate on Benedict directly or indirectly to change his conduct, and, if possible, preserve his property in his hands unimpaired until death. If either was left anything by his will, or if both were left something, they were to share the total value of such legacies or devises equally. There was no certainty that either would be remembered in the will, if one was made. One might be, the other not. Each, in entering into the agreement, in expending time and effort, took his chances as to compensation on the possibility of a remembrance of one or both in Benedict's will. "A gambling contract or wager is a contract by which two parties, or more, agree that a certain sum of money or other thing shall be paid or delivered to one of them on the happening or not happening of an uncertain event." Bouvier, Law Dictionary.

But is it a wager or gambling contract for one person to render service for another party at his request on a contract that he shall be compensated at a certain sum if an uncertain event happens, but go uncompensated if that uncertain event does not happen or occur? If a person under any guise agrees to pay another 10 or 20 cents per bushel increase over the present market price for wheat in case it goes to \$1.30 per bushel in the market, no delivery of wheat under the contract being contemplated, it is a wager contract pure and simple; but, if he employs another to purchase wheat for him at a certain price and agrees to pay \$1 per day for the service out of the increased price or profits on a sale thereof, but nothing in case the wheat does not go up in price, we have no wager contract, but a joint adventure in which the laborer takes his chances as to compensation. A lawyer takes a case and agrees with the client that as attorney he shall have 10 per cent. of the recovery, in case there is one, as his compensation for services, and nothing in case there is no recovery—is this a wager contract? Here the agreement was that each of the parties should do certain things for the benefit of the other. Compensation or no compensation depended on the happening or not happening of something in the future, the happening of which was uncertain. Was this in the nature of a gambling transaction? If so, the law will not tolerate it. *Clews v. Jamieson*, 182 U. S. 461, 490, 21 Sup. Ct. 845, 45 L. Ed. 1183.

Stevens was to pay for the service if he received more under the will of Benedict than did Sheppey. If he did not, he was to pay nothing. However, if the thing Sheppey was to do, the service he was to perform, was illegal as contrary to a sound public policy, he cannot recover for the doing of such act or the rendering of such service. It is not the case of an obligation incurred indirectly connected with an illegal transaction and supported by an independent consideration. In such case the obligation may be enforced. If A. and B. engage in

gambling or any illegal transaction where money is lost by B., and, to pay his loss, B. borrows money of C., and fully informs C. of the transaction and of the use to which the loan is to be devoted, and is devoted, C. may recover the amount of the loan. *Armstrong v. American National Bank*, 133 U. S. 433, 469, 10 Sup. Ct. 450, 33 L. Ed. 747, and cases cited. Here the money was to be paid by Stevens to Sheppey for using his best endeavors to break up the association of Benedict with certain women of questionable character, and prevent a contemplated marriage of Benedict with one of them. If this contract was not contrary to public policy, and therefore void, Sheppey may recover. It matters not that compensation was contingent on Stevens receiving a legacy or devise under the will of Benedict, providing it was not a cover for a gambling or wager transaction. Sheppey had a perfect right to contract in good faith with Stevens to render him a service, not forbidden by statute or public policy, and agree that his compensation should depend on the happening or nonhappening of an event in the future, the happening of which was uncertain. These parties were at liberty to make a contract for a service to be performed for their mutual benefit, or for the benefit of each, and to contract that each should do certain things, and that the one would pay the other for his service on the happening of an event the occurrence or happening of which was uncertain, provided the agreement was not a cover for a gambling scheme, and further provided the service performed or to be performed was not forbidden by law or contrary to public policy. They had no right, however, to gamble or wager on the chance of Benedict making a will in favor of one, and not the other, or of both for an unequal amount. It is open to question whether this is a contract such as I have mentioned. It would seem more like a contract to prevent Benedict from marrying and spending his money hoping to gain money by securing a legacy for one or both which legacy or legacies were to be equally divided between them in case of success, and not a contract for services to be performed the one for the other. This feature of the case I do not find it necessary to pass upon.

In *Printing, etc., Reg. Co. v. Sampson*, L. R. 19 Eq. 462, 465, 44 L. J. Ch. 705, 32 L. T. Rep. N. S. 354, 23 Wkly. Rep. 463, it is said, amongst other things:

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

If, then, public policy demands that men of full age and competent understanding shall have the utmost liberty of contracting (for lawful purposes, of course), how can it be consistent with a sound public policy that men may contract to prevent such persons, one or more, from making and performing a lawful contract to marry?

In the federal courts the question whether a contract is contrary to public policy is one of general law, and not dependent solely upon any

local statute or usage, and in determining such question the federal courts will exercise their own judgment. *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; *Bucher v. Cheshin R. Co.*, 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795; *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359. When a statute has been passed by a state or by the United States forbidding the doing of a certain thing or act, or the making of a certain contract, the public policy of the state or nation is clear. When a state by its highest court or by a line of uniform decisions in its lower courts has declared a certain act or agreement to be contrary to public policy, the public policy of the state cannot be doubted. However, "in the absence of any legislative prohibition of a particular agreement which may be brought before a court, the latter, to declare it void on this ground, must find that such contracts have a tendency to injure the public, are against the public good, or inconsistent with sound policy and good morals as to the consideration or thing to be done. * * *

But there are many things which the law does not expressly prohibit or penalize, but which are so mischievous in their nature and tendency that on grounds of public policy they are not permitted to be the subject of an enforceable agreement." 9 Cyc. 482, 483; *West Virginia Trans. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 46 Am. Rep. 527. If, then, such contracts as the one in question here have a tendency to injure the public, are against the public good, or inconsistent with sound policy and good morals as to the thing to be done, this contract should be held void and recovery denied. The law favors marriage, and, as stated, denounces agreements or conditions "creating or involving restrictions on marriage." If a contract by A. to marry B., if A. ever marries, is void as contrary to public policy, for the reason it is in restraint of marriage, why is it not opposed to a sound public policy for strangers or relatives to make contracts to break up or defeat, if possible, a proposed or contemplated marriage? It seems to me clear that the execution of such contracts would be demoralizing and mischievous in their tendency, and tend to injure the public. Marriage concerns the whole state. It is regulated by law. The contract of marriage can only be annulled by the state. It is essential to the well-being of society and government. If parties may lawfully contract to break up or prevent one proposed marriage, they may lawfully contract to prevent many and all. Who can foresee the number of such agreements that would be made, the number of marriages that would be prevented, the means that would be resorted to, or the social and family disturbances that would result?

In several states an agreement in a divorce action to withdraw and make no defense has been held contrary to public policy and void; the state itself being the third party in interest. *Loveren v. Loveren*, 106 Cal. 509, 39 Pac. 801; *Smutzer v. Stimpson*, 9 Colo. App. 326, 48 Pac. 314; *Hamilton v. Hamilton*, 89 Ill. 349; *Sayles v. Sayles*, 21 N. H. 312, 53 Am. Dec. 208; *Stoutenburg v. Lybrand*, 13 Ohio St. 228; *Phillips v. Thorp*, 10 Or. 494; *Kilborn v. Field*, 78 Pa. 194. However, *Adams v. Adams*, 91 N. Y. 381, 43 Am. Rep. 675, is not opposed to this, but consistent therewith.

I am therefore of the opinion that the contract set out in the complaint was void as opposed to public policy, and that the plaintiff cannot recover. It is not validated by the fact that the woman was of questionable character. Sanction such contracts and those seeking to prevent marriages would or might soon make the character of the woman involved questionable, and then make their contract to prevent the marriage. But is it not the privilege of a man free to marry to marry a woman of questionable character? May not her marriage result in her reformation, and so benefit the community and general public? What power but the state is to set itself up as the censor and regulator of the conduct of others and of their selection of a wife? It is immaterial that no injury or detriment to the public resulted from this contract. The validity of such contracts is determined by their general tendency at the time they are made, and, if this general tendency is opposed to the interests of the public, such contracts are invalid, however good the intent of the parties to them, and even though no harm to any one resulted, or would result in the particular case. *Richardson v. Crandall*, 48 N. Y. 348, 362; *Atchesen v. Mallen*, 43 N. Y. 147, 3 Am. Rep. 678; *McMullen v. Hoffman*, 174 U. S. 639, 648, 649;¹ *Veazy v. Allen*, 173 N. Y. 359, 371, 66 N. E. 103, 62 L. R. A. 362; *Fuller v. Dame*, 18 Pick. (Mass.) 472; *Scofield v. Lake Shore, etc., R. Co.*, 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846; *Woodstock Iron Co. v. Richmond & Danville Extension Co.*, 129 U. S. 643, 658, 661, 9 Sup. Ct. 402, 32 L. Ed. 819.

In *Richardson v. Crandall*, supra, at page 362 of 48 N. Y., the court said:

"It matters not that the motives of the officer were good and humane, if the acts are of such a character as tend, if countenanced, to oppression or a lax performance of official duty. In all cases where contracts are claimed to be void as against public policy, it matters not that any particular contract is free from any taint of actual fraud, oppression or corruption. The laws look to the general tendency of such contracts. The vice is in the very nature of the contract, and it is condemned as belonging to a class which the law will not tolerate. *Atchesen v. Mallen*, 43 N. Y. 147."

This was quoted and approved in *McMullen v. Hoffman*, supra.

In *Woodstock Iron Co. v. Richmond, etc.*, supra, the court, at page 658 of 129 U. S., at page 407 of 9 Sup. Ct. (32 L. Ed. 819), said:

"It was adjudged that the contract was contrary to public policy, and that the note given in consideration of it was therefore void. In coming to this conclusion, the court considered somewhat at large the ground upon which contracts of this character were avoided, and held that it was because they tended to place one under wrong influences by offering him a temptation to do that which might injuriously affect the rights and interests of third persons, and that the case before it was within the operation of this principle, the contract tending injuriously to affect the public interest in establishing the fittest and most suitable location for the termination of the Boston & Worcester Railroad for the accommodation of the public travel."

And at page 661 of 129 U. S., at page 408 of 9 Sup. Ct. (32 L. Ed. 819), the court quoted and approved the following from *Bestor v. Wathen*, 60 Ill. 138:

"In this particular case no wrong may have been done, and yet public policy plainly forbids the sanction of such contracts because of the great temptation they would offer to official faithlessness and corruption."

¹ 19 Sup. Ct. 839, 43 L. Ed. 1117.

It is all-sufficient to condemn the contract that the general tendency and result of the execution of the agreement is to injure the public interests.

And it is immaterial that the whole force and tenor and object of the agreement was not to restrain marriage, but included the rescue of Benedict from his associations with women of questionable character and his temptation to spend or waste his money on them. The laudable and not illegal part of the agreement, assuming a part of it to be laudable, cannot be separated from the illegal part and the latter excluded or eliminated and the agreement upheld and enforced on the validity of the remaining portions. The court cannot remake the agreement. The consideration to be paid was entire, and it is impossible to tell what induced the contract and the promise to pay, or how much, if anything, was intended as compensation for breaking up the prospective marriage, and how much for the endeavors. *Haynes v. Rudd*, 102 N. Y. 372, 7 N. E. 287, 55 Am. Rep. 815; *Foley v. Speir*, 100 N. Y. 552, 3 N. E. 477; *Bishop v. Palmer*, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339; *Taylor v. Jaques*, 106 Mass. 291; *Meguire v. Corwine*, 101 U. S. 108, 112, 25 L. Ed. 899; *Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623.

In *Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623, the court said, speaking of a claim for services honestly rendered and other services which were illegal rendered under the same agreement:

"But they are blended and confused with those which are forbidden. The whole is a unit and indivisible. That which is bad destroys that which is good and they perish together."

This was quoted and approved in *Meguire v. Corwine*, 101 U. S., at page 112, 25 L. Ed. 899. These considerations lead to the conclusion that the demurrer to the first cause of action set out in the complaint must be sustained on the ground that the agreement was contrary or opposed to public policy and therefore void.

As to the second cause of action, it is to recover upon an agreement of defendant to pay money to plaintiff, a sum specified, in consideration that plaintiff would not contest the proof and probate of the last will of said Benedict. The allegations are that such agreement was made, and that, because of such agreement and relying thereon, the plaintiff did not contest the will, but allowed it to go to probate. The defect of this alleged cause of action lies in the fact that it does not allege that the plaintiff had any interest or right to contest the probate of such last will and testament. In this count of the complaint there is no reference to the allegations of the first count, so that it does not appear that the plaintiff was related in any degree to the testator, Benedict. There is no allegation in the second count that plaintiff was related to the testator, and hence, so far as appears, he had neither interest nor right to contest the probate of the will. Hence we have a mere naked agreement without consideration to support it. There was no surrender or abandonment of a right. Those who would share in an estate of a decedent in case of intestacy may contest the probate of a will, and it is a valuable right. The surrender or abandonment of this right after it has accrued at the request of another to

avoid expense and litigation on the promise of that other to pay a sum of money furnishes an adequate and legal consideration for the promise to pay and will support the agreement. Such agreements, if free from fraud and undue influence, when performed by the one who is to surrender the right, may be enforced, and are not contrary to public policy. But it must appear that the right to contest existed, and that it was surrendered or abandoned at the request of the one making the promise to pay the money.

Because of this defect in the allegations of the second cause of action, the demurrer to the second cause of action is also sustained.

The plaintiff may file and serve an amended complaint, as he shall be advised within 20 days, on payment of the costs of the demurrer as taxed by the clerk.

MISSOURI, K. & T. RY. CO. v. LOVE et al. ATCHISON, T. & S. F. RY. CO.
v. SAME. GULF, C. & S. F. RY. CO. v. SAME.

(Circuit Court, W. D. Oklahoma. February 14, 1910.)

Nos. 471, 472, and 473.

1. CARRIERS (§ 12*)—RATES—REGULATIONS—REASONABLENESS.

Whether railroad rates prescribed by a state commission are reasonable involves a determination of the value of the property devoted to the public use to which the rates apply, the measure of a reasonable return on that value, and whether the rates allowed to be charged are sufficient to that end.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 19; Dec. Dig. § 12.*]

2. CARRIERS (§ 12*)—RATES—REGULATION.

Rates should be just both to the public and to the owner of the railroad (Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819); but if a railroad is not ill conceived, greater in extent than it should be, or unduly expensive in construction, and is operated wisely and economically, rates producing no more than a reasonable return on its fair value would not be unjust to any one.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-20; Dec. Dig. § 12.*]

3. CARRIERS (§ 12*)—RATES—REGULATION.

A railroad company, under the Constitution, cannot be lawfully denied a reasonable return on its property devoted to public use; and if, by the scope of its operations, several sovereignties are interested, the special insistence of the officers of one should not be permitted to cast an undue burden on the others. The factors common to all, affecting the reasonableness of rates, should be equitably dealt with and adjusted; and this, though the local rates of a single state are alone in question.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 19; Dec. Dig. § 12.*]

4. CARRIERS (§ 12*)—INTRASTATE RATES—REASONABLENESS—VALUATION OF RAILROAD PROPERTY.

In the case of a railroad system extending into or through two or more states, the part within a state, the value of which is to be determined upon an issue as to the reasonableness of rates therein, should be regarded in its relation to the whole, and consideration given to the influence upon

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that value of property outside the state employed in aid of all its transportation business.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 19; Dec. Dig. § 12.*]

5. CARRIERS (§ 12*)—STATE RATES—REASONABLENESS—VALUE OF ROAD—DETERMINATION.

In a case involving the reasonableness of transportation rates, the revenue rule followed, in apportioning and assigning the value of the railroad in a state to its various kinds of business, and also in distributing the common expense of conducting the interstate and intrastate business therein.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 19; Dec. Dig. § 12.*]

Bills by the Missouri, Kansas & Texas Railway Company, by the Atchison, Topeka & Santa Fé Railway Company, and by the Gulf, Colorado & Santa Fé Railway Company against J. E. Love and others. On application for a temporary injunction. Granted.

See, also, 174 Fed. 59.

Clifford L. Jackson, C. G. Hornor, Joseph M. Bryson and James Hagerman, for complainant Missouri, K. & T. Ry. Co.

Cottingham & Bledsoe, Gardiner Lathrop, Robert Dunlap, and T. J. Norton, for complainants Atchison, T. & S. F. Ry. Co. and Gulf, C. & S. F. Ry. Co.

Frank Hagerman, for all complainants.

Charles West, Atty. Gen., Geo. A. Henshaw, Asst. Atty. Gen., Frederick N. Judson and Robert L. Owen, for defendants.

HOOK, Circuit Judge. These are suits by railroad companies to enjoin the enforcement of the passenger rate of two cents per mile prescribed by the Constitution of Oklahoma and certain freight rates prescribed by the Corporation Commission of that state. The suits were brought in September, 1909, after an experience of about 2 years with the passenger rate and from 9 to 18 months with the freight rates save some unimportant modifications; and it is claimed by the railroad companies the rates have proved so unreasonably low their continued enforcement will confiscate their property and deprive them of the equal protection of the law. In November, 1909, defendants' pleas in abatement were overruled (174 Fed. 59), and the applications of the railroad companies for temporary injunctions were postponed to afford defendants time for preparation. More than two months have been given for that purpose. At the recent hearing of the applications defendants presented exceptions and demurrers to the bills of complaint. They will be referred to presently. Whether rates prescribed by a state are reasonable involves a determination of the value of the property devoted to the public use to which the rates apply, the measure of a reasonable return on that value, and whether the rates allowed to be charged are sufficient to that end. The regulation of commerce among the states having been intrusted to Congress, and being therefore beyond the control of the state, difficult problems arise when the rates involved are those of a railroad com-

*For other cases see same topic & §-NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pany, for it generally happens, as here, that its property, whether entirely within the state or not, is employed commonly and inseparably in both interstate and local transportation; both kinds of traffic are moved in the same trains, over the same road and with the aid of the same employés. Again, it is generally the case, as here, that the railroad is but part of a larger system extending into or through other states, and there are factors of value, revenue, and expense which, though without the state, have such relation to and effect upon those within that they must be regarded in reaching a just conclusion. The extent and varied character of the property comprised in a railroad system make it difficult to ascertain its value, and objections may be made to all rules for apportioning the value and the revenues and expenses of operation to meet the issues in particular cases. Mathematical precision in matters so complex and of so many elements is not to be expected, but a court whose jurisdiction is invoked is not for that reason relieved of its duty to get as near an accurate result as the proofs permit. *C., M. & St. P. Ry. v. Tompkins*, 176 U. S. 167, 178, 20 Sup. Ct. 336, 44 L. Ed. 417. Uniform rules in such cases may not be exact, but when they answer to the great majority of right calls and distances they may be followed with reasonable assurance of a just conclusion. When the railroad is part of a greater system operated in other states as well, the ascertainment of its value within the state, and of such of its revenues and expenses therein as are incident to interstate commerce for purpose of ultimate separation from those pertaining to its commerce purely local to the state, should proceed with due regard not merely to the rights of the parties present, but also to those of the other states and to the province of Congress under the national Constitution. Every state in which a railroad system is operated is interested that justice be done, and it is not infrequently the case that commerce among several states, not subject to local regulation, is in volume at least the dominant feature of the railroad operations. It must always be remembered that under the Constitution a railroad company cannot lawfully be denied a reasonable return upon its property devoted to public use, and if by the scope of its operations several sovereignties are interested, the special insistence of the officers of one should not be allowed to cast an undue burden on the others. The factors common to all of them affecting the reasonableness of rates should be equitably dealt with and adjusted, though the local rates of a single state are alone in question.

In logical order there should first be found the value of the company's entire railroad property devoted to public use within the state, upon which, from all its operations therein, it is entitled to reasonable returns. Mr. Justice Harlan, in *Smyth v. Ames*, 169 U. S. 466, 546-547, 18 Sup. Ct. 418, 434, 42 L. Ed. 819, said:

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet

operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property."

There is a tendency to deny the amount and value of outstanding stocks and bonds as evidences of value. Wholly aside from any consideration of the rights of investors in good faith or of the general consensus of public opinion as exhibited in a normal market for the securities, such evidences imply a recognition of the effect upon local value of influences without the state. A company may have, elsewhere, property of great value employed in aid of all its transportation business. Distant connections with important commercial centers, an outlet to tidewater and the like may affect favorably the worth of every mile of road in the system. It is general knowledge that there is an important element of value in a railroad as a whole which the part within the state, solely and separately regarded, does not possess. While the question ultimately is the value of the road within the state, the influence upon that value of things external is to be considered; and in the common judgment of men it is to some extent reflected in the amount and value of the stocks and bonds resting upon the system. Nor can it properly be said that such influence affects only the value for the interstate business of the company with which the state is not concerned in making local rates. There is too intimate a relation between commerce within the state and that among the states, and too much interdependence in their mutual growth and prosperity. A railroad system is essentially a unit and is generally so regarded. For instance, the part within the state may be assessed for local taxation at its value as an organic portion of a larger whole. *C. B. & Q. R. Co. v. Babcock*, 204 U. S. 585, 598, 27 Sup. Ct. 326, 51 L. Ed. 636; *Western Union Tel. Co. v. Gottlieb*, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. Ed. 1116; *A., T. & S. F. R. Co. v. Sullivan* (C. C. A.) 173 Fed. 456. A value of a railroad in a state for local taxation would seem also to be there when rates of transportation are fixed. The assessed value and the acknowledged basis upon which the assessment is made express the judgment of public officers charged with the duty of investigation under the forms of the law and should receive due consideration. There is another matter to be regarded, not specifically mentioned in the above excerpt from the opinion of Mr. Justice Harlan. An established railroad system may be worth more than its original cost and more than the mere cost of its physical reproduction. It has passed the initial period of little or no return to its owners which, of greater or less duration, almost always follows construction and is not infrequently marked by default and bankruptcy. The inevitable errors in its building which finite minds and hands cannot avoid have been measurably corrected, time and effort have produced a commercial adjustment between it and the country it was intended to serve, relations have been established with patrons, and sources of traffic have been opened up and made tributary. In other words, the railroad, unlike one newly constructed, is fully equipped and is doing business as a going concern. It has attained a position after many experiences common to railroad enter-

prises which entail loss and cost not paid from current earnings, and which correspondingly make for value.

When the railroad within the state is used in both interstate and local commerce it is necessary next to determine what part of its value should fairly be considered as devoted to each use separately, because obviously the company should not exact such excessive rates for local traffic as will also produce a return upon a value employed in a business over which the state has no control. Neither class of traffic, interstate or local, should be made to bear a burden caused by paring the rates on the other to the quick. It is generally agreed that, given the entire value of the railroad property in the state, it is fair to apportion it among the different kinds or classes of business upon a revenue basis, that is to say, in proportion to the gross revenue produced by them respectively. And a like rule applies when the questions involved require separate consideration of the freight and passenger business. In this way will be found the fair proportion of value devoted to each particular use, upon which the owner is entitled for such use to a reasonable return. Counsel for defendants object to this method of assigning values, and the observations of Mr. Justice Brewer in the *Tompkins Case*, 176 U. S. 175-177, 20 Sup. Ct. 336, 44 L. Ed. 417, are quoted to show its inaccuracy under stated conditions. But it seems to have been adopted by him previously in the *Nebraska case* (*Ames v. Union Pac. Ry. Co.* [C. C.] 64 Fed. 165, 179, affirmed in *Smyth v. Ames*, supra) and by the courts generally in subsequent cases. Moreover, it is not perceived that the ton-mile basis advocated in its place is free from similar criticism. The number of tons hauled one mile has no bearing upon the value of the property employed save as revenue is produced, and when that element is recognized we are at once at the revenue basis. The ton mile could not be used in the necessary assignment of values as to mail, express, and miscellaneous services, nor as between passenger and freight traffic. Passengers are not transported by weight, and the passenger mile and the ton mile as units of measurement cannot be reduced to a common term. In these cases, therefore, the total value of the railroad property in Oklahoma of each complaining company, viewed in all its aspects, should be apportioned according to the rule mentioned, and assigned separately to interstate and local business, to freight and passenger business, and to mail, express and miscellaneous business, so the effect of the contested rates may be ascertained.

It is not difficult to ascertain from the records of a railroad company as customarily kept the gross revenue from the local traffic wholly within the state. As to interstate traffic moving in a particular state, the proportion of revenue which should be credited to it may be fairly determined upon a mileage basis—that is, by allotting the state such part of the revenue as the mileage of haul therein bears to the entire haul. It is said by counsel for defendants that because of the higher range of local rates in Oklahoma that state should be credited with a greater percentage of the interstate revenue than the mileage basis yields. That is but another way of asserting that local rates so directly affect interstate rates and the earnings therefrom that their influence may be

measured and must be regarded by the courts. If that be true, then in every case every reduction by the state authorities of local rates directly and materially affects a subject-matter the regulation of which is vested in Congress. A similar contention was made in the *Young Case*, 209 U. S. 123, 145, 28 Sup. Ct. 441, 448 (52 L. Ed. 714, 13 L. R. A. [N. S.] 932), and Mr. Justice Peckham, speaking for the court, said: "The question is not, at any rate, frivolous." But the premise of defendants' contention is not altogether true, for the local rates which are the subject of the present controversy are certainly not as a body higher than the like rates in other states concerned in the movement of Oklahoma interstate commerce, and there is not such a showing as to the others as would enable a court to act intelligently were it practicable under any circumstances.

Having the total value of the railroad property in the state, the gross revenue from all operations therein, the gross revenue from each class of business, interstate and local freight and passenger, and mail, express, and miscellaneous, and the proportionate property values devoted thereto respectively, there must then be ascertained the net revenues from the local freight and passenger business so that their relation to the value of the property employed in producing them may be disclosed and the ultimate question answered, to wit, whether the rates from which the net revenues come are reasonably compensatory. At this point arises the principal controversy. A substantial part of the expense of railroad operation is incurred indiscriminately in all its business. For example, the maintenance of way and structures in a state, which makes one of the most important general expense accounts, is almost entirely for the common benefit of all traffic, interstate and local, freight and passenger. As between freight and passenger traffic a large part of the expenses may be directly located and distributed, and it is the custom to apportion the remainder by various rules not necessary to mention here; but generally speaking it is impracticable in railroad business to separate expenses into the interstate and local and the minor and incidental operations. From the very nature of the case, therefore, some rule must be adopted for charging to each of them their fair and equitable proportion of the common expense. Of necessity it must proceed upon average conditions commonly known or shown to exist, and it argues nothing to say that it does not fully apply to this or that exceptional instance. A general rule based on experienced observation is fair, and what is lost by its application in one place is doubtless gained in another, and an equitable equilibrium maintained. Of those suggested the revenue basis appears to be much more uniform in its adaptability and much less subject to substantial objection. It has been frequently employed. *Ames v. Union Pacific* (C. C.) 64 Fed. 165; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *C., M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. Ed. 417; *Northern Pacific v. Keyes* (C. C.) 91 Fed. 47; *In re Arkansas R. Rates* (C. C.) 163 Fed. 141; *St. Louis & S. F. R. Co. v. Hadley* (C. C.) 168 Fed. 317. It is the one to which the mind naturally turns in every problem involving the charging of common expense to different departments of a business. When a general or common expense cannot be located,

what is more obviously reasonable than to say in the first place the different branches or departments shall bear it according to the value of their products or their gross earnings, and then make due allowance for exceptional conditions if any are perceived? That seems at the start to satisfy the mind intent on equity. It is a working basis for the distribution of all expense incident to a railroad business among its revenue yielding operations of every character. On the other hand, the ton-mile rule for which contention is made can be applied to nothing but the freight business. Besides being entirely useless as a distributor of expense to the mail and express business of a railroad and to the services of switching, demurrage, storage and the like, the ton-mile rule is radically inaccurate when applied to the very business to which it is best adapted. It does not consider the differences and risks in the character of the freight transported, whether glassware or sand, furniture or coal; whether the freight is moved in car load or less than car load lots; whether the haul is long or short; the character of the traffic as regards time consumed in transportation and occupation of the track and equipment; the number of expensive handlings at terminals and terminal expense generally. The ton-mile theory places interstate traffic while it is moving in the state upon the basis of local traffic, and therefore ignores the effect of the external haul upon the internal cost. Concededly the average of haul of interstate traffic is materially greater than that of traffic wholly within the state, and it is an axiom in transportation that the longer the haul the less the cost per ton per mile. These matters in the aggregate run enormously into the cost of freight transportation, but none of them are picked up or accounted for by the ton-mile rule which rests on the erroneous assumption that the transportation costs the same per ton per mile regardless of character, time, distance, or circumstance. The revenue rule is not ideal, but revenue is the product of rates and service, and, generally, in the making of rates some regard is had to the cost of service. In other words, earnings reflect to some extent the important differences in the cost of service which the ton-mile rule entirely ignores.

Bearing on the division of expense is the much controverted question of extra cost of the local business as compared with the interstate. That the former costs much more than the latter is beyond doubt, but the difficulty is in applying the measure of difference. There is a general accord among practical railroad men of high standing and long experience that the cost of local freight traffic is from 2 to 8 times as much as that of interstate traffic, and of local passenger traffic from 25 to 50 per cent. more than the other. Though not altogether clear from the proofs here, it is probable the difference mentioned in the freight traffic should not be fully applied in addition to a division on the revenue basis, for, as already seen, the difference finds expression in a measure in the relative revenue proportions themselves. A cogent reason for selecting the revenue basis in preference to the ton-mile is that the former gives some effect to the known differences in cost. Nor is it altogether clear that the above ratio of extra cost of local freight traffic was intended by the witnesses to apply to all op-

erating expenses as classified by the Interstate Commerce Commission and the Corporation Commission of Oklahoma. In *Southern Pacific Co. v. Bartine* (C. C.) 170 Fed. 725, the ratio of extra cost was confined to transportation expenses as distinguished from maintenance of way and structures, maintenance of equipment, and traffic and general expenses. But substantial factors of extra cost of local traffic may be found in other general accounts; for example, in the large cost of maintenance of yard tracks and sidings at terminals which is charged not as a transportation expense, but to maintenance of way and structures. Those tracks sometimes constitute a fifth of the total mileage of a railroad.

The criticism of the formula for apportioning extra cost mentioned in the *Arkansas* case (C. C.) 163 Fed. 141, is due to a misconception. It appears the evidence in that case showed that on a revenue basis the cost of local freight traffic was double that of the interstate. The court gave a quick abstract rule for ascertaining the local cost, which, if applied to the facts there, would have been to double the local revenue, add it to the interstate revenue, ascertain what proportion the doubled amount bore to the total sum and then take that proportion of the total cost of both. Although every algebraic or mathematical formula applied to the particular facts before that court would have brought the same result, it is earnestly argued here that if a given body of rates are confiscatory they must, under the rule of the *Arkansas* case, still be confiscatory though the revenue were doubled by doubling the rates—that confiscation would follow, however high the rates and great the revenue. Obviously, if revenue is doubled solely by increasing local rates there would be little, if any, increase in gross cost; if revenue is doubled by increase in volume of local traffic without changing rates the gross cost would probably increase, but not proportionately. But no such construction as contended for can be put upon the language of the court. If the formula given is to be applied to shifting conditions there should be a corresponding change in the numerical factors. This is obvious from a cursory reading of the opinion. A change in the amount of local revenue from whatever cause, rates or volume of traffic, would affect the relative cost predicated on the revenue basis, but whenever the ratio is found the apportionment can readily be made by employing it in the way indicated in the *Arkansas* case.

The evidence here shows that, regarding average conditions and not exceptional instances, there is a substantial difference between interstate and local traffic in the ratio of cost to revenue. Particularly is this so as to freight. In other words, the apportionment of expense on a revenue basis does not adequately express the difference between them. It is not necessary to determine it definitely in view of the value of the property of the companies and the statement that because of exceptional circumstances the *Atchison, Topeka & Santa Fé* and the *Gulf, Colorado & Santa Fé* roads should be considered together. The proofs justify the conclusion that the values of the roads in Oklahoma are at least:

Missouri, Kansas & Texas.....	\$35,185,089
Atchison, Topeka & Santa Fé.....	41,877,391
Gulf, Colorado & Santa Fé.....	6,406,607

They were assessed for taxation by the State Board of Equalization at 75 per cent. of those sums. The year ending June 30, 1909, is the fairest of the periods available for illustrating the effect of the contested rates upon the net earnings of the companies. It is furthest removed from the depression of 1907. In each case the railroad value, the gross earnings from each kind of business in Oklahoma, and the gross expenses of all are found, the two latter with little question. Applying the foregoing rules and setting off to the local freight business its assignable proportion of value of the railroad employed therein and deducting from the gross local freight earnings the apportioned expense, but without any allowance whatever for the extra cost of local freight traffic as compared with the interstate save to the extent it may be reflected in the different rates and therefore in the revenues, and also without allowance for interest on bonds or dividends on stock, the following result appears: The Missouri, Kansas & Texas earned slightly less than $5\frac{1}{2}$ per cent. for the year, and the Atchison, Topeka & Santa Fé and the Gulf, Colorado & Santa Fé combined $2\frac{9}{10}$ per cent. If the Atchison and the Gulf roads were to be considered separately, the per cent. of net earnings to assigned value of the former on local freight traffic without allowance for the extra cost or interest or dividends would be $2\frac{1}{2}$ per cent., and that of the latter $7\frac{9}{10}$. The percentage of net return to each company from its local passenger business was substantially less than that from the freight. These results are foreshadowed by a comparison of the entire values in the state with the entire net earnings. For the year mentioned the net earnings from all operations in Oklahoma, of every character, interstate and local, freight, passenger, mail, express, car service, etc., with no deduction for interest or dividends were:

The Missouri, Kansas & Texas.....	\$1,878,589
The Atchison and the Gulf.....	1,519,556

However, the importance of the difference in cost should not be underestimated. For illustration, if, during the period in question, it cost the Missouri, Kansas & Texas Company to earn a dollar of local freight revenue but 10 per cent. more than to earn a like amount of interstate freight revenue, it received a net return of but $4\frac{1}{3}$ per cent. upon nearly \$3,000,000 worth of property employed in that business; if the extra cost was 25 per cent., the net return was $2\frac{2}{3}$ per cent.; if the extra cost was 50 per cent., there was a net return of less than $\frac{1}{10}$ of 1 per cent.—and in each case without deduction for interest on bonds or dividends on stock. Rates should be just both to the public and the owner of the railroad. *Smyth v. Ames*, 169 U. S. 466, 544, 18 Sup. Ct. 418, 42 L. Ed. 819. It does not appear in these cases that the roads were ill conceived, greater in extent than they should be, unduly expensive in construction, or that they are not operated wisely and economically. It therefore does not seem that rates producing no more than a reasonable return on their fair value could be unjust to any one. In fixing the measure of return upon property devoted to public use regard should be had to the character of the business, the locality and the risk; whether the return will be uniform and secure; whether the patronage is steady or fluctuating and

quickly responsive to financial and commercial changes; interest rates legal and contractual and the rates customarily sought and required in like investments in the locality; if a railroad, the character of the traffic, whether largely of a kind dependent upon uncertain conditions, or so diversified that causes affecting part will not greatly affect the whole. The return should be a fair, just, and reasonable one, and not so meager as to repel investment in the property or to embarrass the owner in operating it. In *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, the business was that of a gas company in New York City where interest rates are generally the lowest. It dealt in one of the necessities of urban life. The Supreme Court observed that the risk was reduced almost to a minimum; that the company had a monopoly of the gas service in the largest city in America, secure from competition, and said:

"Taking all facts into consideration, we concur with the court below on this question, and think complainant is entitled to 6 per cent. on the fair value of its property devoted to the public use."

In a preliminary announcement of the conclusion of the court Mr. Justice Peckham said:

"There is no rule as to any particular rate which any corporation subject to legislative control in the matter has a right to obtain without legislative interference. It depends upon circumstances and locality."

The present needs of the cases in hand require no further expression than that the returns to the railroad companies shown by the proofs are clearly deficient.

The demurrers: It is argued that the freight and passenger rates are still in legislative process, and therefore within the doctrine of *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150, not properly the subject of judicial consideration. Both phases of this contention have already been considered in connection with the pleas. 174 Fed. 59. It is the law of the land that a state may not confine to its own courts a citizen who claims his rights under the Constitution of the United States have been denied. And the Supreme Court did not hold in the *Prentis* Case that a similar result could be accomplished by prescribing and enforcing under penalties a legislative rule, even though tentative, and restricting the remedy of the citizen to subsequent legislative inquiry and action.

It is also urged that the bills of complaint are defective because they do not assail the freight rates separately. But the bills disclose the contrary, at least by express general allegations. Moreover, the rates in question should properly be considered as a body and in connection with the other freight rates of the companies not affected by the orders. Though the orders, save three modifications, were made successively, at different times during the year 1908, the rates prescribed constitute as much a single body as if embraced in one order. They affect from 40 to 50 per cent. of the local freight business, and cause an average reduction of about 40 per cent. of the prior rates applied to the same amount of traffic. Presumably the Commission preserved a due relation among them so far as is practicable in such cases, and there is no contention that the rates left untouched are relatively

as low. When all the local freight earnings are considered an insufficient net return is clearly disclosed, and there is no difficulty in locating the cause.

Upon the proofs temporary injunctions should be granted. Provisions are made in the orders for the keeping of accounts and the giving of bonds safeguarding, so far as practicable, the patrons of the roads if it should ultimately be determined the enforcement of the rates should not have been suspended.

In re LEONARD et al.

(District Court, D. Nevada. March 4, 1910.)

No. 101.

1. BANKRUPTCY (§ 114*)—TEMPORARY RECEIVERS—POWERS.

A temporary receiver of a bankrupt is merely a custodian of the estate with authority to inventory and receive and retain all of the bankrupt's assets; the purpose of his appointment being only to protect the property from dissipation and loss until it is ascertained that there is a bankrupt estate to be administered.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 114.*]

2. BANKRUPTCY (§ 484*)—TEMPORARY RECEIVERS—CHARGES—EXAMINATION OF BOOKS—CLAIM VOUCHERS.

A temporary receiver of a bankrupt was not entitled to charge for an expert examination of the bankrupt's books, nor for printing claim vouchers, nor for the services of an attorney, in the absence of an order of court authorizing the attorney's employment.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 484.*]

3. BANKRUPTCY (§ 484*)—TEMPORARY RECEIVERS—FEES.

Where a temporary receiver of a bankrupt, appointed to inventory and preserve the bankrupt's assets until after adjudication, did not perform any extraordinary service beneficial to the estate, he was only entitled to the same compensation that would be allowed a trustee for the same service prescribed by Bankruptcy Act July 1, 1898, c. 541, § 48, 30 Stat 557 (U. S. Comp. St. 1901, p. 3439).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 484.*]

In the matter of bankruptcy proceedings against Volney B. Leonard and others, a copartnership doing business under the name and style of the Merchants' & Miners' Bank. Petition for the allowance of the report of a temporary receiver modified, and allowed as modified.

Mark Walser and George L. Sanford, for petitioning creditors.

FARRINGTON, District Judge. The petition asking that V. B. Leonard, S. W. Collins, E. H. McLaughlin, A. Freiman, Frank Knox, and the Bank of Rawhide, a copartnership doing business under the firm name and style of the Merchants' & Miners' Bank, be adjudged an involuntary bankrupt, was filed herein August 4, 1908. August 20, 1908, the Bank of Rawhide filed its separate answer denying that it was a member of said copartnership, and after a hearing this issue was decided in favor of the Bank of Rawhide. Inasmuch as it then appeared that service of process had not been made or attempted on

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

but two of the alleged members of said copartnership, the court declined to make an order of adjudication until further service had been made. March 22, 1909, on petition of Mark Walser, a creditor of said Merchants' & Miners' Bank, Thomas A. Roseberry was appointed temporary receiver, with power to inventory, receive, and retain in his possession all of the assets of said bank until further order of the court. Mr. Roseberry entered upon the discharge of his duties as such temporary receiver March 24, 1909. May 3, 1909, the receiver filed his inventory and report. The inventory contained a list of more than 100 promissory notes payable to the Merchants' & Miners' Bank, the face value of which in the aggregate was about \$50,000. The inventory also showed as property of the bank 4,800 shares of the Grutt Hill Mining Company's stock, 400,000 shares of Dixie, 1,000 shares of the Rawhide Mining & Reduction Company stock, two deeds to lots in Rawhide, about 12 pieces of jewelry, 11 bank books, 1 lot of canceled checks, 1 lot of escrow papers, 1 pistol, 2 surety bonds, and 1 fire insurance policy. The receiver also reported as being in his possession at that time the following mentioned property, which he says was clearly shown to have been the property, not of the Merchants' & Miners' Bank, but of the Bank of Rawhide, to wit: 29 promissory notes; 1 lot of jewelry valued at \$900, held as security; 13 account books; 1 burglar proof safe burned, but in fair condition; 1 large book safe, burned and worthless; 1 safe deposit box, burned and probably worthless; 6 stock certificate books belonging to various mining companies; 1 lot of cipher code books belonging to various banks; 1 lot of packages, envelopes, and papers belonging to unknown owners, and a safe deposit box not yet opened.

The written instructions to the receiver, embodied in a letter addressed to him by the court March 22, 1909, in so far as they are here pertinent, were as follows:

"You will be authorized to receive and take into possession all of the assets of the Merchants' & Miners' Bank, but you will have no power to disburse any of the funds or assets of the bank, or any other property that you may receive as such trustee, until the further order of this court. The property so far has been in the custody of Mr. Hofer, State Bank Examiner. Your first duty will be to receive the property from him and make a carefully itemized statement and inventory of everything you receive. At the time the property is so received and inventoried, I wish Mr. Hofer, or his representative, to be present; also that some representative from the creditors of the bank shall be at hand, and that the inventory so made shall be vised and approved by you, Mr. Hofer, or his representative, and the representative of the creditors. * * * You will not only make a statement of all the property belonging to the bank, but also of all the property in custody or control of the bank, and all property which is turned over to you by Mr. Hofer. This list will be sent to me, and you will do nothing with the property except to hold it until further order of the court. None of it is to be turned over to the Bank of Rawhide or to the people who claim to own the contents of deposit boxes."

The inventory filed by the temporary receiver is not signed by the State Bank Examiner or by a representative of the creditors, nor is any reason given for the omission. The report also fails to show the amount of money found in the safe. According to the bank books there should have been \$2,019.75. The inventory merely shows the

receipt from T. R. Hofer, Bank Examiner, of \$834.80, and of mutilated coin amounting to \$5. It shows also that since the closing of the bank and up to May 3d, the date of the order, the receiver had received in currency, money orders, drafts, and checks \$273.38. With this inventory the receiver presented the following bill for services and expenses from March 24th to May 3d:

Merchants' & Miners' Bank to Thomas A. Roseberry, Jr., Dr.

1909.	
March 29.	To oil and can for oiling safes..... \$ 55
31.	To hauling desk and chairs to office..... 1 00
31.	To hauling away garbage..... 35
	To labor to one man moving safes..... 1 50
	To stove pipe..... 1 25
April 1.	To one night latch..... 1 50
4.	To stationery 3 60
5.	To express on printed stationery..... 1 65
11.	To moving table to office..... 1 00
	To charges of Wells Fargo Co. for money orders amounting to \$834.80..... 2 45
	Turpentine, oil, etc., for opening coin safe..... 85
19.	To H. B. Sprinkel for services and expenses in opening money chest..... 94 20
20.	To G. W. Eytel, labor drilling chest..... 5 50
	To S. L. Gregory for blacksmith work, drilling chest.... 9 20
	To F. Gowatz, making 2 rods for chest..... 1 20
22.	To J. A. Alexander, 23 hours' work drilling chest..... 13 80
	To E. C. Ferguson and William Kidd, labor drilling chest 16 30
	To assorted lot of rubber bands..... 75
Merchants' & Miners' Bank to Reno Printing Co., Dr.	
April 1.	500 letter heads.....\$3 50
	250 envelopes 2 00
	1,000 claim vouchers..... 5 25
	10 75
To John Kinkaid.	
April 29.	Attorney's fees to date..... 25 00
To Alfred Boyle.	
April 29.	Typewriting report and stenographic services..... 15 00
To W. H. G. Buck.	
April 29.	To 21½ days services, experting records, and reporting on the financial condition of the Merchants' & Miners' Bank in connection with the Bank of Rawhide, of Rawhide, Nevada, at \$8.00 per day..... 172 00
To Thos. A. Roseberry.	
April 29.	To services acting as temporary receiver, and assisting in checking records, 19 days at \$8.00 per day.....\$152 00
	To 14 days' services as temporary receiver at \$5.00 per day..... 70 00
	222 00
To Mark Walser.	
April 29.	To legal services rendered and to be rendered in the insolvency proceedings (this includes all traveling and other expenses)..... 250 00
Total	
\$851 40	

It will be noted that the total amount of cash which came into the hands of the receiver during the period covered by this bill was \$1,112.38. September 11, 1909, the receiver transmitted a further report on the Merchants' & Miners' Bank affairs, furnished, as he states, at the request of J. Poujade, referee in bankruptcy, containing a further bill, which includes the bill rendered May 3d, and is as follows:

Merchants' & Miners' Bank to Thomas A. Roseberry, Jr., Dr.

1909.		
April.	By Reno Printing Co.....	\$ 10 75
Sept. 9.	By safety deposit box rent from June 9 to Sept. 9, 1909, to First Exchange Bank of Rawhide.....	7 50
Sept. 1.	By attorney fees to John Kinkaid.....	25 00
June 30.	By individual disbursements on stamps	50
June 30.	By individual disbursements on safety deposit box rent from April 9 to June 9, 1909.....	5 00
May 14.	By window glass and putty to S. W. Collins Hardware Co.	2 10
April 29.	By individual disbursements for opening safe.....	156 65
April 29.	To services rendered as temporary receiver to May 1, 1909	222 00
Sept. 1.	By services rendered as temporary receiver from May 1, 1909, to Sept. 1, 1909, 123 days at \$2.50 per day..	307 50
April 29.	To Alfred Boyle, stenographic work.....	15 00
April 29.	To W. H. G. Buck, to services rendered.....	172 00
April 29.	To Mark Walser, to legal services.....	250 00
Total		\$1,174 00

Thus the total bills for receiving and keeping possession of the property of the Merchants' & Miners' Bank from March 24 to September 1, 1909, including attorney's fees, amount to \$1,174; and the total amount of cash and money values which came into the hands of the temporary receiver as such was but \$1,773.18.

Bankruptcy Act July 1, 1898, c. 541, § 2, subd. 3, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3421), authorizes the court to appoint a receiver of the property of the alleged bankrupt when absolutely necessary for the preservation of the bankrupt estate; the appointment can be made only after the filing of the petition, and the authority of the receiver so appointed ceases when the petition is dismissed, or, if there be an adjudication, as soon as the trustee selected by the creditors is qualified.

In this case the receiver was appointed to preserve the bankrupt estate. Under the authority conferred upon him he was merely a custodian of the estate, with authority to inventory, receive, and retain in his possession all the assets of the alleged bankrupt.

It is proper that there should be an inventory in order that there may be no misunderstanding as to the amount and character of the property in the custody of the receiver. A sufficient reason for the limited power and authority in such a temporary officer is that prior to and pending an adjudication in bankruptcy the property belongs to the bankrupt, and to him alone, and therefore the court can and should do no more than protect the property from dissipation and loss until it is ascertained that there is really a bankrupt estate to be administered upon.

It was not shown, nor has any attempt ever been made to show, that the preservation of the property described in the inventory here, prior to adjudication, demanded that the books of either the Merchants' & Miners' Bank or of the Bank of Rawhide should be experted. Such a service was not authorized by the court, nor was it ever intimated to the court in any way that such an expenditure was in contemplation until the bills therefor were presented and filed in this court May 3, 1909. The item of \$172, alleged to be due W. H. G. Buck for 21½ days' services experting records, at \$8 per day, and the item of \$152, alleged to be due Thomas A. Roseberry for 19 days of similar service, cannot be allowed. The item of \$5.25 for printing claim vouchers was entirely unnecessary and improper; until adjudication it could not be known that there would be any use for claim vouchers, and when claims are presented they should be prepared at the expense of the creditor, and not at the expense of the estate. This item, also, is disallowed. As to the item of \$25, alleged to be due John Kinkaid for attorney's fee, it is not shown what, if any, services were ever rendered. Moreover, a temporary receiver charged simply with the custody and safe-keeping of cash, stock, and evidences of indebtedness of an alleged bankrupt should always apply to the court for leave to do so before employing an attorney at the expense of the estate.

In *Re T. E. Hill Co.*, 159 Fed. 73, 77, 86 C. C. A. 263, 267, the Circuit Court of Appeals for the Seventh Circuit says, in sustaining an order denying the receiver an allowance for compensation of his attorney:

"Ordinarily, the duties of this statutory receiver neither require nor justify employment of an attorney, and it is plain that no claim for such services is chargeable per se as against the estate, predicated alone upon the fact of employment and service rendered."

Until it is made to appear that this is a proper charge against the estate—in other words, that the services rendered were rendered in behalf of the estate and were of the actual value of \$25—the charge cannot be allowed. *Collier on Bankruptcy* (7th Ed.) p. 690.

In section 64b(3) of the bankruptcy act, it is provided that the court may direct the trustee to pay "one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases."

Mr. Sanford and Mr. Walser will be allowed \$250 for all legal services performed to date. This amount includes a full allowance for all personal expenses incurred by the attorneys. Considering the fact that Mr. Walser has made several trips to Carson from Rawhide at his own expense, and that the interests of the creditors have been represented by Mr. Walser and Mr. Sanford, both in the proceedings prior to the adjudication, and also on the motion of Frank Knox to set aside the adjudication, the sum of \$250 seems to be a reasonable fee.

The amount charged by the receiver for his services, if we consider merely what was necessary for the preservation of the property under the instructions of the court, is excessive.

Bankruptcy Act, § 2, subd. 5, invests the District Court of the United States in the several states with jurisdiction to "authorize the business of bankrupts to be conducted for limited periods by receivers * * * if necessary in the best interests of the estate, and allow such officers additional compensation for such services, but not at a greater rate than in this act allowed trustees for similar services."

In this case the receiver has not carried on the business of the bankrupt, nor was he authorized so to do; consequently, the additional compensation here provided for is not permissible.

By section 48 of the bankruptcy act, trustees are allowed "from estates which they have administered such commissions on all moneys disbursed by them as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars."

Section 72 declares:

"That neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act."

In *Re Richards* (D. C.) 127 Fed. 772, and again in *Re Cambridge Lumber Co.* (D. C.) 136 Fed. 983, Judge Lowell held that a receiver who had been continuing and conducting the business of the alleged bankrupt could receive no greater compensation for his services than the percentage allowed by the act to a trustee. On the other hand, it has been held that the provision and limitation, in so far as it relates to the services of a receiver, has reference only to services in conducting the business of the bankrupt, and that it presupposes some compensation is also to be allowed for services rendered in taking charge of and caring for the property.

In *Re Kirkpatrick*, 148 Fed. 812, 78 C. C. A. 501, where the receiver, with the assistance of his attorney, had recovered large amounts of property belonging to the bankrupt estate which otherwise would probably have been lost, it was held by the Circuit Court of Appeals that the amount of compensation was within the discretion of the court. And in the case of *In re Sully* (D. C.) 133 Fed. 997, where the receiver's management had been exceptionally able and profitable to the estate, and unexpectedly large sums had been realized for property sold, the court awarded fees much larger than those which the law permitted to be allowed trustees.

In the present case, what has the receiver done which will justify compensation in excess of that which the law fixes for the regular trustee? In his bill there is a charge of \$2.45 for Wells Fargo & Co. money orders amounting to \$834.80. This probably is the money received from Bank Examiner Hofer. We may assume that this money was sent to the proper United States depository for funds belonging to bankrupt estates, and that the money orders were purchased for that purpose. The same bill shows a charge of \$12.50 for the rental of a safety deposit box in the First Exchange Bank of Rawhide from

April 9 to September 9, 1909. We may therefore assume that the promissory notes, securities, and other valuable papers and documents, as well as jewelry, were cared for in the vaults of that bank. In this manner the custody of the greater portion of the property could and should, and probably was maintained; and, as to some of the other property, we learn from a memorandum on the back of the final report that the receiver since the completion of the foregoing report had "received advice that the following named property, assessed in the name of the Merchants' & Miners' Bank, had been sold for taxes, to wit: Block #5, lot #1, and improvements; block #4, lot #6; block #8, lot #9, and improvements; Eckstein & Kelly Dance Hall; one-half interest in Harbold building; block #1, lot #5; bank fixtures."

In the letter of instruction from the court addressed to the receiver at the time of his appointment, he was directed to prepare an inventory of the property received at the time it was turned over to him by the State Bank Examiner, and to have this list or inventory vided and approved by the State Bank Examiner, also by a representative of the creditors. This has never been done.

Although the estate is charged with a bill of \$156.65 for opening safes, neither the first nor the second report of the receiver states what was found therein. It appears from the books that there was more than \$2,000 on hand at the time the bank was closed; it also appears that State Bank Examiner Hofer turned over to the receiver but \$834.80. For aught that appears in the record, the whole \$2,000 may have been in the safe when it was opened. When the money reached the hands of the receiver from the Bank Examiner, \$1,200 had disappeared, and by May 3d, less than two months after the receiver had been appointed, bills for the receiver, including his expenses, claims for attorneys' services, and the cost of opening the safe, amounted to \$851.

In a letter to the clerk of this court, and now a part of the record herein, the receiver states that he was not even present when the coin safe was opened. This was an event of great importance to the estate, more so than any other which has occurred since adjudication. The absence of the receiver was very unfortunate, to say the least.

In every case to which my attention has been called where the receiver has been allowed compensation greater than that allowed a trustee, it has been justified and warranted by good results, and by management of such efficiency that the assets of the alleged bankrupt estate have been greatly increased, or that assets which otherwise would have been lost have been preserved and saved to the estate. Nothing thus far has been shown which justifies compensation for the receiver largely in excess of what would have been allowed a trustee for the same services. The receiver will therefore be allowed \$150.

The claim of \$20 for a desk and chair sold by W. N. Coyle to T. A. Roseberry, Jr., for his use as temporary receiver, will be allowed, provided the desk and chair are worth \$20, and they are at once turned over to the trustee to be sold. This expenditure was neither authorized by the original appointment nor by the court, nor has any showing been made of conditions which warranted such a purchase. I am in-

formed by the referee in bankruptcy that at a meeting of the creditors of the estate regularly held in Rawhide, October 1, 1909, six persons were present representing claims amounting to nearly \$8,000. At this meeting it seems to have been the general opinion that the bills presented by the receiver should be paid. Notwithstanding the great respect which should be paid to an opinion emanating from such a source, the court must be guided by the law, and must also remember that many creditors of the Merchants' & Miners' Bank were neither present nor represented at that meeting. There is nothing in the law, nor in this opinion, however, which will prevent such creditors, and others who may be like minded, after the assets of the estate have been distributed to the creditors, from making up to Mr. Roseberry and Mr. Buck the full amount of their claims.

The claims authorized to be paid by the present trustee of the estate are as follows:

T. A. Roseberry, for services as receiver.....	\$150 00
T. A. Roseberry, for disbursements for opening safe, etc.....	156 65
T. A. Roseberry, for safety deposit box rent in First Exchange Bank of Rawhide.....	12 50
T. A. Roseberry, for Reno Printing Co.....	5 50
T. A. Roseberry, for stamps	50
T. A. Roseberry, for S. W. Collins Hardware Co., for window glass, putty, etc.....	2 10
T. A. Roseberry, for desk and chair.....	20 00
Alfred Boyle, for stenographic work.....	15 00
Messrs. Walser and Sanford, attorney's fee.....	250 00

MOUND CITY CO. v. CASTLEMAN et al.

(Circuit Court, W. D. Missouri, Central Division. February 11, 1910.)

1. COURTS (§ 492*)—STATE AND FEDERAL COURTS—ORIGINAL JURISDICTION—PRIORITY OF ATTACHMENT.

Where the highest court of a state, construing her process statute, had held that the filing of the petition in the clerk's office was the institution of the suit, the filing of a petition in partition in the clerk's office of the state court of original jurisdiction, in the county where the land was situated, conferred exclusive jurisdiction on such court having jurisdiction to partition the land, precluding a subsequent suit in the federal courts, regardless of the time of service of process on the parties in the state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1345; Dec. Dig. § 492.*]

2. ACTION (§ 64*)—COMMENCEMENT OF SUIT.

A suit in equity is commenced by filing the bill of complaint.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 730; Dec. Dig. § 64.*]

3. COURTS (§ 498*)—STATE AND FEDERAL COURTS—JURISDICTION—RES.

It is not essential to the exclusive jurisdiction of a state court in which a suit for partition is first instituted, as against the federal courts, that there should have been an actual seizure or specific lien fixed on the res.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1387-1396; Dec. Dig. § 493.*]

4. **LIS PENDENS (§ 25*)—PENDENTE LITE PURCHASER—CORPORATION.**

Where C., with knowledge of the institution of a suit against him for partition, left the state to avoid service and caused a corporation which he controlled to be organized in New Jersey, to which he conveyed his interest in the land in exchange for most of the corporation's stock, the corporation was a pendente lite purchaser with notice and bound by the judgment.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 47-57; Dec. Dig. § 25.*]

5. **JUDGMENT (§ 460*)—FRAUD—PLEA.**

Where fraud is charged as ground for relief against a judgment, the judgment cannot be pleaded by a pure plea in bar of the bill, but the plea, besides setting up the judgment, must deny the fraud or other circumstances on which the judgment is sought to be impeached.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 889; Dec. Dig. § 460.*]

6. **EQUITY (§ 213*)—HEARING ON BILL AND ANSWER.**

Where a verified answer was filed to a bill, and complainant set the case down for hearing on the pleadings and record without a replication, the averments of the answer are to be taken as true.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 486; Dec. Dig. § 213.*]

7. **JUDGMENT (§ 479*)—CONCLUSIVENESS—COLLATERAL ATTACK.**

A judgment of a court having jurisdiction is conclusive against collateral attack in any other court, whether it be a judgment in a proceeding at law or in equity.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 913-915; Dec. Dig. § 479.*]

8. **PARTITION (§ 49*)—PETITION—AMENDMENT.**

Where, pending suit for partition, certain of the parties in interest made conveyances and put deeds of trust on their shares, complainant was authorized by Rev. St. Mo. 1899, § 667 (Ann. St. 1906, p. 685), to make the grantees and beneficiaries of such conveyances under deeds of trust parties by amendment to the petition, though they were not necessary parties.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 133, 134; Dec. Dig. § 49.*]

9. **JUDGMENT (§ 713*)—CONCLUSIVENESS—ISSUES CONCLUDED.**

Since Rev. St. Mo. 1899, § 4378 (Ann. St. 1906, p. 2414), vested the court with full jurisdiction in a partition proceeding to determine the effect of alleged advances made to one of the defendants by the common ancestor, a decree fixing the rights of the parties was conclusive of such question under the rule that a decree is not only conclusive of every matter actually litigated, but also as to any other admissible matter which might have been litigated and determined.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1241; Dec. Dig. § 713.*]

In Equity. Suit by the Mound City Company against Robert H. Castleman and others. Bill dismissed.

This controversy grows out of the partition of certain lands situate in Cooper county, Mo., belonging to David Castleman at the time of his death in January, 1907. He left surviving him his widow, the defendant Ida May Castleman, who was his second wife, and his two sons, defendants Robert H. Castleman and Ben T. Castleman. On March 20, 1907, Robert H. Castleman instituted a suit in the circuit court of Cooper county, Mo., against said Ida May Castleman and Ben T. Castleman for the partition of said lands among them. Summons was issued thereon March 25, 1907, which as to Ida May Castleman was directed to the sheriff of Cooper county, where she then re-

sided, and was promptly served upon her. The summons as to Ben T. Castleman was directed to the sheriff of the city of St. Louis for service, where he then resided, and was engaged in the practice of law. The sheriff was unable to serve him until perhaps May, 1907. While said process was in the hands of the sheriff of St. Louis county, the said Ben T. Castleman, on the 30th day of March, 1907, executed a deed of conveyance of his interest in said lands to the complainant, Mound City Company, a corporation which he had organized in the state of New Jersey. The consideration of said conveyance was the issuing to him of practically all the stock of said company. Thereafter, on the 2d day of May, 1907, he caused to be filed in this court a bill in equity in the name of the said Mound City Company against the said Robert H. Castleman and Ida May Castleman, setting out its acquisition of the interest of said Ben T. Castleman in said lands, and praying for partition thereof. To this bill the said Robert H. Castleman and Ida May Castleman appeared and filed plea setting up the pendency of said partition suit in the state court. When that matter came up for hearing, the then presiding judge of this court made an order suspending the hearing of said plea until the final determination of the suit in the state court. At the next term of court the complainant filed motion to have said order vacated, which was denied. This was repeated at the next term of court, before another judge then presiding, which was denied.

In October, 1907, an amended petition was filed in the case pending in the state court, making one Whitlow the trustee, and one Chilton beneficiary, under a mortgage on part of this land existing at the time of the death of David Castleman. Thereafter, on the 29th day of October, 1907, in the Cooper county circuit court, an order was made fixing a special day for the hearing of the partition suit pending in that court, and directing the clerk to notify said Ben T. Castleman thereof, which was done. On the 2d day of November, 1907, said Ben T. Castleman sent an answer to the clerk of the Cooper county circuit court disclaiming any interest in the land, which was filed in said court on the 9th day of November, 1907. That suit proceeded to interlocutory judgment in partition, and on the 19th day of November, 1907, notice was served on Ben T. Castleman by the commissioners appointed therein, advising him of the time of their meeting, to wit, November 25, 1907, to make said partition. The report of the commissioners was made on November 30, 1907, which was confirmed and final judgment rendered therein November 28, 1907. After said assignment in partition, the said Ida May Castleman and Robert H. Castleman were put in possession of their respective portions of the land, which they have proceeded to make conveyances of and put deeds of trust upon.

After all these occurrences, at the March term of this court, 1909, the complainant was permitted to file herein supplemental bill, restating the averments of the original bill, and charging that certain advancements had been made to said Robert H. Castleman in the lifetime of his father, and making indiscriminate charges of irregularities and frauds in the proceedings in the state court leading up to the rendition of judgment, and in the proceedings of the commissioners in making the allotment of the lands, and various other matters not material to the decision of the case.

Said Ben T. Castleman made himself a party defendant to this amended bill, and made answer under oath, doubtless with the mind to make it effective as an admission of all the material allegations of the bill against the defendants.

Thereafter on the 27th of July, 1909, on application of the complainant, the clerk set down the case for hearing on the pleadings, and in this condition of the record the case has been argued and submitted to the court.

Ben T. Castleman and Chester Krumm, for complainant.

W. M. Williams and John Cosgrove, for defendants, except Ben T. Castleman.

PHILIPS, District Judge (after stating the facts as above). Lying at the very threshold of this case is the question: Was not the jurisdiction of the state court over the subject-matter of this controversy exclusive of the jurisdiction of this court? By the state statute (chap-

ter 53, art. 1, p. 1051, vol. 1, Rev. St. 1899 [Ann. St. 1906, pp. 2409-2430]), jurisdiction was conferred upon the circuit court of Cooper county, Mo., where the land is situate, to partition it among the heirs. It is the settled rule, by the highest court of the state in construing the process statute, that the filing of the petition in the clerk's office is the institution of suit. *Moore v. Ruxlow*, 83 Mo. App. 51; *Becker v. Stoeher*, 167 Mo. 306, 66 S. W. 1083; *Holloway v. Holloway*, 103 Mo. 283, 15 S. W. 536; *South Missouri Lumber Co. v. Wright*, 114 Mo. 326, 21 S. W. 811; *Gosline v. Thompson et al.*, 61 Mo. 471.

"A suit in equity is commenced by filing a bill of complaint." *Farmers' Loan & Trust Co. v. Lake Street Elevated R. R. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667.

Jurisdiction, therefore, in partition, over the land in question, had vested in the said Cooper county circuit court before Ben T. Castleman conveyed his interest in the land to the complainant company, and, of course, prior to the institution by it of the suit in this jurisdiction. It is a well-settled rule of law that the jurisdiction of the state court over the res, i. e., the subject-matter of the partition of this land, was exclusive of that of every other court subsequently undertaking to exercise such jurisdiction; this for the obvious reason that as the judgment to be rendered by the court first in time to be effective must operate upon the land itself, the control and possession of which is essential to accomplish the very ends of the proceeding. *Freeman on Co-Tenancy & Par.* (2d Ed.) § 423; *Vowinkel v. Clarke* (C. C.) 162 Fed. 991; *Farmers' Loan & Trust Co. v. Lake Street Elevated R. R. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667.

It is not essential to such exclusive jurisdiction that there should have been any actual seizure or specific lien fixed upon the land. *Farmers' Loan & T. Co. v. Lake St. Ele. R. R. Co.*, supra; *Westfeldt v. North Carolina Mining Co.*, 166 Fed. 706, 92 C. C. A. 378; *Gaylord v. Railroad Co.*, 6 Biss. 286, Fed. Cas. No. 5,284.

So, Judge Sanborn, in *Sullivan v. Algrem*, 160 Fed. 366-369, 87 C. C. A. 318, 321, said:

"The legal custody of specific property by one court of competent jurisdiction withdraws it, so far as necessary to accomplish the purpose of that custody, until that purpose is completely accomplished from the jurisdiction of every other court. The court which first acquires jurisdiction of specific property by the lawful seizure thereof, or by the due commencement of a suit in that court, from which it appears that it is, or will become, necessary to a complete determination of the controversy involved, or to the enforcement of the judgment or decree therein, to seize, charge with a lien, sell, or exercise other like dominion over it, thereby withdraws that property from the jurisdiction of every other court, and entitled the former to retain the control of it requisite to effectuate its judgment or decree in the suit free from the interference of every other tribunal."

Nor does it matter that Ben T. Castleman conveyed his interest in the land to the complainant company before service of process upon him. The conveyance was made *pendente lite*, and the complainant took subject to the judgment after it was rendered in the pending suit. *Becker v. Stoeher*, 167 Mo. 306, 66 S. W. 1083; *Holloway v. Holloway*, 103 Mo. 283, 15 S. W. 536; *Hart v. Steedman*,

98 Mo. 453, 11 S. W. 993; *Farmers' Loan & Trust Co. v. Lake Street Elevated R. R. Co.*, supra.

When the defendants to the original bill of complaint answered, setting up the pendency of the suit in partition in the state court in bar of the suit in this court, the complainant had that plea set down for hearing. On the hearing thereof, Judge Lewis, then sitting, on the suggestion that, non constat, the plaintiff in the suit in the state court might dismiss it, he ordered a stay of the suit in this court until the final disposition of that pending in the state court. After two unsuccessful efforts before other judges to have said order of Judge Lewis' vacated, and after the suit in the state court had proceeded to final judgment, the complainant did not wait for additional plea by the defendants, suggesting to the court that said suit in the state court had so proceeded to final judgment, but evidently impressed with the fact that it could not maintain the suit in this court while the judgment of the state court remained in force, constituting an effectual bar, it filed herein what its counsel terms a "supplemental bill," in which, after restating the facts alleged in the original bill, copying therein the original bill, pleaded matters which in its view would avoid the effect of the proceedings in the state court, and open up the case in the state court after final judgment for relitigation in this jurisdiction. Having obtained leave to file said supplemental bill of complaint, the defendants were required to make answer thereto; in which answer they pleaded in detail the proceedings in the suit in partition in the state court, leading up to and culminating in the final judgment, as authorized thereto by statute, with or without the permission granted by this court in the order aforesaid. The supplemental bill of complaint disclosed on its face that the cause in the state court had proceeded to final judgment. The answer denied specifically each material allegation of the supplemental bill of complaint, which charged the defendants and their counsel with certain irregularities and undue influence in the proceedings in the state court leading to the final judgment, also denying what is claimed to have been an unfair and inequitable division of the property by the commissioners, and the other new matters advanced in the bill.

Counsel for the complainant in his brief challenges the right of the defendants to plead the suit and judgment in the state court in bar, and also to take issue on the allegations of new matter set forth in the bill of complaint, on the ground that such special matter of defense cannot be combined with the plea in bar. I do not so understand the rule of pleading in equity. Story on Equity Pleading, § 784, asserts the rule as follows:

"If there is any charge of fraud, or if other circumstances are shown by the bill, as a ground for relief (against a suit or judgment), the sentence or judgment cannot be pleaded, by a pure plea, in bar of the bill. But the plea must, besides setting up the sentence or judgment, proceed by suitable averments to deny the fraud or other circumstances upon which the sentence or judgment is sought to be impeached; and thus put them in issue by the plea. And it must also be supported by a full answer to the special charges in the bill."

The answer, duly verified, has followed this rule. Without replying to the answer, complainant's counsel had the case set down for

hearing on the pleadings and record. I understand the settled rule in equity to be that, where the complainant thus has the case set down for hearing, the averments of the answer are taken as true; especially so when under oath. It admits all the matters well pleaded, and only raises the question of the legal effect and sufficiency thereof. 1 Rose, Fed. Pro. § 1005; 2 Bates, Fed. Pr. § 680, p. 626.

So, it not only appears on the face of the pleadings that the suit in partition in the state court proceeded to final judgment, but every allegation designed or intended by the supplemental bill to impeach and avoid the validity of the proceedings and judgment in the state court were put in contestation by the answer. Without filing any replication thereto, and without taking any testimony whatever to sustain the controverted averments of the bill of complaint, the complainant had the case set down for hearing, asking for final decree in its favor.

It can make no difference that the judgment of the state court under the state statute was a proceeding at law. Story, in his work on Equity Pleading (section 786), declares that:

"Where a court not only possesses jurisdiction over a particular cause, but that jurisdiction is of a peculiar and exclusive nature, its sentence or decree, *ex directo*, in a matter properly recognizable there, is conclusive, whenever the same matter shall come in question collaterally in any other court, whether it be a court of law or a court of equity."

The bill of complaint charges that the suit in the state court was abandoned, and then proceeds to disclose by the supplemental bill the fact that that suit proceeded to final judgment. The answer, however, denied the allegation of abandonment, and the complainant has furnished no evidence to sustain it. On the contrary, the whole record of the proceedings in the state court, which is before this court filed as an exhibit with depositions taken herein, shows that there was no dismissal or abandonment of the original suit. The record only shows that there was an amendment of the original petition in the state court, making parties defendant the trustee and beneficiary in the deed of trust executed on the lands by David Castleman. This amendment was permissible under the state Code (1 Rev. St. 1899, § 667 [Ann. St. 1906, p. 685]).

It is a well-recognized rule of law that:

"An amendment to a bill of complaint, after a purchase or the acquisition of other rights *pendente lite*, which does not alter the cause of action, does not affect the *lis pendens*, since it relates back to the filing of the original bill." *Gaylord v. Railway Co.*, 6 Biss. 286, Fed. Cas. No. 5,284; 25 Cyc. 1473, and citations.

Furthermore, while proper parties to the suit in partition, such new defendants were not necessary parties. *Stevens v. Stevens*, 172 Mo., loc. cit. 33, 72 S. W. 542.

The complainant, evidently by its bill, seeks to maintain the right to go into a court of equity, notwithstanding the anterior proceedings in the state court, by alleging advancements made to one of the defendants by the common ancestor. Under the state statute, the circuit court of Cooper county, Mo., was vested with full authority to entertain therein jurisdiction respecting such contention as to any ad-

vancement made to the heir. 1 Rev. St. Mo. 1899, § 4378 (Ann. St. 1906, p. 2414); *Gunn v. Thurston*, 130 Mo. 339, 32 S. W. 654; *Green v. Walker*, 99 Mo. 68, 12 S. W. 353.

The complainant, through its president, Ben T. Castleman, having full knowledge of said proceeding in partition in the state court, could have set up the alleged claim respecting the advancement and had the matter litigated therein. Having failed to do so, that does not give the complainant any standing in an independent suit in equity to have such claim asserted. A judgment rendered upon the merits is an absolute bar to a subsequent action. "It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." If any matter competent in defense was "not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence." *Cromwell v. County of Sac*, 94 U. S., loc. cit. 352, 24 L. Ed. 195.

As already shown, if the complainant be regarded as a distinct legal entity, endowed with power to sue and be sued as a corporation, it became a purchaser of the interest in the land of Ben T. Castleman pending the partition suit in the state court, and, as such, was as much bound by the judgment therein as its assignor. It is not to be entertained that this complainant in any sense sustains the relation of an innocent purchaser for value. The answer alleges, and it is not denied by the pleadings, that Ben T. Castleman, with knowledge of the fact that the writ of summons was in the hands of the sheriff of St. Louis county for service on him, concealed himself or avoided service. He went at once to the state of New Jersey and caused to be organized the complainant company, or at least conveyed to it, as the bill of complaint discloses, his interest in the real estate in question as its asset, in consideration of the stock of the company therefor. The corporation was nothing more than a holding corporation for Ben T. Castleman, and in this litigation it is but his alter ego. He elected himself president, going through the usual form of having some local persons holding nominal stock elected directors. Whereupon he at once caused to be instituted this suit in the name of said corporation; evidently seeking thereby to transfer to this jurisdiction the controversy respecting the partition of said lands. The transaction was little more than simulative for jurisdictional purposes. *Miller & Lux v. East Side Canal Co.*, 211 U. S. 293, 29 Sup. Ct. 111, 53 L. Ed. 189; *Southern Realty Co. v. Walker*, 211 U. S. 603, 29 Sup. Ct. 211, 53 L. Ed. 346.

Waiving this, however, on the pleadings and records before this court the request for decree by the complainant should be denied.

The climax in the role played by Ben T. Castleman in this proceeding was reached when to the supplemental bill he made himself a co-defendant. And without waiving answer thereto under oath, he filed answer, under oath, in effect admitting the allegations of what would be regarded as a bill of complaint in his own behalf, and pleaded mat-

ters aliunde, which he conceived would bolster up the suit against the other defendants. Then, without filing replication thereto, had the case set down for hearing on the pleadings and record. It is sufficient to say that this is a farce play, without a moral, not participated in by the real defendants whom he thus sought to compromise. As Ben T. Castleman is a self-assigned defendant in this controversy, and the bill being framed upon the theory that his interests are vested in the complainant, it is not perceived that the latter is entitled to any decree against its other self.

The bill of complaint is dismissed.

PAINTER v. CHICAGO, B. & Q. R. CO. et al.

(Circuit Court, D. Nebraska, Grand Island Division. December 16, 1909.)

1. REMOVAL OF CAUSES (§ 50*)—GROUNDS—DIVERSITY OF CITIZENSHIP—SEPARABLE CONTROVERSY.

That an action for causing death, against a railroad company, and a conductor and brakeman in its employ, is based as against the railroad company on Comp. St. Neb. 1909, c. 72, art. 1, § 3, providing that every railroad company shall be liable for damages inflicted on passengers, while the liability of the employes is for negligence under the common law, does not present a separable controversy so as to entitle the railroad to removal of the cause, under Act March 3, 1875, c. 137, § 2, 18 Stat. 470, as amended by Act March 3, 1887, c. 373, § 1, 24 Stat. 552 and corrected Act August 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 509) providing that when there shall be a controversy between citizens of different states and which can be fully determined as between them, either one or more of the defendants may remove the suit in to the Circuit Court of the United States.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 100; Dec. Dig. § 50.*]

Separable controversy affecting right to remove cause to federal court, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co., 35 C. C. A. 155.]

2. REMOVAL OF CAUSES (§ 50*)—GROUNDS—DIVERSITY OF CITIZENSHIP—SEPARABLE CONTROVERSY.

Since Code Civ. Proc. Neb. § 2, provides that there is but one form of action, distinctions between actions in case and trespass do not determine the question whether a cause of action for death arising in Nebraska presents a separable controversy within the statutes relating to removal of causes to the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 100; Dec. Dig. § 50.*]

3. REMOVAL OF CAUSES (§ 49*)—GROUNDS—DIVERSITY OF CITIZENSHIP—SEPARABLE CONTROVERSY.

Whether separable controversies are presented does not depend on whether the cause of action is a joint one against the defendants.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 95-99; Dec. Dig. § 49.*]

Action by Calvin B. Painter, administrator of the estate of Lloyd Painter, deceased, against the Chicago, Burlington & Quincy Railroad Company and others. Petition for remand of cause to state court. Sustained.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

J. L. Cleary and Fred W. Ashton, for plaintiff.
James E. Kelby and Halleck F. Rose, for defendants.

T. C. MUNGER, District Judge. The plaintiff filed a petition in the state court alleging that, in leaving the coach where he had been riding as a passenger upon the defendant railroad company's train, his intestate fell through the open doorway in the floor of the vestibule of the coach, receiving injuries which caused his death. The petition was filed against the railroad company and the conductor and brakeman in charge of the coach, and alleged that each of the defendants negligently permitted the vestibule to remain open and unprotected, and negligently left this open place unguarded, thereby causing the injuries described. A petition for the removal of the case to this court was filed by the railroad company alleging that there was a separable controversy between the plaintiff and the railroad company. A motion to remand has been submitted. The record discloses that the defendant employes are citizens of Nebraska, as also is the plaintiff. A statute of Nebraska reads as follows (section 3, art. 1, c. 72, Comp. St. Neb.):

"Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice."

The argument of the railroad company is that there is a separable controversy between the railroad company and the plaintiff, because the petition of the plaintiff states a cause of action as against the railroad company under this statute, while the cause of action stated in plaintiff's petition against the conductor and brakeman is one for negligence arising under the common law. The statutes of the United States provide as follows:

"When in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district." Section 2, Act March 3, 1875, c. 137, 18 Stat. 470, as amended by Act March 3, 1887, c. 373, 24 Stat. 552, and corrected Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 509).

The "controversy" defined by this statute is the plaintiff's cause of action, and that cause of action is whatever the plaintiff, in good faith, has declared it to be in his petition. *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U. S. 92-97, 18 Sup. Ct. 264, 42 L. Ed. 673; *Alabama Southern Ry. Co. v. Thompson*, 200 U. S. 206-216, 26 Sup. Ct. 161, 50 L. Ed. 441; *Wecker v. National Enameling & Stamping Co.*, 204 U. S. 176-182, 27 Sup. Ct. 184, 51 L. Ed. 430. The plaintiff's cause of action, if it be founded upon the Nebraska statute cited, is nevertheless an action for the negligence of the railroad company, under the settled construction of this statute by the Supreme Court of Nebraska. *Missouri Pacific Ry. Co. v. Baier*, 37 Neb. 235, 55 N. W. 913;

Union Pacific Ry. Co. v. Porter, 38 Neb. 226, 56 N. W. 808; Chicago, Burlington & Quincy R. R. Co. v. Hague, 48 Neb. 97, 66 N. W. 1000; Fremont, Elkhorn & Mo. Valley R. R. Co. v. French, 48 Neb. 638, 67 N. W. 472; Chicago, Rock Island & Pacific Ry. Co. v. Zernecke, 59 Neb. 689, 82 N. W. 26, 55 L. R. A. 610; Chicago, Rock Island & Pac. Ry. Co. v. Eaton, 59 Neb. 698, 82 N. W. 1119. Because the suit of plaintiff as against the railroad company is founded upon the statute, and as against the employes is founded upon the common law, it does not necessarily follow that the plaintiff has joined separate causes of action. While the facts which must be proved as against the defendants are not the same as to each, this is true of many cases where defendants are properly joined in one action. In the case of a joint trespass or conversion the proof of each defendant's participation in the tort must be established, and such proof is no part of the case as against any other defendant. In an action alleging concurrent negligence of several defendants, as the collision between trains of different railway companies (*Whitcomb v. Smithson*, 175 U. S. 635, 20 Sup. Ct. 248, 44 L. Ed. 303), sufficient proof against one may not establish the liability of the other. Yet because an action is for concurrent negligence, separable controversies are not presented. *Chesapeake & Ohio Ry. Co. v. Dixon*, 179 U. S. 131-139, 21 Sup. Ct. 67, 45 L. Ed. 121. When joint negligence is charged against the master and servant, resulting from the negligent act of the servant, in addition to the proof of negligence of the servant, there must be proved, as against the master, a fact irrelevant to the case against the servant, to wit, the relationship of the servant to the master. An action for such joint negligence does not present a separable controversy. *Alabama Great Southern Ry. Co. v. Thompson*, 200 U. S. 206, 218, 220, 26 Sup. Ct. 161, 50 L. Ed. 441.

It may be true that in the case at bar the plaintiff need not prove acts which amount to negligence at the common law on the part of the railroad company, while as against the employes such proof must be made, but in an action under the common law for concurrent negligence, against two railway companies, causing injury to a passenger by a collision of the train upon which he is riding with the train of another railway, slight negligence is sufficient proof against the one, while lack of ordinary care must be proved as against the other. If a single cause of action is presented (see *Alabama Great Southern Ry. Co. v. Thompson*, 200 U. S. 206-216, 26 Sup. Ct. 161, 50 L. Ed. 441) against the railway company and the engineer running the engine, for a collision of the train with one upon the track, when the negligence claimed arises from excessive speed or failure to give signals, as required by the common law, it can hardly be said that separable controversies exist, when such excessive speed or failure to give signals are alleged to be in violation of some statute regulating such speed and signals.

The conclusion is that separable controversies are not presented by the plaintiff's petition, even though the rights asserted by him are founded on the statute as against one defendant and upon the common law as to the other defendant. Under section 2 of the Nebraska Civil

Code, there is but one form of action, and hence distinctions between actions in case and trespass do not determine the question. The plaintiff alleges but one transaction, and no practical difficulty arises in submitting the issues to the jury, and in many states joint actions are maintainable against the master and servant for the negligence of the servant. 15 Encyc. Pleading & Practice, 560. The question whether separable controversies are presented does not depend upon whether or not the cause of action is a joint one against the defendants. The plaintiff, in good faith, as appears from the record, has endeavored to charge a joint liability arising from the negligence of all of the defendants.

In *Alabama Great Southern Railway Company v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, the plaintiff, as administrator, brought an action against the railway company and its engineer and conductor, charging joint negligence in running over the deceased while he was upon the track of the railway company, causing his death. The railway company removed the action to the United States court. The court says:

"If he (plaintiff) has improperly joined causes of action he may fail in his suit; the question may be raised by answer and the right of the defendant adjudicated. But the question of removability depends upon the state of the pleadings and the record at the time of the application for removal (*Wilson v. Oswego Township*, 151 U. S. 56, 66 [14 Sup. Ct. 259, 38 L. Ed. 70]), and it has been too frequently decided to be now questioned that the plaintiff may elect his own method of attack, and the case which he makes in his declaration, bill, or complaint, that being the only pleading in the case, is to determine the separable character of the controversy for the purpose of deciding the right of removal. * * *

"Does this become a separable controversy within the meaning of the act of Congress because the plaintiff has misconceived his cause of action and had no right to prosecute the defendants jointly? We think, in the light of the adjudication above cited from this court, it does not. Upon the face of the complaint, the only pleading filed in the case, the action is joint. It may be that the state court will hold it not to be so. It may be, which we are not called upon to decide now, that this court would so determine if the matter shall be presented in a case of which it has jurisdiction. But this does not change the character of the action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal. The case cannot be removed unless it is one which presents a separable controversy wholly between citizens of different states. In determining this question the law looks to the case made in the pleadings, and determines whether the state court shall be required to surrender its jurisdiction to the federal court."

In the case of *Wecker v. National Enameling & Stamping Co.*, 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, the plaintiff brought an action against the defendant company and two employés, only one of whom was served with process, and the defendant company removed the action into the United States court. The negligence charged against the employé was in superintending and planning the equipment and place to work which plaintiff was required to use and in failing to instruct the plaintiff as to his duties. The court expressly reaffirmed the decision in *Alabama Southern Railway Co. v. Thompson*, cited above, and in the opinion said:

"In that case it was held that, upon a question of removal, where a plaintiff, in good faith, prosecuted his suit as upon a joint cause of action, and the re-

moval was sought when the complaint was the only pleading in the case, the action as therein stated was the test of removability, and if that was joint in character, and there was no showing of a want of good faith of the plaintiff, no separable controversy was presented with a nonresident defendant, joined with a citizen of the state; in other words, if the plaintiff had, in good faith, elected to make a joint cause of action, the question of proper joinder is not to be tried in the removal proceedings, and that, however that might turn out upon the merits, for the purpose of removal the case must be held to be that which the plaintiff has stated in setting forth his cause of action. * * * Much discussion is had in this case as to whether the alleged cause of action is joint or several in its character, and whether the corporation and Wettengel could be jointly held responsible to the plaintiff upon the allegations of the complaint, but we do not deem it necessary to determine that question. Upon the authority of the Alabama Great Southern Case, *supra*, and the preceding cases in this court which are cited and applied in the opinion in that case, if the complaint is filed in good faith, the cause of action, for the purposes of removal, may be deemed to be that which the plaintiff has undertaken to make it. * * *

The plaintiff in this case has elected to make his attack by charging in his petition the concurrent negligence of the defendants, and, in the language of the case last cited, "whether the alleged cause of action is joint or several in its character, and whether the corporation and (employés) could be jointly held responsible to the plaintiff upon the allegations of the complaint," is not material at this time.

Counsel for the railroad company have cited as applicable to this case the decisions in *Chicago, R. I. & P. Ry. Co. v. Stepp* (C. C.) 151 Fed. 908, and *Lockard v. St. Louis & S. F. R. Co.* (C. C.) 167 Fed. 675, but each of these cases proceeded upon the theory that the cause of action stated against the employé as well as against the corporation was based upon a statute, whereas no cause of action existed under such statute against the employé, and therefore there was but one controversy presented, to wit, the plaintiff's cause of action against the corporation. In the first case it is said:

"It is conceded on argument by counsel for respondents that the joint liability of Louis Collier, the engineer, is predicated of the amendatory act of the Legislature. * * * If this statute does not embrace the engineer in charge of the locomotive, as the servant of the railway company, it is further conceded that there is no joint liability of the company and said Collier, and consequently the case was removable on the petition of the former." Pages 910, 911, of 151 Fed.

In the second case cited it was held that no cause of action existed under the common law against the employé for the acts alleged in the petition and "the cause of action given by the statute to which I have referred is against the railroad company alone, and not against its employé." Pages 676, 677, of 167 Fed. In the case now before the court it is conceded that there is an action against the employés for the acts alleged, at the common law, and one against the railroad company, under the statute of this state.

For the reasons expressed, the motion to remand will be sustained.

In re BAYLEY.

(District Court, W. D. Pennsylvania, July 31, 1909.)

1. LANDLORD AND TENANT (§ 80*)—ASSIGNMENT OR SUBLEASE—CONSTRUCTION.

Where the lessee of a hotel executed what purported to be a sublease for the entire remaining term for the same rent, providing that receipts for installments made to the original landlord should be received in discharge of the sublessee's obligation under the lease, the original lessee retained no reversion, and the sublease would be regarded as an assignment of the term, and not as a sublease, though it expressly provided that it was intended to establish the relation of landlord and tenant between the parties thereto with all the rights and liabilities attached to that relation.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 254-257; Dec. Dig. § 80.*]

2. BANKRUPTCY (§ 350*)—CLAIMS AGAINST ESTATE—LANDLORD'S LIEN—PRIORITY.

The lien of a landlord on personal property, which is liable to distress, will be preserved in bankruptcy proceedings as against the proceeds of such property in priority to the general expense of the administration of the estate, subject only to the direct expense incurred in realizing the fund liable to the lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 537; Dec. Dig. § 350.*]

3. LANDLORD AND TENANT (§ 267*)—SUBLEASE OR ASSIGNMENT—EFFECT—DISTRESS.

In case of a sublease, the lessor by operation of law has the right of distress by reason of the reversion remaining in him after the termination of the sublease; whereas, in case of an assignment, the lessor or assignor, having parted with all his estate, does not possess the right of distress unless expressly reserved in the deed of assignment.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1081; Dec. Dig. § 267.*]

4. LANDLORD AND TENANT (§ 267*)—ASSIGNMENT OF LEASE—DISTRESS BY ASSIGNOR.

Where the assignment of a lease provided that, in case of the assignee's failure to pay rent, the assignor may declare a forfeiture and re-enter, and also contained a waiver of the exemption law on any warrant of distress that might be issued, it did not include an implied right of distress in the assignor.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1080, 1081; Dec. Dig. § 267.*]

5. BANKRUPTCY (§ 249*)—ADMINISTRATION OF ESTATE—CONTINUANCE OF BANKRUPT'S BUSINESS—MISTAKE OF JUDGMENT—TRUSTEE'S LIABILITY.

Where, on the bankruptcy of the assignee of a hotel lease, the assignor, on the appointment of a receiver, petitioned the court to authorize the receiver to continue in the operation of the hotel because it would be to the interest of the estate that it should be sold as a going concern, and, though the assignor objected to the continued operation of the hotel, he took no immediate steps to prevent such continuance, nor until considerable loss had been sustained by the trustee, the latter was chargeable only as for a mistake of judgment, and was therefore not bound personally to make good any loss.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 347; Dec. Dig. § 249.*]

In the matter of bankruptcy proceedings against Howard Bayley. On exceptions to trustee's account. Dismissed, and report confirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The following is the opinion of Blair, Referee.

On September 26, 1908, the trustee in the above-entitled case filed its second and final account, showing a balance due the trustee of \$267.83. To said account exceptions were filed on behalf of William Witherow, alleging that the accountant should be surcharged with: First, the sum of \$4,325, the amount received by the trustee from the sale of the personal property in the hotel belonging to the bankrupt; and, second, that it should be further surcharged with the sum of \$28,309.84 as rent due exceptant during its administration of the estate. After said exceptions were filed, a hearing or hearings were held before the referee at his office in the city of Pittsburgh, and certain testimony and evidence was taken, a true and correct transcript of which is filed of record in the case.

The questions raised by the exceptions are, briefly: First, whether the claim of the landlord for rent due at the time of the filing of the petition, and undisputedly amounting to the sum of \$14,000, should not be paid out of the proceeds of the sale of the personal property on the premises of the bankrupt in priority to the expense of carrying on the hotel during the bankruptcy proceedings; and, second, whether the trustee should not also be ordered to pay the rent of the premises for the year during which the trustee occupied the hotel in the administration of the estate.

The facts in the case the referee finds from the testimony and evidence to be as follows:

That in August, 1907, the accountant, the South Side Trust Company, of the City of Pittsburgh, was duly appointed receiver of the estate of Howard Bayley, the bankrupt in this case. At the time of the filing of the petition, the bankrupt was in possession of a hotel in the city of Pittsburgh, known as the "Hotel Duquesne," under articles of agreement with William Witherow, the exceptant in this case. Witherow was the lessee from Andrew W. Mellon of the hotel under a lease for the term of 10 years from April 1, 1904, to wit, until April 1, 1914, the terms of which, so far as material to the present controversy, will be more fully set forth later in this report.

The articles of agreement between Witherow and Howard Bayley, the bankrupt, are dated the 22d day of June, 1906, and recite "an agreement of the parties whereby Witherow agreed to sell to Bayley the hotel business, known as the Hotel Duquesne, and to 'sublet' to Bayley the premises known as the Hotel Duquesne from A. W. Mellon for the remainder of the term of said lease, subject to all the provisions thereof, and upon the same terms and conditions and for the same rental as herein provided"; a copy of said Mellon lease being attached to the agreement. The agreement then proceeds that: "For the purpose of carrying into effect the above-recited contract between the parties hereto (that is, Witherow and Bayley), except in so far as the terms of the Mellon lease may herein be expressly modified or supplemented, and for the purpose of establishing between the parties hereto the relation of landlord and tenant, with all the rights and liabilities attached to that relation at law, in equity and by statute, the first party (Witherow) hereby sublets to the second party (Bayley) from the 25th day of June, 1906, for and during the term of seven (7) years, nine (9) months and seven (7) days, that is, until April 1, 1914, reserving as rent the several sums hereinafter covenanted to be paid by the second party," the property known as the "Hotel Duquesne."

The agreement further provides for the assumption by Bayley, the tenant, of Witherow's lease to certain tenants of part of the property, and also for the substitution of Bayley to all the terms and conditions of the lease from Mellon to Witherow. The covenant to pay rent is as follows: "In consideration whereof the second party (Bayley) for himself, etc., covenants and agreed that he will pay to the first party (Witherow) as rent the sum of \$232,500.00 in the manner following: \$2,500.00 on the first day of July, 1906, and the sum of \$2,500.00 on the first day of each and every month following the date last aforesaid until the whole amount of said rent is paid, making actual payment, however, of the several sums to A. W. Mellon, whose receipts delivered to the first party within five (5) days after due and prompt payment of each installment of rent shall be complete discharge of the second party from his liability from said agreement."

The said articles of agreement also provide as follows: "And said second party (Bayley) for himself, etc., hereby waives the benefit of all laws and acts of assembly exempting property of any amount or value from levy and sale on execution or distress for rent upon any landlord's warrant that may be issued, or upon any execution of any judgment that may be recovered for rent to become due under this lease." The agreement further provides that, in case the rent should be in arrear, Mellon might, at his option, declare a forfeiture, and after 15 days' notice re-enter and repossess himself of the premises. The articles of agreement contain no express reservation of the right of distress in Mr. Witherow.

It is not disputed that at the time of the filing of the petition there was due from Bayley as rent of the premises the sum of \$14,000. And it is also undisputed that the personal property on the premises, consisting of the furnishings of the hotel, was sold by the trustee for the sum of \$4,325, which the trustee has applied to the expenses of managing the hotel while the trustee continued its operation.

Upon the foregoing facts the learned counsel for the exceptant bases his first exception, and claims that the exceptant, William Witherow, is entitled to have devoted to the payment of the rent due at the time of the filing of the petition, to wit, the sum of \$14,000, the proceeds of the sale of the personal property, namely, the sum of \$4,325, in lieu of devoting said last-mentioned sum to the expense of maintaining the hotel. The learned counsel based the exceptant's claim upon the assertion that the personal property sold, as above stated is liable to a lien in favor of Mr. Witherow, as landlord, which lien was entitled to be paid in preference to the expense of keeping the hotel in operation.

In support of their proposition they cite Barnes' Appeal, 76 Pa. 50; In re Morris (D. C.) 19 Am. Bankr. R. 781, 159 Fed. 591; In re Mitchell (D. C.) 8 Am. Bankr. R. 324, 116 Fed. 87, and other cases, in which it has been held that the lien of a landlord upon personal property on the leased premises "liable to distress" is entitled to priority in payment under the law of Pennsylvania. It is undoubtedly true that the lien of the landlord upon personal property which is "liable to distress" will be preserved as against the proceeds of such personal property in priority to the general expense of the administration of the estate, and subject only to the direct expense incurred in realizing the fund liable to said lien. But the question in this case is whether, under the agreement between Mr. Witherow and Mr. Bayley, the bankrupt, the personal property, the proceeds of which are now here for distribution, is liable to distress by Mr. Witherow.

Mr. Witherow was the lessee from Mr. Mellon of the premises under the lease running until April 1, 1914, and by the articles of agreement already referred to and quoted his entire interest in said hotel is transferred to Mr. Bayley, who is now the bankrupt, and the question is now whether the articles of agreement between Mr. Witherow and Mr. Bayley were a lease or sublease by Mr. Witherow to Mr. Bayley, or an assignment of the term.

The referee, after the most careful consideration of the agreement and all its terms, has reached the conclusion that the paper must be regarded as an assignment of Witherow's lease with Mellon, and not as a lease or sublease from Witherow to Bayley. It is true, as already appears from the quotations from the articles of agreement already made, that the parties called it a sublease, and especially recite that it is executed for the purpose of establishing the relation of landlord and tenant, with all the rights and liabilities resulting from that relation in law, equity, or by statute; but it is a cardinal rule in the construction of papers that it is the paper itself which determines its character, and not what the parties may have chosen to designate as its character. In other words, if the agreement is in legal effect an assignment of the lease, it must be so regarded, although the parties themselves may call it something else, and may even recite that it is their intention to create something else. Where the lessee of land transfers all of his interest therein, it is an assignment, and not a sublease thereof. A lease or a sublease must, in legal contemplation, leave in the lessor or sublessor some estate in reversion. This is implied in every lease or sublease, and if the lessee transfers all his estate without reserving any reversion to himself the transfer is an assignment, and not a lease or sublease. Now, the difference between the lease or sublease and an

assignment, so far as the right of distress is concerned, is this: That in the case of a lease or sublease the lessor has by operation of law the right of distress by reason of the reversion remaining in him after the determination of the lease; whereas, in the case of an assignment the lessor or assignor, having parted with all his estate in the land, does not possess the right of distress, unless the right of distress is reserved to him in the deed of assignment.

Guided by these rules, the referee is of the opinion that the agreement between Witherow and Bayley was an assignment, and the only question remaining, therefore, is whether the right of distress is, by said agreement, reserved to Mr. Witherow. The article of agreement contains no express reservation of the right of distress. It provides that in case of the failure to pay rent Mr. Witherow may declare a forfeiture and re-enter. It then provides for the waiver of the exemption law upon any warrant of distress that may be issued, etc., and it is argued that this implies the reservation of the right to issue such landlord's warrant; but the referee does not so construe this agreement. While it is true the agreement contains an understanding on the part of Bayley to pay a rent equal to the rent due Mr. Mellon under his lease with Witherow, yet the lease itself provides for the payment of this rent primarily to Mr. Mellon, and the waiver of the exemption clause, in the judgment of the referee, is to be construed as applicable to any warrant of distress, including, of course, any which may be issued by Mr. Mellon, the landlord, rather than as creating a right of distress in Mr. Witherow, which could have been clearly and unambiguously created, as is done every day, if it had been the clear intention to create a right of distress in Mr. Witherow.

For the reason, first, that the article of agreement between Witherow and Bayley transferred the entire interest of Witherow in the land for the entire term or terms identical with the terms of Mr. Witherow's lease from Mr. Mellon, and are therefore in law an assignment of Witherow's lease, no matter what the article of agreement chose to call itself, and, second, that in such assignment there is no reservation of the right of distress in Mr. Witherow, the referee is of the opinion that the personal property in the Hotel Duquesne was not at the time of the filing of the petition liable to the distress warrant by Mr. Witherow, and that Mr. Witherow's claim, based on such assumed liability, cannot be sustained.

The second exception, or class of exceptions, filed on behalf of Mr. Witherow, claims or claim that the trustees should be surcharged with the rent accruing during the maintenance of the hotel by the receiver and trustee, upon the ground that the account as filed prefers the creditors for supplies and wages during the operation of the hotel to the exclusion of the landlord, who is thus made not to share the losses incurred in the operation of the hotel, but to sustain them.

In addition to the facts already found in this report, it appears that, almost immediately upon the appointment of the receiver, the bankruptcy court, on the petition of Mr. Witherow, authorized the receiver to continue the operation of the hotel upon averments contained in Mr. Witherow's petition that it would be for the interest of the estate that the hotel should be kept open and the same sold as a going concern, rather than that it should be shut up.

In pursuance of said order of court, the receiver and trustee afterwards continued to operate the hotel at a loss, as shown by the account.

It appears that, shortly after the receiver commenced the operation of the hotel, Mr. Witherow called upon Mr. Page in regard to the disposition of the property. There is some difference in the testimony introduced on behalf of Mr. Witherow and the trustee as to exactly what took place at these two interviews; but it appears to be clear that they did not altogether agree as to the advisability of operating the hotel, Mr. Witherow being of the opinion that it could not be successfully operated, while, on the contrary, Mr. Page, the executive officer of the receiver and trustee, being of the opinion that it could. Mr. Witherow states that at these interviews he protested against the continued operation of the hotel. Mr. Page says that, while it is true Mr. Witherow differed with him as to the wisdom of continuing the operation, Mr. Witherow's objection was not so much a protest against the continued operation of the hotel, but was in the line of urging its speedy sale. Mr. Page further states that the receiver and trustee were heartily in favor of the sale and

disposition of the property at the earliest possible moment, and that it made every effort to accomplish such a sale; that several sales were advertised, and on two or three occasions the property actually submitted to bidders; but that no reasonable bid was ever received for the property prior to the sale which resulted in the funds now for distribution.

It further appears that in ——— Mr. Witherow retained John C. Slack, Esq., as his counsel in place of Messrs. Scandrett & Barnett, who up to that time had acted for both Mr. Witherow and for the trustee, and thereupon Mr. Slack filed a petition asking leave for Mr. Witherow to proceed on his landlord's warrant to a sale of the personal property. This petition was refused, and thereupon active negotiations ensued, which resulted in the sale of the property to Mr. Witherow.

In these circumstances the learned counsel for Mr. Witherow urged that, the operation of the hotel having been carried on against his will, he should not now be compelled to lose his rent, and that, the trustee having exercised its judgment in favor of operating the hotel, it should suffer the consequences in being obliged to pay the rent to Mr. Witherow.

The referee has examined the testimony and all the evidence presented in the case with the utmost care, and after full consideration has reached the conclusion that this contention on behalf of Mr. Witherow cannot be sustained. While it is undoubtedly true that the trustee's hopes and expectations as to the results of the operation of the hotel have been disappointed in the event, a mere mistake of judgment, without more, is, of course, insufficient to involve the trustee in personal liability. While it is clear from the testimony of Mr. Witherow that he did not approve the policy of continuing the operation of the hotel, and probably so expressed himself to the trustee, the referee is of the opinion that, when he found the trustee differed with him upon this subject, it was his duty to take steps to protect his rights, or at least to unequivocally notify the trustee of the consequences which he proposed to fasten upon the trustee.

The referee is of the opinion that it was the duty of Mr. Witherow, in case he was unwilling that the operation of the hotel should be continued, for the benefit of himself and creditors, to have taken steps to have prevented such continuance, as was done in 1908, when his petition above mentioned was filed, resulting eventually in the sale of the property.

In this case, while the hopes and expectations of the trustee have been disappointed, as already stated, the matter in all the circumstances of the case was a matter of judgment merely—a mistake which should not and does not render the trustee liable to make good the loss resulting from such mistaken judgment.

On the whole case, the referee is of the opinion that the exceptions filed on behalf of Mr. Witherow should be dismissed, and the account of the trustee confirmed.

Thomas Patterson, John C. Slack, O. S. Richardson, and W. D. N. Rodgers, for exceptant.

W. S. Thomas and J. M. Shields, for accountant.

PER CURIAM. Exceptions to referee's report dismissed, and report confirmed.

CATTERLIN v. VONEY et al.

(Circuit Court, D. Oregon. March 21, 1910.)

No. 3,099.

1. CONTRACTS (§ 278*)—BREACH—RECOVERY.

Where complainant was in default in the performance of his obligations under a mine developing contract, he was not entitled to sue the other party thereon for an accounting.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1207-1215; Dec. Dig. § 278.*]

2. TRUSTS (§ 145*)—DEFAULT OF TRUSTEE—OBLIGATIONS OF CESTUIS QUE TRUST INTER SE.

Where a contract for the development of a mine provided that certain money should be paid to W. by a firm to be checked out by W. on complainant's orders, W. was trustee of the fund for both complainant and the firm, and hence the firm was not liable to complainant for W.'s failure to check out the fund as required.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 145.*]

3. DAMAGES (§ 118*)—BREACH OF CONTRACT.

Where the only relief provided for the second party to a mine developing contract for C.'s failure to make a dividend producing mine out of the property in question was the forfeiture of C.'s stock, such forfeiture constituted their entire measure of damages for C.'s default, both as against him and the mining company.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 118.*]

In Equity. Suit by F. J. Catterlin against Matthew Voney and others for an accounting, in which the Williamsburg Mining Company was made a party defendant. After answering the bill, defendants filed an alleged cross-bill, and subsequently, one White having obtained judgment against the mining company, Voney, Hamilton & Walker sue to enjoin him from sequestering the property of the mining company. Bills dismissed.

J. F. Boothe, for plaintiff.

D. J. Haynes and Lewis C. Garrigus, for Voney, Hamilton & Walker.

J. N. Brown, for Williamsburg Mining Company.

WOLVERTON, District Judge. The Williamsburg Mining Company is an incorporation under the laws of the state of Oregon, having a capital stock of \$500,000 divided into 500,000 shares, with a par value of \$1 per share. On February 14, 1906, F. J. Catterlin, who claimed to be the owner of 251,000 shares of the capital stock of this concern, entered into an agreement with Voney, Hamilton & Walker, of St. Louis, Mo., a firm consisting of Matthew Voney, Charles E. Hamilton, and James M. Walker.

The agreement purports to be tripartite between Catterlin, of the first part, Voney, Hamilton & Walker, of the second part, and the St. Louis Trust Company, of the third part. By the terms and stipulations of the agreement Catterlin grants unto Voney, Hamilton & Walker the exclusive right, for a period extending to March 14, 1906,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to sell, at not less than 25 cents per share, 150,000 shares of the stock of the mining company then owned by Catterlin, but by him, under said agreement, set aside for the use and benefit of all the stockholders of the concern; the condition being that, after \$12,000 has been realized by the sale of 48,000 shares for cash, the balance of the 150,000 shares, to wit, 102,000 shares, shall be at once surrendered to Voney, Hamilton & Walker, and the title thereof shall vest in them. The right granted to sell this stock is termed an "option," and it is further agreed that, concurrently with the acceptance of the option by Voney, Hamilton & Walker, they shall produce a buyer or buyers for not less than 12,000 shares of said stock, together with the purchase price of \$3,000 in cash, at the depositary designated; that Catterlin shall deposit the 150,000 shares of stock with such depositary, and, further to secure his faithful performance of the stipulations on his part in the event of the acceptance of the option by Voney, Hamilton & Walker, that he will, within three days after such acceptance, deposit with said depositary 101,000 other shares of the stock of said mining company, the same being also his individual property.

Catterlin further agrees that, in the event the option is accepted, said \$3,000 shall be by him, within 30 days after the receipt of the same, invested to secure the equipment of the mine and mill of said mining company with a concentrator; that with the aid of said concentrator said mine will be made to produce, for six months after April 12, 1906, a monthly dividend of one-half per cent. upon the capital stock of the company, the requisite ore being available for the purpose; and that he will, within 30 days after the receipt by him in Portland, Or., of the said sum of \$3,000, have in operation said concentrator, and demonstrate by the clean-up at the end of the first month the ability of said mine to produce and yield to the stockholders for the period of six months thereafter a monthly dividend of not less than one-half per cent. on the capital stock, or that he will forfeit said block of 101,000 shares to Voney, Hamilton & Walker, if the sworn statement required to be made on or before April 15, 1906, by the duly accredited representative of both parties does not show that said mine is a dividend producer as stipulated. Catterlin further agrees that he will refrain for six months after the acceptance of the option from presenting against the mining company certain claims owned and controlled by him, aggregating about \$9,000, and only in the event that it is shown that said mine is a dividend producer as stipulated shall the depositary place to the credit of Catterlin, in the Merchants' National Bank at Portland, Or., all sums received, and as fast as received, up to the said sum of \$9,000, for stock sold subsequent to the sale of the 12,000 shares, and that, as soon as any money is received by Catterlin to the credit of said \$9,000, he will apply the same in payment of the indebtedness specified of said mining company; that, in case it is found that said mine is not a dividend producer as stipulated, then the depositary shall return to the several purchasers of stock the proceeds of such sales, upon surrender of the stock, and the title and right of possession of such stock so surrendered shall at once vest in Catterlin.

Catterlin further agrees that six days before the last date of said contingent acceptance of the option he will cause the directors of the mining company to bind themselves to produce monthly sworn statements touching the expenses and profits of said mine for a period of six months after the installment of the concentrator, and that if, after six months of the operation of said mine, the same is demonstrated to be a failure as a required dividend producer, he will forfeit to Voney, Hamilton & Walker not only said block of 101,000 shares, but also the unsold portion of the block of 150,000 shares of stock, reserving, however, the right to redeem said stock by returning, within 30 days after conclusive demonstration of failure, the purchase price of all stock actually sold and paid for at the office of said depository. It is further agreed that if, after six months' operation of the concentrator, the said mine is a dividend producer as required, then Catterlin is entitled to a return of the block of 101,000 shares of stock and the unsold portion of the subject-matter of the option, plus accrued dividends on both. A board of arbitrators is then provided, for determining whether, after due trial, the mine has been shown to be a dividend producer as stipulated, in case of a disagreement upon the subject.

If the option is not accepted prior to March 14, 1906, then all stock deposited by Catterlin is to be returned to him.

The depository named in the agreement refused to accept the obligations imposed upon it, or to become in any way bound by the agreement.

On April 25, 1906, Voney, Hamilton & Walker, acting through Walker, and Catterlin modified such agreement, by stipulating that the parties would accept any other reputable trust company in St. Louis as a depository under the agreement; that the time allowed for the erection of the concentrator and the commencement of operations should be extended 30 days; that the time for the first report to be made—April 25, 1906—and the time within which Voney, Hamilton & Walker were to make sale of the balance of the 48,000 shares of stock were extended accordingly; that the time within which Catterlin agreed that the mine should be a dividend producer should be six months after the time fixed by the modified agreement for the commencement of the operation of the mine; and that the claims held by Catterlin were not to be prosecuted in the meantime. It was further stipulated that the sum of \$3,000, less the sum of \$250 then paid to Catterlin, should be sent to James M. Walker, who was authorized to check the same out to the proper officer of the mining company as the same should be needed in payment for the concentrator and improvements at the mine; the receipt of such officer to be a satisfactory voucher to Voney, Hamilton & Walker for such payments, Catterlin to furnish Walker from time to time with statements of amounts of money required, and Walker to honor such statements by making payments as stipulated without unnecessary delay.

This cause originated by the complainant F. J. Catterlin filing a suit in equity in the state court against Voney, Hamilton & Walker for an accounting, and for the recovery of the sum of \$943.53, which

sum it is alleged would be found due from the defendants to complainant upon such accounting. The suit is based upon the contract and modification thereof, as above set out. A removal of the cause was had to this court. Subsequently the Williamsburg Mining Company was made a party defendant, and the bill of complaint was amended accordingly. The defendants, after answering the bill, filed what they term a "cross-bill," the arrangement of the parties being the same as in the original bill, whereby Voney, Hamilton & Walker set up the agreement between the firm and Catterlin, and seek a recovery of certain moneys expended upon the mine in providing equipment, machinery, etc., and for labor and outlay connected therewith, amounting to the sum of \$2,632.11. Recovery is also sought against the Williamsburg Mining Company.

Somewhat later one H. White obtained a judgment in the state court against the mining company for \$11,550, and, he being about to enforce such judgment by execution, Voney, Hamilton & Walker instituted a suit in this court to enjoin him from sequestering the property of the mining company; said firm alleging that whatever rights White might have against said mining company were subordinate to their demand as shown by their cross-bill to the suit of Catterlin.

Eventually all these proceedings were consolidated. The evidence has been taken before a special examiner, and the cause has been submitted after argument of counsel upon such evidence.

On April 11, 1906, the board of directors of the mining company held a meeting, and, among other things, elected James M. Walker a director of the company. The agreement between Voney, Hamilton & Walker and Catterlin was brought to the attention of the board, and Catterlin was authorized to use the \$3,000 to be raised by a sale, through Voney, Hamilton & Walker, of 12,000 shares of the capital stock of the company, and all other moneys that might be or become available by reason of said agreement, in the installation of a concentrator and the making of such other improvements as to him, acting in conjunction with Walker, might seem wise. The board, however, disclaimed any purpose or intention of making the mining company a party to the agreement. It is shown by the testimony, and is even admitted by all parties to the controversy, that, while a concentrator was purchased and put in operation at the mine, and other equipment and improvements were added, and much money was expended in operating the mine and the concentrator, Catterlin was wholly unable to make of the mine a dividend producer, as he agreed to do under the terms of the agreement with Voney, Hamilton & Walker. Indeed, no profit of any kind was ever derived from the operation of the mine in pursuance thereof, so that Catterlin utterly failed to perform his part of the agreement in that respect.

By the modified agreement, it will be seen that Voney, Hamilton & Walker were to forward the \$3,000 to be derived from the sale of the first 12,000 shares of stock, less \$250 theretofore paid to Catterlin, to Walker, who was charged with the duty of checking the same out as needed for making the necessary improvements upon the mine. It is alleged by Voney, Hamilton & Walker that, in pursuance of such

arrangement, said firm paid out for such improvements and labor attending the work \$2,632.11, and that, by reason of Catterlin's failure to make of the mine a dividend producer, they are entitled to recover the same from Catterlin and the mining company. By a letter of date August 2, 1906, Catterlin, acknowledging his default, agreed to refund by August 15th whatever portion of the \$3,000 was expended by him, and to leave the question of compensation to which Voney, Hamilton & Walker were entitled for their services in selling the stock, and the rate of interest to be allowed buyers on return of stock sold them by Voney, Hamilton & Walker, to a board of arbitrators; and that, in case he was unable to refund the money as agreed, he would forfeit his stock as per the original agreement, without defense or cost of expense on the part of Voney, Hamilton & Walker. Catterlin testifies that Voney, Hamilton & Walker answered this letter, through their attorney, to the effect that they would accept the money paid, with the additional expenses they claimed they were out and the commission, namely, \$2,040. It is not clear what is meant by this answer. But I take it that Voney, Hamilton & Walker were willing to accept a refund of the money paid out by them, together with their commissions claimed for the sale of such stock, and this is the theory upon which they base their cross-bill.

I am satisfied that Walker was constituted a manager along with Catterlin to direct the improvements to be made upon the mine and the work to be done in working the mine and reducing the ores. This I deduce from the action of the board of directors of the mining company in electing Walker a director, the modified agreement whereby Walker was made the custodian of the fund, with authority to check the same out as needed, and the testimony of Catterlin saying that Walker had charge of the mine.

I conclude that the complainant Catterlin is not entitled to recover, because: First, it is admitted that he did not perform his part of the agreement in making of the mine a dividend producer, as he stipulated he would do; and, second, Walker was as much a trustee of the fund in question for Catterlin as he was for Voney, Hamilton & Walker, and a refusal or failure of Walker to check upon the fund in his hands would not render Voney, Hamilton & Walker liable to Catterlin.

It seems to be suggested that the only relief provided for on behalf of Voney, Hamilton & Walker, in case of a breach of the agreement on the part of Catterlin, was the forfeiture to them of Catterlin's stock, and hence that Catterlin, by forfeiting his stock, would be entitled to recover what money was obtained for the sale of stock under the so-called option. But it is a rule of law that a party to a contract is never entitled to recover while he himself is in default, and this is Catterlin's condition. Nor do I think that Voney, Hamilton & Walker are entitled to relief against Catterlin or the mine, because, first, they have agreed, in effect, that a forfeiture to them of Catterlin's stock shall constitute the measure of their damages. The agreement evidences a venture on the part of Voney, Hamilton & Walker, as well as on the part of Catterlin, to exploit the mine; they being willing to rely upon the undertaking of Catterlin to make the mine

a dividend producer, and, if he did not, then to accept a forfeiture of Catterlin's stock in discharge of his default. The letter of August 2d, instead of being an agreement to refund, strengthens this view. It constitutes but an offer to refund, along with a proposition to submit the matter of compensation of Voney, Hamilton & Walker for sale of stock, and the interest question to arbitration. This offer was never accepted on the part of Voney, Hamilton & Walker, and hence never ripened into an agreement. It is the latter clause of this offer that emphasizes the foregoing construction of the original agreement, reading as follows:

"If I am unable to refund the money as per contract will surrender stock held by you as forfeited as per contract without defense or any expense whatever to you."

This letter was directed to C. E. Hamilton, it is true; but it was designed for the firm, and has the same effect as if so directed. This last clause in the offer was but a reaffirmance of the condition of the original agreement, to remain in effect in case the offer was not accepted by Voney, Hamilton & Walker, or Catterlin himself was not able to refund by the date designated.

It follows from these considerations that both the bill of complaint and the cross-bill must be dismissed. So, also, will Voney, Hamilton & Walker's bill of complaint against White for an injunction be dismissed. Voney, Hamilton & Walker are entitled to their costs and disbursements against Catterlin. The suits having been consolidated, no costs will be allowed to White.

In re TRACY & CO.

Ex parte TRACY.

(District Court, S. D. New York. February 28, 1910.)

1. COURTS (§ 376*)—UNITED STATES COURTS—STATE LAWS.

On an application to a court of bankruptcy for an injunction and order to prevent a county district attorney from using, and a trustee in bankruptcy from permitting the use, of books of the bankrupt in criminal proceedings, no question arises involving the Constitution of the state; the jurisdiction of the court depending on the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) and the Constitution of the United States.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 376.*]

2. CONSTITUTIONAL LAW (§§ 206, 255*)—PRIVILEGE OF WITNESS—EXAMINATION.

The provisions of the New York state Constitution in regard to self-incrimination by witnesses do not raise any question under Const. U. S. Amend. 14.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. §§ 206, 255.*]

3. BANKRUPTCY (§ 238*)—EXAMINATION—PRIVILEGE—WAIVER.

Where a bankrupt, on the commencement of the bankruptcy proceedings, surrenders his books to the receiver without raising the question of privilege as to their use against him, so far as it is a proper use of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

books by the trustee in bankruptcy to allow prosecuting authorities to use them, the bankrupt is chargeable with knowledge of that right, and his surrender of the books waives his privilege.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 238.*]

4. BANKRUPTCY (§ 242*)—POWERS AND DUTIES OF TRUSTEE—USE OF BOOKS OF BANKRUPT.

Where a bankrupt surrenders his books to a receiver appointed at the commencement of the bankruptcy proceedings, who transfers them to the trustee in bankruptcy, it is proper for the trustee to permit their use by state prosecuting authorities against the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 242.*]

5. BANKRUPTCY (§ 242*)—USE OF BANKRUPT'S BOOKS—STATUTORY PROVISIONS.

Bankr. Act July 1, 1898, c. 541, § 7, subd. 9, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3425), requiring the bankrupt to submit to an examination, but providing that no testimony given by him shall be offered in evidence against him in any criminal proceeding, so far as it affects the right of the trustee to permit the use of books of the bankrupt by state prosecuting authorities, at most raises a question of competency of the evidence in the state court.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 242.*]

In the matter of the bankruptcy of Tracy & Co. Application by William W. Tracy for injunction and order to the district attorney of New York county and the trustee in bankruptcy. Denied.

This is an application made to the bankruptcy court for an order enjoining the district attorney of New York county and his assistants from offering in evidence any books of the petitioner, an adjudicated bankrupt, before the grand jury or in any criminal cause, or from taking copies from such books, or from retaining possession of such books, directing them to turn the same back to the trustee in bankruptcy, directing the trustee to take possession of the books, and not to deliver them to the district attorney, enjoining him from permitting them to inspect, or take copies from the same. A petition in bankruptcy was filed on May 17, 1909, against three copartners, of whom the petitioner was one. On the same day a receiver was appointed without their consent, who at once took possession of all the books and papers of the petitioner, and, although the petitioner alleges this also was without his consent, he did not at the time raise any question of his constitutional privilege against self-incrimination, or attempt to assert his right to possession of the books. Subsequently the receiver was appointed trustee after adjudication, and delivered the books to public accountants. The respondent Kindieberger, an assistant district attorney for the county of New York, was put in charge of criminal prosecutions against the petitioner and his partners. By a subpoena duces tecum, issued against the accountants and with the connivance and consent of the trustee, he obtained possession of the books and at the time of this application was proposing to use them as evidence before the grand jury of the county of New York. The petitioner raises what he claims to be his constitutional privilege to prevent the use of the books and to prevent the district attorney from making or using any copies of the books which he may obtain from their possession.

Howard S. Gans and Joseph O. Morris, for petitioner.

Charles S. Whitman, Dist. Atty., and Robert C. Taylor, Asst. Dist. Atty., opposed.

HAND, District Judge (after stating the facts as above). It is first apparent that no question involving the Constitution of the state of New York exists in the case. Such jurisdiction as I may have depends upon the bankruptcy act and the Constitution of the United States,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and as such the Constitution of the state of New York cannot be involved. In this connection it is also apparent that, since *Twining v. New Jersey*, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97, the provisions of the New York state Constitution in regard to self-incrimination do not raise any question under the fourteenth amendment.

There is, however, a question, under the fourth and fifth amendments of the United States Constitution, as to whether the provisions of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) are in conflict with those amendments. Had the petitioner, for example, resisted the receiver and been compelled by an order of contempt to turn over his books, it might well be that he would retain a privilege. *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746. I do not even say that the mere claim of privilege would not be enough to preserve his rights, or that he was obliged to wait for the receiver actually to obtain an order of contempt against him. It is not necessary to decide how far he must protest in order to preserve his rights.

In that case the question would have arisen as to whether the bankruptcy act—section 70 (1) and section 2 (3)—is in violation of the fourth or fifth amendments. Section 7 (9), even if the word "testimony" covers books and papers seized, is not sufficiently broad to provide the constitutional protection to a bankrupt, and it has been held in a number of cases that a bankrupt may resist the delivery of his books, if he claims they are incriminatory. *Re Hess* (D. C.) 134 Fed. 109; *Re Kanter* (D. C.) 117 Fed. 356; *Re Harris* (D. C.) 164 Fed. 292; *Re Hark* (D. C.) 136 Fed. 986. It is not necessary to consider the rule laid down in *Re Harris*, *supra*, because that, as well as the other cases cited, all arose when the bankrupt made timely protest against the surrender of his books.

The first question which arises is therefore whether the petitioner's rights survived the surrender of the books without claim of the undoubted privilege which up till then he may have had. That the evidence, whether oral or documentary, is admissible is quite clear. *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575; *Kerrich v. United States*, 171 Fed. 366, 96 C. C. A. 258. Moreover, if freely given once, it may, of course, be used thereafter. *Tucker v. United States*, 151 U. S. 164, 14 Sup. Ct. 299, 38 L. Ed. 112. For the privilege is purely personal, and may be waived. *Brown v. Walker*, 161 U. S. 591, 597, 16 Sup. Ct. 644, 40 L. Ed. 819. The delivery might have been conditional; but it was not. Was not surrender of possession a waiver? Neither party has cited any case very nearly in point; but I think there is not great difficulty. It is well settled that to testify without raising the point is a waiver; nor would any one deny that to produce the document for what one knew to be a judicial proceeding would be enough as well. The receiver was a judicial officer, whose duties in fact involved an inquisition in the affairs of the then alleged bankrupts. The question is whether they were not sufficiently advised of the use to which the books were to be put. If, as I shall try to show, it was a proper use of them by the trustee to allow the prosecuting authorities to use them, the petitioner was chargeable with knowledge of that right. His surrender necessarily involved a recogni-

tion of the possibilities of all legitimate uses to which they could be put when once he parted with them. If there were any such that he thought damaging to his interests, then was the time to assert his privilege of protection.

The only remaining question is as to whether the use of the books by the trustee was improper, and whether the bankrupt's eventual rights in them were infringed. The petitioner insists that the trustee's duties are confined to the administration of the estate, and it is no part of those duties to assist in the prosecution of the bankrupt. I do not mean to say that the trustee has any such duties, or that he is delinquent when he does not aid a prosecution. It is one thing, however, to say that he has no such positive duties, and another to say that it is an abuse of his powers so to assist. If the trustee proposed to show the books to trade rivals of the bankrupts, so as to prejudice them in re-establishing themselves in business, it would clearly be a wanton and illegal misuse of power. However, the trustee is an officer of this court, and this court cannot remain impartial, a disinterested spectator, when the issue is of the detection and prosecution of crime. It cannot, and, of course, it does not, assume that this petitioner, or any one else, is guilty of any crime; but when the responsible authorities of a state institute lawful proceedings to inquire into acts which may be criminal, in due course of law, that is a public purpose to which no court can remain indifferent, whether the prosecution be before the tribunals of the United States or of the state of New York. Any documents which are in our possession, and to show which is not illegal, will, I hope, always be open to the inspection of any public officer charged with the prosecution of crime. So long as the petitioner retained his constitutional privilege, he might decline to assist any prosecution against himself, or he might surrender to this court his books only on condition; but, when he waives it, he must waive it for all those purposes for which courts exist, and I cannot limit them, so as to exclude the proposed use here. He must be, therefore, charged with knowledge that the court recognizes a public propriety, incident to the purposes of its own existence, in the use of all documents to ascertain the truth as to the violation of law.

It may be asked whether the same rule would apply if the trustee proposed to use the books in aid of the prosecution of a claim not provable in bankruptcy. Perhaps it could not, because in civil matters our law has in many ways remained inert towards assisting in the disclosure of facts. But in any case the instance is not parallel. There is a public interest in the investigation of the violation of the laws, which does not exist in the case of merely civil controversies. It is true that in *Blum v. State*, 94 Md. 375, 51 Atl. 26, 56 L. R. A. 322, the Court of Appeals of Maryland reversed a conviction for the admission of books taken by a receiver; but that decision is certainly not the law of the federal courts, after *Adams v. New York*, supra, which holds that the competency of the testimony does not depend upon the mode of its acquisition. That case was followed by the Cook county criminal court in *People v. Swarts*, 8 Am. Bankr. Rep. 487. However, in *State v. Strait*, 94 Minn. 384, 102 N. W. 913, the Supreme Court of Minnesota declined to quash an indictment when the trustee had

gone before the grand jury. It is true in this case, also, that the evidence was good, whoever presented it; but, dictum for dictum, the case at least meets *Blum v. State*. Nor, in view of the surrender of the books in this case without protest, does it matter that in that case the bankruptcy proceeding was voluntary, while here it was not.

So far as section 7 (9) of the act goes, it raises a question at most of the competency of the testimony in the state courts (*Burrell v. Montana*, 194 U. S. 572, 24 Sup. Ct. 787, 48 L. Ed. 1122), and it does not arise in this proceeding. I cannot decide what is competent proof for conviction in New York, nor need I say that I will restrain a trustee from offering books to the district attorney of New York county because they may prove to contain only incompetent testimony. The courts of New York are as much bound by the laws and Constitution of the United States as I, nor may I suppose them less willing or able to construe or enforce them.

This disposes of all the petitioner's contentions, but that based on *Potter v. Beal*, 50 Fed. 860, 2 C. C. A. 60. That case arose on what was construed to be a final decree upon a bill in equity asking the delivery to the complainant of his trunk full of documents taken by the receiver of a bank. Two points were decided: First, that because he suspected the trunk to contain incriminatory documents, the district attorney could not intervene; second, that there could not be a distribution of documents, constituting final decree, without any evidence at all. The language of the opinion is no broader, though in the analogies Judge Putnam uses he refers to the practice upon production of documents in equity by motion. The case has no bearing whatever in this case, because it was in a suit to recover the papers from the receiver, which this petitioner does not even ask, and because to all the papers the receiver had *prima facie* no right, as they had all been taken from complainant's possession. I must say that I cannot see the least bearing of all this upon the case at bar.

Petition denied.

UNITED STATES v. ZAVELO et al.

(Circuit Court, N. D. Alabama, S. D. March 25, 1910.)

1. ARREST (§ 9*)—PRIVILEGES—FREEDOM FROM ARREST.

The privilege of a witness of freedom from arrest under civil process during the time he reasonably consumes in going to, attending, and returning from court to his home is to insure due administration of justice.

[Ed. Note.—For other cases, see *Arrest*, Cent. Dig. §§ 20-32; Dec. Dig. § 9.*]

2. CONTEMPT (§ 6*)—SERVICE OF CIVIL PROCESS ON WITNESSES—STATUTES.

Where witnesses were brought by the United States to testify in a criminal proceeding from another state, and duly subpoenaed, and after the termination of the proceeding they were served with civil process by the acquitted defendant in an action for malicious prosecution growing out of their testimony, such act constituted a "contempt" of court, within Rev. St. § 725 (U. S. Comp. St. 1901, p. 583), limiting the jurisdiction of the federal courts to punish a misdemeanor committed in the presence of the court or so near as to obstruct the administration of justice, though

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the service was not in the courtroom nor in its immediate vicinity; the court's power being construed to extend as far as necessary to the protection of the witness.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 6, 10, 13; Dec. Dig. § 6.*

For other definitions, see Words and Phrases, vol. 2, pp. 1489-1492; vol. 8, p. 7614.]

Contempt proceedings against B. Zavelo and certain others for serving civil process on witnesses under subpoena by the United States to testify in a criminal proceeding by the United States against Zavelo and others, during a witness' attendance at the court. Prosecution sustained in part.

O. D. Street, U. S. Atty.

C. B. Powell, for defendants.

GRUBB, District Judge. This matter comes up for decision upon a rule served upon the respondents, at the instance of the United States attorney, citing each of them to show cause why they should not be attached for a contempt of the Circuit Court arising out of the facts herein set out.

The respondent Zavelo was a defendant in a criminal prosecution in the District Court. Certain witnesses for the government were brought to Birmingham, the place of trial of this cause, by it from another state, but were regularly subpoenaed as witnesses in the cause. After the termination of the criminal suit, which resulted in an acquittal of the respondent Zavelo, Zavelo instituted civil suits for malicious prosecution, arising out of the criminal prosecution, against the witnesses who had testified in behalf of the government, and caused process to be executed on said witnesses, after the disposition of the criminal case, but before the witnesses had left, or had had reasonable opportunity to leave, the place of trial on their return journey to their homes. The other respondents were the attorneys of record of Zavelo in the civil suits and the state officers who served the civil process on the witnesses and persons who assisted the officers in making such service.

The question presented is as to the extent of the privilege of witnesses to be exempt from the service of civil process, which did not involve arrest, while attending another court in another cause, and as to whether persons violating such privilege are in contempt of the court, in attendance upon which the witnesses were when so served.

The privilege of a witness of freedom from arrest under civil process during the time he reasonably consumes in coming to court, attending upon it, and returning from it to his home, is well established by the authorities. *Larned v. Griffin* (C. C.) 12 Fed. 590, and cases cited. As this privilege extends to the witness for a reasonable time after his discharge as a witness, to enable him to reach his home, it is clear that the reason supporting it is not altogether that the detention of the witness may prevent his presence and testimony in the cause at the term at which he is summoned to testify, by reason of his confinement under the writ of arrest. The probability that the fear of ar-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rest may prevent his return to the place of trial at a future term, if his presence be thereafter required, operates also in support of the rule, as does the general deterrent effect upon the attendance of witnesses at court of a contrary rule. The purpose of the privilege is not so much for the advantage of the witness as for the proper and efficient conduct of the court in the procuring of the necessary attendance of its witnesses. This being the reason of the rule, it seems clear that the difference in effect in this respect between writs of arrest and other civil processes is a difference of degree rather than one of kind. The deterrent effect would exist, but possibly not so forcibly, in the latter as in the former class of process. That the possibility of being so subjected to service of process in a civil suit, which could not otherwise reach a witness, would be a material inducement operating to prevent his attendance upon court in all cases in which his attendance was optional and could not be enforced by subpoena, is manifest. This seems an ample reason for extending the rule to process not involving arrest of the person; and the authorities support the extension, though not with unanimity. In *re Healey*, 53 Vt. 694, 38 Am. Rep. 713; *Bridges v. Sheldon* (C. C.) 7 Fed. 17-45; *Atchison v. Morris* (C. C.) 11 Fed. 582. Contra: *Blight v. Fisher*, 3 Fed. Cas. 704; *Ex parte Schulenberg* (C. C.) 25 Fed. 211.

As the privilege is for the advantage of the court, as well as for the witness, it seems that the willful violation of the privilege should constitute a contempt of the court, and that the setting aside of the service of the process would not adequately and completely redress the wrong, at least in so far as it directed against the court. This view is sustained by the three first cases cited above. In 16 Am. & Eng. Ency. Pleading, 983, the rule is stated as follows:

"It is generally held that a person who causes the arrest of a privileged party or procures the service of a summons in violation of privilege may be punished for contempt of the court, whose guaranty of protection is thus violated."

To what extent is this conclusion modified with respect to federal courts by the provision of section 725, Rev. St. U. S. (U. S. Comp. St. 1901, p. 583), which limits the jurisdiction of the federal court to punish for contempt to three classes of cases: (1) Misbehavior of any person in the presence of the court or so near thereto as to obstruct the administration of justice; (2) misbehavior of officers of the court in their official transactions; and (3) disobedience or resistance to any lawful writ, process, order, rule, decree or command of the court by any person?

So far as this proceeding relates to the attorneys, it would seem that their act in knowingly causing the writ to be served on privileged witnesses would constitute misbehavior of officers of the court in their official transactions. The attorneys for the defendant, Zavelo, in the criminal case, were also his attorneys in the civil case brought by him against the witnesses, and in which the process was issued and served on them.

The acts relied on the United States attorney were not committed in the immediate presence of the court. Were they committed so near to it as to obstruct the administration of justice? The tendency to ob-

struct justice is just as effectually accomplished by causing process to be served on witnesses, while in attendance on the court, though not in its immediate presence, as by causing it to be served on them in the immediate presence of the court. The willful arrest on civil process of a witness, before his testimony had been given, but while he was away from the courtroom during a recess, would be too palpable an obstruction of the administration of justice to go unredressed. Yet if the rule is limited to acts obstructive of justice, committed in the courtroom or its immediate vicinity, it would necessarily go unpunished. The true rule would seem to be that the power of the court extends as far as the necessity of protection to the witness. The privilege of the witness extends to his sojourn at the place of trial and his trip in coming and going between such place and his home. The power of the court to punish a willful violation of the privilege should be equally broad, or the privilege would be a futile one to the witness; and the power of the court to procure the attendance of witnesses, with or without subpoena, would be impaired. Wrongful conduct, the inevitable consequence of which is to obstruct the administration of justice, will be construed to have occurred near enough to the presence of the court to accomplish that result which is, in fact, accomplished by it.

The witnesses, upon whom process was served, were under subpoena. They were held in attendance upon the court by its writ, order, or process. Implied in that order was the protection of the court extended to them against any violation of their exemption from service of civil process while in attendance upon the court. Any willful violation of such privilege, with knowledge of its existence, would constitute a violation of the order, writ, or process of the court, and a contempt. The statute would be narrowly construed, if limited to disobedience by the person to whom the order was directed. If others, not embraced in the order, by compulsion prevented the person to whom it was directed, from obeying it, they would be guilty of disobedience and resistance of it, within the meaning of the statute. In the case of *United States v. Shipp*, 203 U. S. 563, 27 Sup. Ct. 165, 51 L. Ed. 319, the Supreme Court adjudged the defendants, who were merely members of the mob, equally, with the sheriff and his deputies, to have violated the court's order, and to be in contempt therefor. In the case of *Bridges v. Sheldon* (C. C.) 7 Fed. 45, the court said, as to the effect of section 725:

"Still this court, as are all federal courts, is limited in its power to punish for contempt. Their power extends only to misbehavior in the presence of the court, or so near as to obstruct the administration of justice, or of the officers of the court, or to disobedience or resistance of any lawful writ, process, order, rule, decree, or command of the courts. Rev. St. U. S. § 725. The master was acting under the authority of the court when he made the order. A disturbance of the master's proceedings would have been a contempt of the court; and, had any one undertaken by force to prevent the defendants from attending the examination of witnesses ordered, probably no one would contend it was not a contempt. This interference was of the same nature; still it is not punishable as a contempt, unless it was done in disobedience of, or resistance to, an order of the court. This does not mean a written order always, but only an exercise of authority, constituting a requirement. Had a writ of protection issued, as one might, there would have been no question but that there was an order to be regarded. But, as before shown, the actual ex-

istence of such writ neither makes nor adds to the protection. The order to take testimony issued under the authority of the court carried with it the protection of the court from the service of foreign process in attending the taking. That protection was an order. McNeill's Case, 6 Mass. 264. The service of the process was a disobedience of the order. The service of the process in Hall's Case was denominated a disobedience of the writ, in the opinion of the court. 1 Tyler [Vt.] 274. The conduct of the orator constituted a contempt of the authority of the court, whether it was so actually intended or not."

A different conclusion would imperil the administration of justice, since it is always possible for persons to accomplish acts of obstruction away from the immediate presence of the court as effectually as within it, and to prevent the enforcement of the court's order or process, though not included in its mandate, and so, in either case, to defeat the administration of justice with impunity. A fair construction of section 725 would extend its provisions so far, and only so far, as is imperative to confer authority on the courts to prevent all persons from engaging in acts directly obstructive to their proper conduct, by punishment thereof as contempts of its authority.

The defendants Brown and Cooper will be discharged from the rule, as it is not shown that they had knowledge that the parties upon whom the process was served were within the protection of this court when served. The other defendants are adjudged to be in contempt of this court, of which they will be permitted to purge themselves upon payment of the costs of this rule and causing to be set aside the service obtained in each of the suits instituted upon any and all of said witnesses, within 30 days from the date of the rendition of this order, otherwise, they will be required to pay a fine of \$50 each and the costs of this proceeding.

DUNN et al. v. ONEIDA COMMUNITY, Limited, et al.

(Circuit Court, N. D. New York. March 26, 1910.)

1. EXCHANGE OF PROPERTY (§ 11*)—TITLE—DELIVERY AND ACCEPTANCE.

Pursuant to a contemplated contract for electric power, the electric company offered to exchange two 40-cycle motors in question for two 60-cycle motors defendant then had in operation, the electric company agreeing to extend its wires to defendant's switch board and defendant to install the motors and do all wiring in connection therewith. The electric contract did not refer to the exchange of the motors and was never carried out. The 40-cycle motors were sent to defendant's premises, but were never installed, nor were the 60-cycle motors disconnected or delivered to the electric company or its receivers. Defendant wrote the electric company's receivers that it had decided to keep the 60-cycle motors and returned those shipped by plaintiff to be exchanged, but subsequently refused to do so. *Held*, that title to the motors so shipped to defendant for exchange never passed to it, but that defendant elected to rescind the exchange contract, and was bound therefore to return the motors to defendant or account for their value.

[Ed. Note.—For other cases, see Exchange of Property, Dec. Dig. § 11.*]

2. EXCHANGE OF PROPERTY (§ 10*)—BREACH OF CONTRACT—DAMAGES—LIEN.

Where an agreement for an exchange of electric motors was made pursuant to a contemplated contract for electric power, and, the power con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tract not having been performed, defendant elected to rescind the exchange without asserting any lien on the electric company's motors, delivered in accordance with such contract, defendant could not thereafter claim a lien on such motors for damages alleged to have been sustained by the electric company's breach of the power contract.

[Ed. Note.—For other cases, see Exchange of Property, Dec. Dig. § 10.*]

Action by George W. Dunn and others, as receivers of the Madison County Gas & Electric Company against the Oneida Community, Limited, and another. Decree for complainants.

This is an action by the above-named receivers against the defendants, the Oneida Community, Limited, and Stephen R. Leonard, to recover four 40-cycle motors in the possession of the defendants or their value alleged to be about \$1,200, and which motors said receivers claim are the property of the Madison County Gas & Electric Company, one of the corporations of which they are receivers appointed by this court. The only questions now before the court are, first, the question of title; and, if that is found in favor of the complainants, second, have defendants, or either of them, a lien on such motors which justifies the retention of possession? It was stipulated that if the actual value of such motors becomes material, or if the amount of certain damages sustained by the defendants becomes material, the questions shall be sent to a special master for evidence on those points.

Abram J. Rose and George B. Curtiss, for complainants.
Will B. Crowley, for defendants.

RAY, District Judge. Prior to January 8, 1907, the defendants had some conversation with H. W. Coffin representing the Hudson River Electric Power Company, which in turn represented and controlled the Madison County Gas & Electric Company, that being a subsidiary company of the Electric Power Company, as to the making of a contract by which the said Power Company was to furnish power to the Oneida Community, Limited, a corporation. The Empire State Power Company was also a subsidiary company of the Electric Power Company, and it was contemplated that the contract was to be between the Empire Company and the Oneida Company. January 8, 1907, the Electric Power Company, by Coffin, wrote the Oneida Company a letter stating the terms of a contract it would make for furnishing power or electrical energy, the amount it would furnish, and the price to be paid. The offer was:

"We will enter into a 5 or 10 year contract to supply," etc.

In giving the terms of the contract to be entered into, the letter said:

"We will exchange the two 20 horse power 60-cycle motors and the two 10 horse power 60-cycle motors which you now have in use, provided they are in good condition, for two 22 horse power 40-cycle motors and two 12 horse power 40-cycle motors without cost to you. We will extend our wires to your switchboard at our expense, and you are to install the motors and do all wiring in connection therewith, and such wiring and material as is necessary for your lighting system."

The letter concluded as follows:

"We think it would be possible to work out a penalty clause in our proposed contract covering possible interruptions that would be mutually satisfactory, but the basis of such a clause will have to be decided upon at a future confer-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ence. We expect to be able to demonstrate that our power is constant and reliable."

The Oneida Company assented to the proposition contained in the letter of Coffin, and a written contract was prepared dated March 15, 1907, and sent to Mr. Leonard of the Oneida Company accompanied by the following letter:

"Enclosed I hand you three copies of the proposed power contract with the changes suggested by you. The wording of the minimum clause paragraph is slightly changed, but the new wording makes the terms plainer, and is precisely in effect to the proposed clause which I prepared. I think you will find all other conditions will be agreeable. If possible, I would be glad to have you execute this contract, and mail to me to-morrow at Amsterdam, N. Y., where I will have the officers of the Empire State Power Company and the Hudson River Electric Power Company execute same, and return one of the copies to you. I expect to be in the Utica office Thursday forenoon, and, if desirable to consult me for anything, please call Bell Telephone #1672."

The Oneida Company did execute the written contract submitted and returned it as requested. This written contract contains no reference whatever to an exchange of motors or to the letter or its provisions. July 1, 1907, the Electric Power Company wrote the Oneida Company:

"I refer to yours of June 24th, and beg to advise you that 2-12 H. P. forty-cycle motors have been shipped to Oneida, and our local manager, Mr. E. J. Kennedy, has been instructed to deliver same to you."

No letter of June 24th is in evidence.

The following mutual concession is in the case:

"It is conceded that after the writing of the letter, Exhibit A (that of January 8, 1907), and the acceptance of the proposition therein made by the Oneida Community, Limited, the Hudson River Electric Power Company took the four motors in question to the premises of the Oneida Community, Limited, and left them there; that they were not installed or connected with any electrical machinery, nor have they ever been; that the four motors, two 20 H. P. 60-cycle, and two 12 H. P. 60-cycle motors mentioned in Exhibit A as belonging to the Oneida Community, Limited, were at the time Exhibit A was written in use on the premises of the Oneida Community, Limited, and have been ever since used by the Oneida Community, Limited, and never have been disconnected or in the possession of the Hudson River Electric Power Company or any of the defendants in the equity action or of the receivers or tendered to them."

Also:

"That neither the Hudson River Electric Power Company nor the Empire State Power Company ever completed or carried out the contract for the furnishing of electric light and power to the Oneida Community, Limited."

About November 1, 1908, these receivers were appointed by this court in an equity action wherein Eben H. Gay and another were plaintiffs and the Hudson River Electric Power Company and seven other subsidiary companies, including the Madison County Gas and Empire State companies were defendants, the bill alleging insolvency, etc., and having for its object the winding up of such corporations.

It would seem that the exchange of motors was treated in a way as an independent proposition, as it was not included in the written contract or referred to in any way therein. As it was not included in the written contract, that proposition of exchange of motors might be

considered as having been abandoned as part of the contract to furnish power. There was some correspondence between the companies after the contract was signed by the Oneida Community, Limited, but I find no reference to the motors until we come to a letter of February 11, 1909, written by the receivers to the Oneida Company, Limited, which reads as follows:

"Confirming our recent conversation by telephone, relative to the 12 and 22 H. P. motors which you have at Kenwood, will you kindly advise us as soon as possible what you desire to do. You will remember that you were to write me in relation to the matter and I will appreciate the information as soon as it is convenient for you to let me have it."

The motors were not returned, and February 11, 1909, the Oneida Company, Limited, wrote C. H. Peddrick, Jr., representing the receivers, as follows:

"After talking with you over the 'phone the other day in regard to the motors, we received a letter from Mr. De Lano and copies of letters from your office asking that the matter be straightened out as promptly as possible. Mr. Leonard has written to Mr. De Lano explaining the situation. I have looked the matter up from the factory end, and as long as the power situation is so unsettled we have decided to keep the motors that we purchased at the time we expected to receive power from you, and return the four motors that you shipped us, and that were to be exchanged for the 60-cycle 250 volt which we own. Undoubtedly you would still follow out your part of the contract by replacing the motors in the new shop should you at any time in the future be in position to supply the 40-cycle energy. Assuming that such would be the case, we are holding the motors awaiting instructions from you. We can send them on to Oneida by team if you so direct."

March 17, 1909, Mr. Peddrick wrote said company as follows:

"I refer to my communication to you under date of March 9th regarding the return of the 40-cycle motors. I do not desire to bother you unnecessarily with this matter, but I should like to know if you are intending to return these motors, and, if so, about when."

To this the Oneida Company replied:

"Answering your letter from Mr. Peddrick to Mr. Marble we have to say that certain considerations have appeared in regard to these motors whereby the question of returning them to you at this time has come up for discussion. We hope to give you some further definite word in the matter before long."

Other correspondence follows, but I find nothing that bears on the real question in the case, viz.: Were the motors delivered to and accepted by the Oneida Community, Limited, so that title passed? They were not installed or put in use by the Oneida Company. It is evident they were to be used in a reconstruction of the plant of that company so as to accommodate itself to the supply of power it was contracting for. The Oneida Community, Limited, did not disengage or take out the motors they owned and had in use and which it was to give in exchange for the motors in question, or send or offer to send them to the power company. The Oneida Community, Limited, did nothing to indicate an acceptance of such motors. The letter of January 8th stated:

"We will extend our wires to your switchboard at our expense and you are to install the motors and do all wiring in connection therewith and such wiring and material as is necessary for your lighting system."

It was a part of the exchange of motors that the power company was to extend its wires to the Oneida Company's switchboard, which it did not do, and the Oneida Company was to install the motors, which it did not do. It did put in some additional wiring, but so far as appears this had nothing to do with the exchange of motors. The letter of February 11, 1909, from the Oneida Community, Limited, to Peddrick, is a plain election to consider the proposed barter or trade or exchange of motors as abandoned. The Oneida Community, Limited, had decided to keep the motors it had purchased and which it had in use and "return the four motors that you shipped us," these being the motors in question.

If the title to these four motors in question here vested in the Oneida Community, Limited, when placed on their premises, then the title to the ones that company had in use and which they decided to keep (the 60-cycle 250 volt motors) vested in the Hudson River Electric Power Company. I do not understand that A. can say to B., "I will give you my white horse for your bay mare," and on B.'s saying, "I will do it," and on A. bringing his white horse on the premises of B. to make the exchange, lose title to both horses, B. asserting that as the white horse is delivered he will keep it, and that as the bay mare has not been taken from the stable and delivered he will keep that also. When that becomes the law, grand larceny or horse larceny will have been sanctioned by the court so deciding. Here, assume that it was a sale of motors to be paid for by other specific motors, it is evident that the acceptance of the motors in question was to be accompanied by a delivery of the motors then in the plant of the Oneida Community, Limited. But this latter company elected not to accept or keep the motors placed on its premises by the Hudson River Electric Power Company but to return them, and to this the power company assented. It also elected not to part with the motors it owned and had in use in exchange for the others, and to this the power company assented. The contract of sale was rescinded or abandoned by mutual consent. It was evidently the intention of the parties that delivery by the power company and acceptance by the Oneida Company was to be accompanied by a surrender of the motors owned and in use by the Oneida Company. Clearly the Oneida Company had the right with the assent of the power company to rescind and not perform the contract or abandon it, and when the election was made and assented to by the receivers it was too late for the Oneida Company to claim it had purchased the motors and that title had vested, and that it was entitled to retain possession under and by virtue of the contract. *Graves v. White et al.*, 87 N. Y. 463, 465. In this case at page 465, of 87 N. Y., Finch, J., all concurring, says:

"We think the ruling of the General Term was right. It rests upon a foundation common to all contracts that two persons who are competent to make a contract are competent to waive or abandon it, and, when both concur in such waiver or abandonment, their united assent dissolves the contract, and the rights of each under it are ended. This was long ago held as to contracts respecting personal property."

This would be conclusive of this case even had there been a delivery by the power company and an acceptance by the Oneida Company, for

a contract rescinded or abandoned places the parties in the same position they were before it was made. The Oneida Company was not only to exchange motors, but to install those it received from the power company. This it elected not to do. If the contract was entire and the power company failed to perform, the Oneida Company had the right to stand on the contract, perform on its part and sue for damages, or to rescind or abandon the contract. This last is what it elected to do, not having installed the new motors or delivered the ones it was to give in exchange, and in such case it could not retain what it had obtained possession of under the contract. See *Graves v. White, et al.*, supra. The court there said:

"If the plaintiff could have stood upon the contract and compelled performance or recovered damages for the breach, she was not bound to adopt that remedy, but had the right to bring ejectment to recover back her land. In so doing, and giving the preliminary notice to surrender possession, she, too, gave her assent to the abandonment of the contract, and the parties who made it having thus by mutual assent rescinded it, its vitality was gone, and it ceased to exist. Neither party, thereafter, could invoke its terms or protection as against the other; and the plaintiff was at liberty to maintain ejectment to recover the possession of the land to which she had a legal title."

In *Hubbell v. Pac. Mut. Ins. Co.*, 100 N. Y. 41, 47, 2 N. E. 470, the court, said:

"Either party not in default may compel performance by the other, or, treating the refusal as an abandonment, may himself join in the abandonment and so terminate the contract and destroy its existence. *Graves v. White*, 87 N. Y. 463; *New Eng. Iron Co. v. Gilbert El. R. R. Co.*, 91 N. Y. 168. If in such case the breach on one side is such as to indicate an intent to abandon or repudiate the agreement, the other party may assent and so the contract be dissolved."

See, also, *Harris v. Hiscock*, 91 N. Y. 340, 343, where a lease was abandoned by mutual consent. *Brewster v. Wooster*, 131 N. Y. 473, 30 N. E. 489, is to the same effect, and it also holds that when a contract is rescinded or abandoned by mutual acts or consent, the consideration or property received must be returned. This is clearly so when the one who has received property into his possession elects to rescind or abandon the contract and return the property that has come into his possession. That is precisely what the Oneida Company did. True it did not actually return the motors in its possession but it elected and promised so to do. However, I hold that the motors in question here were never delivered to or accepted by the Oneida Community, Limited; that the motors never became its property. They were there for installation in pursuance of an agreement which neither party fully performed, and which the Oneida Company elected not to perform, and in which election the power company acquiesced on the promise of the Oneida Company to return its property. Later the Oneida Company took the position that it either owned the motors or that it has a lien thereon because of damages sustained by reason of the non-performance of the agreement by the power company to furnish light and power. If the contract to furnish power and exchange motors is treated as entire, then it was abandoned by mutual consent in its entirety with an election to return the motors and no claim for damages

for its breach exists or can be sustained. *Harris v. Hiscock*, 91 N. Y. 340, 344, 345. The court said:

"The lease was canceled by mutual agreement under seal. The failure of the arbitration cannot restore the abandoned contract. No suit, therefore, can be maintained upon it for it does not exist. If Hiscock remained in possession he was not in under the lease. If he was liable for anything it was not for the rent reserved. If he can sue for anything it is not upon the covenants in the lease. It can only be for compensation for its surrender."

If that part of the letter of January 8, 1907, relating to the motors and not included in or referred to in the written contract is treated as an independent agreement or contract, then it was abandoned by mutual consent, and no claim for damages can be recovered under it or based thereon, but there would be a claim for damages arising on the written contract executed subsequently to the writing of the letter. If any claim for damages exists it is on a contract that has nothing whatever to do with the motors in question, except incidentally. I do not know of any rule of law or of equity that gives a lien on property to satisfy a claim for damages under such circumstances. The agreement or election to return the motors was absolute and unconditional. No lien was asserted. There was an unconditional promise to return the motors instead of an assertion of the contract and an insistence on compliance therewith, or a suggestion that the motors would be retained as compensation in whole or in part for damages sustained. Having full knowledge of all the facts, the election made and conveyed to the receivers was that the Oneida Community, Limited, had decided to keep the motors it owned and had in use, and which were to be given by it in exchange for the motors the power company was to furnish, and return to the receivers the motors it was to receive in exchange, and which the power company had placed on its premises for installation in place of the motors to be sent to it. I can only look at the transaction as an election to abandon the agreement to exchange motors, and when that election was made the agreement for such exchange had no validity—it was ended—and each party stood where it did before the motors were sent to the premises of the Oneida Company. There was a sufficient consideration. The exchange of motors involved (1) the furnishing by the power company of the four motors in question for installation; which it did by placing them on the premises of the Oneida Company for installation by it; (2) the taking out of the motors the Oneida Company owned and had in use which it was to do, but did not do; (3) the installation of the motors furnished by the power company in place of the ones removed, which the Oneida Company was to do, but did not do; and, (4) finally, the delivery by the Oneida Company of the removed motors to the power company, which was not done. These three things, to be done by the Oneida Company in order to effect the exchange, it elected not to do, and said, "I will return the new motors you sent here." This was assented to and was an effectual mutual abandonment of the contract of exchange. Thereupon the power company became entitled to the motors in question or their value. Williston on Sales, § 593, p. 982, and cases cited. I know of no principle of equity that will permit a retention of these motors. "In the absence of anything to show a contrary in-

tent on the part of the parties, a contract for the exchange of property must be performed on both sides concurrently." *Brennan v. Ford*, 46 Cal. 7; *Pead v. Trull*, 173 Mass. 450, 53 N. E. 901; 17 Cyc. 833. The Oneida Company was in default. It did not perform; it elected to abandon and return the motors. There was no waiver of performance on the part of the Oneida Company by the power company except in the mutual abandonment on the election to surrender and return these motors. Neither party to an exchange of property can put the other in default except by a full performance on its part or an offer to perform. *Royal v. Dennison*, 109 Cal. 558, 42 Pac. 39; *Pead v. Trull*, 173 Mass. 450, 53 N. E. 901; *Hamilton v. Crossman*, 130 Pa. 320, 18 Atl. 634; *Crabtree v. Levings*, 53 Ill. 526. So far as the exchange of property was concerned, it is seen that the power company fully performed on its part, and the only party in default was the Oneida Company, whereupon it elected to abandon the exchange and return the motors in question, and gave notice of such election, which was acquiesced in by the power company. This abandonment as we have seen ended the contract, and left the power company the owner of the property in question as between it and the Oneida Company, the Madison County Gas & Electric Company being the real owner. In this view of the case it is immaterial whether there was a delivery of the motors in the first instance. The contract having been abandoned with an election to return the motors, they became the property of the power company. As no credit was contemplated, it had a lien until the other motors were delivered, which under the agreement to return ripened into a right of possession.

Within the cases cited the receivers are entitled to the motors in question, and there will be a decree accordingly, or for their value if not surrendered, in which case it will be sent to a master to take evidence as to the actual value thereof. The decree should provide for such reference.

LAWRENCE v. SOUTHERN PAC. CO. et al.

(Circuit Court, E. D. New York. March 4, 1910.)

1. COURTS (§ 343*)—FEDERAL COURTS—PRACTICE—REMOVAL OF ACTION—FOREIGN EXECUTORS OF DECEASED DEFENDANT.

A suit cannot be instituted against executors in a federal court in a state other than the one in which they have taken out letters, where jurisdiction depends on diversity of citizenship, nor can a pending suit against the testator be revived against such executors, unless ancillary letters are taken out in the state where the suit is pending.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 915, 916; Dec. Dig. § 343.*]

2. COURTS (§ 343*)—FEDERAL COURTS—LOSS OF JURISDICTION—DEATH OF INDISPENSABLE PARTY.

A suit in a federal court may be dismissed on motion for want of jurisdiction on the death of a defendant who is an indispensable party, where such fact plainly appears from the pleadings, and the executors of the decedent cannot be brought in, but if there is doubt on the question, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

it appears that the suit may be separable, it should not be so dismissed, nor when there is a possibility of revival against the executors, until after the lapse of a reasonable time.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 915, 916; Dec. Dig. § 343.*]

In Equity. Suit by Walter B. Lawrence against the Southern Pacific Company, Frederic P. Olcott, the Central Trust Company of New York, the Farmers' Loan & Trust Company, the Metropolitan Trust Company of the City of New York, the Houston & Texas Central Railroad Company, and the Houston & Texas Central Railway Company. On motion to dismiss. Motion denied.

See, also, 165 Fed. 241.

Dittenhoefer, Gerber & James (A. J. Dittenhoefer, H. Snowden Marshall, and David Gerber, of counsel), for complainant.

Joline, Larkin & Rathbone (Arthur H. Van Brunt and Henry V. Poor, of counsel), for defendants Central Trust Company of New York, Southern Pacific Company, and Houston & Texas Central Railroad Company.

CHATFIELD, District Judge. The complainant, stating that he sues on behalf of himself and other stockholders of the Houston & Texas Central Railway Company who may be similarly situated and who may come in, has brought an action in equity in the Supreme Court of Queens county, since removed into the Circuit Court for this district, against the Southern Pacific Company, the Central, the Metropolitan, and Farmers' Loan & Trust Companies, the Houston & Texas Central Railroad Company, and the Houston & Texas Central Railway Company, and also one Frederic P. Olcott, who happened at the time of certain transactions to be president of the Central Trust Company, and to have bid in the property of the Houston & Texas Central Railway Company at a sale held under the decree of the United States Circuit Court for the Eastern District of Texas, in which suit the claims of the Southern Pacific Company and certain mortgagees, consolidated in the one action, were left undetermined and a reorganization effected between the Southern Pacific Company, certain trust companies, and many of the bondholders. Upon May 4, 1888, a decree in the consolidated action was entered ordering a sale of the entire property upon the defaults on the various mortgages recited in the decree. All possible defenses were withdrawn, the decree was entered substantially by consent, and at the sale held in pursuance of this decree the property was bid in, according to the terms of the reorganization agreement, by Mr. Olcott. The new or reorganized corporation was called the Houston & Texas Central Railroad Company, and the property bought in by Mr. Olcott was transferred to that company, except certain lands which had been pledged as security for the bonds of the old company and these lands were conveyed by Mr. Olcott as security to three trust companies, one of which was the Central, who advanced money or made loans under the terms of the reorganization agreement. The bondholders of the old company accepted the bonds of the new company, but, according to the complaint in this action, the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

minority stockholders of the old company refused to pay the assessments which were demanded, and ultimately all of the stock of the new company was taken over by the Southern Pacific Company, which now holds the same; certain guaranties having been made by the Southern Pacific Company at the time of so doing.

The complainant alleges unequal treatment, so far as the minority stockholders are concerned, on the part of the Southern Pacific Company, and the existence of a trust upon the stock of the reorganized railroad in the hands of the Southern Pacific Company. The complaint also alleges that the defendant trust companies have no beneficial interest in the lands purchased by Mr. Olcott and conveyed for trust purposes to each of these trust companies, and that the complainant has requested the directors of the old company to commence an action for an accounting against the Southern Pacific Company, Mr. Olcott, or any of those named as defendants in this action, and that these directors have refused so to do.

It is further alleged that these directors have taken the position that neither the Southern Pacific Company nor Mr. Olcott should be called upon to account or afford any relief to the minority stockholders who are said to be some one hundred in number; and the relief prayed for is that the Southern Pacific Company be held to have acquired and to hold the capital stock of the reorganized Texas Company and the profits and earnings received therefrom as trustee for the minority stockholders, as their rights may appear; that an accounting be had from the Southern Pacific Company; that it be adjudged that neither of the three defendant trust companies nor Mr. Olcott had a beneficial interest in the lands; that after the carrying out of the trust agreements by the trust companies the surplus of the lands, which would then revert to Mr. Olcott, be transferred, assigned, and delivered to the old railway company, and an injunction and the appointment of a receiver to carry the decree into effect (in which injunction the prayer asks that Mr. Olcott be also included) is demanded.

The action thus instituted was removed into the United States court by the Southern Pacific Company, Frederic P. Olcott, and the Houston & Texas Central Railroad Company, appearing specially. The petition on removal states that the defendants Olcott and the Central Trust Company had already appeared in the action, but that the time to answer had not expired. A motion to remand was denied upon the ground that the trust companies were not indispensable parties to the action.

It then appeared that the defendant the Houston & Texas Central Railway Company had not been served, and had no intention of appearing voluntarily, and that Mr. Olcott had subsequently died in the state of New Jersey, letters testamentary having been taken out by his executors in that state. A suggestion to that effect has been entered upon the minutes of this court by a motion to dismiss the complaint upon the ground that the action cannot proceed without Mr. Olcott or his representatives, and that the complainant can neither bring these representatives in as parties defendant nor have they voluntarily joined in the action, nor taken out ancillary letters within the state of New

York. This particular motion is made by the defendants the Southern Pacific Company, the Houston & Texas Central Railroad Company, and the Central Trust Company. It appears that subsequent to the motion to remand, a plea in bar, to the effect that the Houston & Texas Central Railway Company was an indispensable party to this action, had been interposed by the defendants who did appear, namely, the Southern Pacific Company, Mr. Olcott, the Houston & Texas Central Railroad Company, and also the Central Trust Company. A replication on the part of the complainant was filed before Mr. Olcott's death.

If Mr. Olcott or his representatives are necessary and indispensable parties to the trial of any cause of action set forth in the complaint, then the action must be held to have abated. If there be a cause of action which would not abate, and as to which the suit can be revived by bringing in the proper parties to give the court necessary jurisdiction, or if there be an alleged cause of action which can be litigated without Olcott's representatives, then a dismissal should not be granted. It appears from the complaint that Mr. Olcott was a proper party to be joined as defendant, and, if all of the issues relating to these transactions are to be settled between the parties in one action, Mr. Olcott or his representatives would be an indispensable party to the determination of the precise issue that is raised with reference to his rights. But it does not follow that the death of Mr. Olcott raised the question of abatement of the entire action, nor does the possibility of revivor, whether made as against his representatives or by them, determine whether he was an indispensable party to the suit. A suggestion upon the record would allow the executors to make a motion for revivor under section 955, Rev. St. (U. S. Comp. St. 1901, p. 697); and in the same way, upon such a suggestion entered on the record, the case might proceed under the terms of section 956, Rev. St., as to any parties or issues in which Mr. Olcott or his representatives were not required for the adjudication of their claims. Where the proposition that an action has abated is raised by other defendants, but where the possibility of revivor exists up to the time of trial, it would seem that the question of the lack of necessary or indispensable parties may be raised by motion, but should not be determined summarily, when, as in the present instance, the absence of the alleged necessary parties is based upon the fact that the executors of Mr. Olcott's estate have not as yet applied for letters within the state of New York; and hence can neither be sued nor are in a position to bring suit. *Jessup v. Ill. Cent. R. Co.* (C. C.) 36 Fed. 735; *Picquet v. Swan*, 5 Mason, 561, Fed. Cas. No. 11,135.

It is evident that a suit could not be instituted against executors in another state than where they have taken out letters upon a cause of action in the federal court in which jurisdiction is based upon citizenship. *Lewis v. Parrish*, 115 Fed. 285, 53 C. C. A. 77; *Skiff v. White* (C. C.) 127 Fed. 175. Nor can a suit be revived against executors in some state other than that in which they have been authorized to act in their representative capacity, unless ancillary letters shall be obtained in the state where the action is pending. *Filer & Stowell Co. v. Rainey* (C. C.) 120 Fed. 718. A determination that jurisdiction does not exist if the cause of action be not separable can be disposed of

upon motion, if the question of jurisdiction is plainly ascertainable from the pleadings, and depends solely upon the statement of the cause of action. But if there is any doubt as to the question, or if there is a possibility of revival, then the action should be dismissed on motion only for lack of prosecution and unreasonable delay. In the present case, the result of a dismissal would be to put the plaintiff out of court, with no determination of the rights of the minority stockholders as against the Southern Pacific Company and the Texas Railroad Companies, under the reorganization plan, and without any determination upon the plea at bar which has been already interposed.

A further plea, based upon the ground of the necessity or indispensability of representation on the part of Mr. Olcott's executors, could be considered in connection with the plea already interposed, and, if the complainant can maintain a cause of action or prove that it has a cause of action against the Southern Pacific Company and the Houston & Texas Central Railroad Company, which can be litigated in the absence of the Houston & Texas Central Railway Company and of Mr. Olcott's representatives (who seem to be entitled to a reversion of the lands in question), this court should not dismiss the action solely upon the ground that another suit may be necessary. The complainant is the one to determine whether a new action can be brought in one jurisdiction against all of the parties concerned in the different issues presented by the present complaint. The complainant also must consider the necessity which he will be under of bringing an action against Mr. Olcott's representatives if the present suit should be determined in favor of the minority stockholders against the railroads; and it would seem that the question of whether Mr. Olcott's representatives or heirs should ultimately be called upon to reconvey a reversionary interest is separable from the cause of action against the railroad companies. That cause of action is not dependent upon the existence of any reversionary interest or balance after the application of the collateral to the payment of the bonds secured by that collateral; nor (if the persons holding title should then refuse to comply with any demand) upon ability of the complainant or any other minority stockholder to impress a trust upon the reversion. Mr. Olcott was no more necessary to the determination of the claim against the railroad companies, except as he might wish to appear and defend his own action, than are the trust companies, who must administer their trusts so as to be able to account to all of those who are entitled to such an accounting.

For both of these reasons, therefore, the present motion must be denied.

UNITED STATES v. MASON (four cases).

(Circuit Court, D. Massachusetts. March 4, 1910.)

Nos. 45-48.

1. EMBEZZLEMENT (§ 34*)—SUFFICIENCY OF INDICTMENT—"TO EMBEZZLE" DEFINED.

In an indictment against a public officer for embezzlement of public funds alleged to have been in his possession as such officer, the rule applied that it is sufficient to charge that he embezzled the same, without more.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 53, 54; Dec. Dig. § 34.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2350-2358; vol. 8, p. 7649.]

2. EMBEZZLEMENT (§ 28*)—INDICTMENT—FUNDS EMBEZZLED—DESCRIPTION.

An indictment for embezzlement specifying the amount of money alleged to have been embezzled, and stating that the grand jury is unable to give further information, sufficiently describes the funds.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 42; Dec. Dig. § 28.*]

3. EMBEZZLEMENT (§ 21*)—CLERKS OF FEDERAL COURTS—FEES AND EMOLUMENTS—OWNERSHIP.

Money received by a clerk of a Circuit or District Court of the United States as fees and emoluments is not public money of the United States when so received within the meaning of Rev. St. § 5490 (U. S. Comp. St. 1901, p. 3704).

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 29; Dec. Dig. § 21.*]

4. CLERKS OF COURTS (§ 61*)—CLERKS OF FEDERAL COURTS—RETURNS OF FEES AND EMOLUMENTS—OATH.

The provision of Rev. St. § 833 (U. S. Comp. St. 1901, p. 642), that the semiannual returns required thereby to be made by district attorneys, clerks of the Circuit and District Courts, and marshals shall be verified by the oath of the officer making the same was not repealed by implication with respect to the returns by clerks by Appropriation Act June 28, 1902, c. 1301, § 1, 32 Stat. 475 (U. S. Comp. St. Supp. 1909, p. 239).

[Ed. Note.—For other cases, see Clerks of Courts, Dec. Dig. 61.*]

5. CLERKS OF COURTS (§ 61*)—RETURNS OF FEES—OATH—AUTHORITY TO ADMINISTER—DISTRICT JUDGE.

The oath of a clerk of a District Court to his semiannual return may be taken by the district judge.

[Ed. Note.—For other cases, see Clerks of Courts, Dec. Dig. § 61.*]

6. CLERKS OF COURTS (§ 76*)—INDICTMENT—CLERK OF FEDERAL COURT—FALSE OATH TO RETURN.

The provision of Rev. St. § 833 (U. S. Comp. St. 1901, p. 642), and of Act June 28, 1902, c. 1301, § 1, 32 Stat. 475 (U. S. Comp. St. Supp. 1909, p. 239), requiring clerks of the District Court to make semiannual returns of fees and emoluments on the 1st days of January and July of each year, or within 30 days thereafter, is a mere regulation; and the fact that the return is not made until after the expiration of the prescribed time is no defense to an indictment charging the clerk with perjury in making a false oath to such return.

[Ed. Note.—For other cases, see Clerks of Courts, Dec. Dig. § 76.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The following is a copy of the indictment in case No. 45:

"The United States of America.

"At a District Court of the United States of America, for the District of Massachusetts, begun and holden at Boston, within and for said district, on the first Tuesday of December in the year of our Lord one thousand nine hundred and nine.

"First Count. The jurors for the United States of America, within and for the District of Massachusetts, upon their oath, present that Frank H. Mason, of Boston, in said district, during all of the year nineteen hundred and eight was, and ever since then has been, an officer of the United States, to wit, clerk of the District Court of the United States for the District of Massachusetts, and, on the first day of February, in the year nineteen hundred and nine, had in his possession and under his control, to wit, at Boston aforesaid, certain money of the United States, a particular description whereof is to said grand jurors unknown, to the amount and value of three hundred and eighty-seven dollars, which during said year nineteen hundred and eight had come into his possession and under his control in the execution of his office as such officer and clerk, and under authority and claim of authority as such officer and clerk, and which he should, on said first day of February, in the year nineteen hundred and nine, have accounted for and paid to the United States at Boston aforesaid in the manner provided by law; and that said Frank H. Mason, on said first day of February, in the year nineteen hundred and nine, at Boston aforesaid, the same money unlawfully and feloniously did embezzle.

"Second Count. And the jurors aforesaid, on their oath aforesaid, do further present, that said Frank H. Mason during all of the year nineteen hundred and eight was, and ever since has been, an officer of the United States, to wit, clerk of the District Court of the United States for the district of Massachusetts, and on said first day of February, in the year nineteen hundred and nine, had in his possession and under his control, to wit, at Boston aforesaid, certain public moneys of the United States, a particular description whereof is to said grand jurors unknown, to wit, moneys to the amount and of the value of three hundred and eighty-seven dollars, which during said year nineteen hundred and eight had come into his possession and under his control in the execution of his office as such officer, and under authority and claim of authority as such officer, and were a portion of a surplus of fees and emoluments of his said office over and above the compensation and allowances authorized by law to be retained by him for said year nineteen hundred and eight, which said public moneys said Frank H. Mason, on said first day of February, in the year nineteen hundred and nine, as such officer, was charged, by certain acts of Congress, to wit, sections 823, 828, and 844 of the Revised Statutes of the United States, and the act approved June 28, 1902, 32 Statutes at Large, chapter 1301, and by divers other acts of Congress, safely to keep; that said Frank H. Mason, on said first day of February, in the year nineteen hundred and nine, at Boston aforesaid, the same public moneys unlawfully did fail safely to keep as required by said Acts of Congress, and, on the contrary, the same then and there unlawfully did convert to his own use, and that thereby said Frank H. Mason then and there was guilty of embezzlement of said public moneys so converted.

"Third Count. And the jurors aforesaid, on their oath aforesaid, do further present, that said Frank H. Mason during all of the year nineteen hundred and eight was, and ever since has been, an officer of the United States, to wit, clerk of the District Court of the United States for the District of Massachusetts, and on said first day of February, in the year nineteen hundred and nine, had in his possession and under his control, to wit, at Boston aforesaid, certain public moneys of the United States, a particular description whereof is to said grand jurors unknown, to wit, moneys to the amount and of the value of three hundred and eighty-seven dollars, which during said year nineteen hundred and eight had come into his possession and under his control in the execution of his office as such officer, and under authority and claim of authority as such officer, and were a portion of a surplus of fees and emoluments of his said office over and above the compensation and allowances au-

thorized by law to be retained by him for said year nineteen hundred and eight, which said public moneys said Frank H. Mason, on said first day of February, in the year nineteen hundred and nine, as such officer, was charged, by certain acts of Congress, to wit, sections 823, 828, and 844 of the Revised Statutes of the United States, and the act approved June 28, 1902, 32 Statutes at Large, chapter 1301, and by divers other acts of Congress, safely to keep; that said Frank H. Mason, on said first day of February, in the year nineteen hundred and nine, at Boston aforesaid, the last-mentioned public moneys unlawfully did fail safely to keep as required by said acts of Congress, and, on the contrary, the same then and there unlawfully and fraudulently did convert to his own use, and that thereby said Frank H. Mason then and there was guilty of embezzlement of said public moneys so converted.

"Fourth Count. And the jurors aforesaid, on their oath aforesaid, do further present, that said Frank H. Mason during all of the year nineteen hundred and eight was, and ever since then has been, an officer of the United States, to wit, clerk of the District Court of the United States for the District of Massachusetts, and on said first day of February, in the year nineteen hundred and nine, had in his possession and under his control, to wit, at Boston aforesaid, a portion of the money of the United States, a particular description whereof is to said grand jurors unknown, to wit, money to the amount and of the value of three hundred and eighty-seven dollars, which during said year nineteen hundred and eight had come into his possession and under his control in the execution of his office as such officer, and under authority and claim of authority as such officer, and was a portion of a surplus of fees and emoluments of his said office over and above the compensation and allowances authorized by law to be retained by him for said year nineteen hundred and eight, which money last aforesaid he should, on said first day of February, in the year nineteen hundred and nine, have paid to the United States at Boston aforesaid in the manner provided by law, and that said Frank H. Mason, on said first day of February, in the year nineteen hundred and nine, at Boston aforesaid, the same money unlawfully, wrongfully and fraudulently did convert to his own personal use and embezzle.

"Fifth Count. And the jurors aforesaid, on their oath aforesaid, do further present that Frank H. Mason, of Boston, in said district, at said Boston, on the twenty-fifth day of May, in the year nineteen hundred and nine, said Mason being then and there an officer, to wit, the clerk of the District Court of the United States for the District of Massachusetts, and a person charged, by certain acts of congress, to wit, sections 823, 828 and 844 of the Revised Statutes of the United States, and the act approved June 28, 1902, 32 Statutes at Large, chapter 1301, and by divers other acts of Congress, with the safe keeping of the public moneys of the said United States, and then and there having such public moneys in his charge as such officer and person, did then and there fail, in the manner following, safely to keep the same, that is to say, by unlawfully converting to his own use of the said public moneys the amount and value of three hundred and eighty-seven dollars. Whereby, and by force of the statute in such case made and provided, the said Frank H. Mason has committed the crime of embezzlement.

"Sixth Count. And the jurors aforesaid, on their oath aforesaid, do further present that said Frank H. Mason, of Boston, in said district, at said Boston, on the twenty-fifth day of May, in the year nineteen hundred and nine, said Mason being then and there an officer, to wit, the clerk of the District Court of the United States for the District of Massachusetts, and a person charged, by certain acts of Congress, to wit, sections 823, 828 and 844 of the Revised Statutes of the United States, and the Act approved June 28, 1902, 32 Statutes at Large, chapter 1301, and by divers other acts of Congress, with the safe keeping of the public moneys of the said United States, and then and there having such public moneys in his charge as such officer and person, did then and there fail, in the manner following, safely to keep the same, that is to say, by unlawfully and fraudulently converting to his own use of the said public moneys the amount and value of three hundred and eighty-seven dollars. Whereby, and by force of the statute in such case made and provided, the said Frank H. Mason has committed the crime of embezzlement."

The different counts herein are different descriptions of the same acts.

The indictment in case No. 48 is as follows:

"The United States of America.

"At a District Court of the United States of America, for the District of Massachusetts, begun and holden at Boston, within and for said district, on the first Tuesday of December in the year of Our Lord one thousand nine hundred and nine.

"First Count. The jurors for the United States of America, within and for the District of Massachusetts, upon their oath, present that Frank H. Mason, of Boston, in said district, at the several times of the committing of the several offenses in this indictment hereafter charged, was clerk of the District Court of the United States for the District of Massachusetts, and as such clerk was by law required to make to the Attorney General of the United States, on the first days of January and July, in each year, and in the form prescribed by said Attorney General, a written return for the half year ending on said days respectively, showing, among other things, all the fees and emoluments of his office, of every name and character, and all the necessary expenses of his office, and to verify such return by his oath; that said Frank H. Mason, on the twenty-fourth day of September, in the year nineteen hundred and eight, at Boston aforesaid, then so being such clerk, came in person before the Honorable Frederic Dodge, then and before that time judge of the District Court of the United States for the District of Massachusetts, and then and there made and subscribed a certain declaration and certificate in writing before said judge, on the occasion of his making his return as aforesaid as such clerk for the half year ending on the thirtieth day of June, in the year nineteen hundred and eight, and was, on the day first aforesaid, there in due manner sworn by said judge touching the truth of the matters contained in said return, and took his corporal oath, before said judge, that said written declaration and certificate by him the said Frank H. Mason subscribed was then just and true, he the said Frederic Dodge as such judge then and there having competent authority, and being a tribunal and officer having authority, to administer said oath and take said written declaration and certificate; and that said Frank H. Mason then and there falsely, corruptly, and willfully, and contrary to his said oath, did in and by his said written declaration and certificate declare and certify certain material matters, among other things, in substance and to the effect that said return was in all respects just and true, according to his best knowledge and belief, and that he had neither received, directly or indirectly, any other money or consideration than therein stated; that the total amount of fees and emoluments received in bankruptcy proceedings was six thousand five hundred and fifteen dollars and eighty-five cents; that the total amount of fees and emoluments, not in bankruptcy proceedings, earned from parties other than the United States, was six hundred and thirty-four dollars and eighty-three cents; and that the balance then due to the United States from him as such clerk was four thousand and nineteen dollars and forty-six cents; whereas in truth and in fact said Frank H. Mason, at the time he took said oath and made and subscribed said written declaration and certificate, had, as he then well knew, received as such clerk, during said half year, fees and emoluments in bankruptcy proceedings a much greater total sum, to wit, the sum of six thousand six hundred and seventy-four dollars and eighty-five cents, and had earned fees and emoluments, not in bankruptcy proceedings, from parties other than the United States, a much greater total sum, to wit, the sum of six hundred and eighty-one dollars and eighty-three cents, and the balance then due to the United States from him as such clerk was a much greater sum, to wit, four thousand two hundred and twenty-five dollars and forty-six cents; and whereas in truth and fact said Frank H. Mason did not then believe it to be true that the total amount of such fees and emoluments so received by him in bankruptcy proceedings was six thousand five hundred and fifteen dollars and eighty-five cents, or that the total amount of fees and emoluments so earned by him, not in bankruptcy proceedings and from parties other than the United States, was six hundred and thirty-four dollars and eighty-three cents, or that such balance then due to the United States was four thousand and nineteen dollars and forty-six

cents; and so said Frank H. Mason, at the time and place and in manner and form aforesaid, unlawfully did commit willful and corrupt perjury.

"Second Count. And the jurors aforesaid, on their oath aforesaid, do further present, that said Frank H. Mason, of Boston, in said district, at the time of the committing of the offense in this count of this indictment hereafter charged, was clerk of the District Court of the United States for the District of Massachusetts, and as such clerk was by law required to make to the Attorney General of the United States, on the first days of January and July, in each year, and in the form prescribed by said Attorney General, a written return for the half year ending on said days respectively, showing, among other things, all the fees and emoluments of his office, of every name and character, and all the necessary expenses of his office, and to verify such return by his oath; that said Frank H. Mason, on the third day of February, in the year nineteen hundred and nine, at Boston aforesaid, then so being such clerk, came in person before the Honorable Frederic Dodge, then and before that time judge of the District Court of the United States for the District of Massachusetts, and then and there made and subscribed a certain declaration and certificate in writing before said judge, on the occasion of his making his return as aforesaid as such clerk for the half year ending on the thirty-first day of December, in the year nineteen hundred and eight, and was on the day in this count first aforesaid, there in due manner sworn by said judge touching the truth of the matters contained in said return, and took his corporal oath, before said judge, that said written declaration and certificate by him the said Frank H. Mason subscribed was then just and true, he the said Frederic Dodge, as such judge, then and there having competent authority, and being a tribunal and officer having authority, to administer said oath and take said written declaration and certificate; and that said Frank H. Mason then and there falsely, corruptly and willfully, and contrary to his said oath, did in and by his said written declaration and certificate declare and certify certain material matters, among other things, in substance and to the effect that said return was in all respects just and true, according to his best knowledge and belief, and that he had neither received, directly or indirectly, any other money or consideration than therein stated; that the total amount of fees and emoluments received in bankruptcy proceedings was five thousand and eighty-nine dollars and ninety-five cents; that the total amount of fees and emoluments, not in bankruptcy proceedings, earned from parties other than the United States, was four hundred and fifty-five dollars and thirty-two cents; and that the balance then due to the United States from him as such clerk was one thousand six hundred and thirty-nine dollars and forty-one cents; whereas, in truth and in fact, said Frank H. Mason, at the time he took said oath and made and subscribed said written declaration and certificate, had, as he then well knew, received as such clerk, during said half year, fees and emoluments in bankruptcy proceedings a much greater total sum, to wit, the sum of five thousand two hundred and eight dollars and ninety-five cents, and had earned fees and emoluments, not in bankruptcy proceedings, from parties other than the United States, a much greater total sum, to wit, the sum of five hundred and seventeen dollars and thirty-two cents, and the balance then due to the United States from him as such clerk was a much greater sum, to wit, five thousand three hundred and eighty-nine dollars and ninety-five cents; and whereas in truth and fact said Frank H. Mason did not then believe it to be true that the total amount of such fees and emoluments so received by him in bankruptcy proceedings was five thousand and eighty-nine dollars and ninety-five cents, or that the total amount of fees and emoluments so earned by him, not in bankruptcy proceedings and from parties other than the United States, was four hundred and fifty-five dollars and thirty-two cents, or that such balance then due to the United States was one thousand six hundred and thirty-nine dollars and forty-one cents; and so said Frank H. Mason, at the time and place and in manner and form in this count aforesaid, unlawfully did commit willful and corrupt perjury.

"Third Count. And the jurors aforesaid, on their oath aforesaid, do further present, that said Frank H. Mason, of Boston, in said district, at the time of the committing of the offense in this count of this indictment hereafter

charged, was clerk of the District Court of the United States for the District of Massachusetts, and as such clerk was by law required to make to the Attorney General of the United States, on the first days of January and July, in each year, and in the form prescribed by said Attorney General, a written return for the half year ending on said days respectively, showing, among other things, all the fees and emoluments of his office, of every name and character, and all the necessary expenses of his office, and to verify such return by his oath; that said Frank H. Mason, on the eleventh day of August, in the year nineteen hundred and nine, at Boston aforesaid, then so being such clerk, came in person before the Honorable Frederic Dodge, then and before that time judge of the District Court of the United States for the District of Massachusetts, and then and there made and subscribed a certain declaration and certificate in writing before said judge, on the occasion of his making his return as aforesaid as such clerk for the half year ending on the thirtieth day of June, in the year nineteen hundred and nine, and was, on the day in this count first aforesaid, there in due manner sworn by said judge touching the truth of the matters contained in said return, and took his corporal oath, before said judge, that said written declaration and certificate by him the said Frederic Dodge, as such judge, then and there having competent authority, and being a tribunal and officer having authority, to administer said oath and take said written declaration and certificate; and that said Frank H. Mason then and there falsely, corruptly and willfully, and contrary to his said oath, did in and by his said written declaration and certificate declare and certify certain material matters, among other things, in substance and to the effect that said return was in all respects just and true, according to his best knowledge and belief, and that he had neither received, directly or indirectly, any other money or consideration than therein stated; that the total amount of fees and emoluments received in bankruptcy proceedings was six thousand three hundred and ninety-one dollars and fifty-eight cents; that the total amount of fees and emoluments, not in bankruptcy proceedings, earned from parties other than the United States, was five hundred and nineteen dollars and twenty-three cents; and that the balance then due to the United States from him as such clerk was five thousand two hundred and seventy-five dollars and eighty-one cents; whereas in truth and in fact said Frank H. Mason, at the time he took said oath and made and subscribed said written declaration and certificate, had, as he then well knew, received as such clerk, during said half year, fees and emoluments in bankruptcy proceedings a much greater total sum, to wit, the sum of six thousand five hundred and forty-two dollars and eight cents, and had earned fees and emoluments, not in bankruptcy proceedings, from parties other than the United States, a much greater total sum, to wit, the sum of five hundred and sixty dollars and seventy-three cents, and the balance then due to the United States, from him as such clerk was a much greater sum, to wit, five thousand four hundred and sixty-seven dollars and eighty-one cents; and whereas in truth and fact said Frank H. Mason did not then believe it to be true that the total amount of such fees and emoluments so received by him in bankruptcy proceedings was six thousand three hundred and ninety-one dollars and fifty-eight cents, or that the total amount of fees and emoluments so earned by him, not in bankruptcy proceedings and from parties other than the United States, was five hundred and nineteen dollars and twenty-three cents, or that such balance then due to the United States was five thousand two hundred and seventy-five dollars and eighty-one cents; and so said Frank H. Mason, at the time and place and in manner and form in this count aforesaid, unlawfully did commit willful and corrupt perjury."

The following are the statutes prescribing the duties of the clerk of the District Court:

Rev. St. § 833 (U. S. Comp. St. 1901, p. 642):

"Every * * * clerk of a District Court * * * shall, on the first days of January and July, in each year, or within thirty days thereafter, make to the Attorney General, in such form as he may prescribe, a written return for the half year ending on said days, respectively, of all the fees and

emoluments of his office, of every name and character, and of all the necessary expenses of his office, including necessary clerk hire, together with the vouchers for the payment of the same for such last half year. He shall state separately in such returns the fees and emoluments received or payable under the bankrupt act. * * * Said returns shall be verified by the oath of the officer making them."

Rev. St. 844 (U. S. Comp. St. 1901, p. 647):

"Every * * * clerk * * * shall, at the time of making his half-yearly return to the Attorney General, pay into the treasury, or deposit to the credit of the Treasurer, as he may be directed by the Attorney General, any surplus of the fees and emoluments of his office, which said return shows to exist over and above the compensation and allowances authorized by law to be retained by him."

Act June 28, 1902, c. 1301, § 1, 32 Stat. 475 (U. S. Comp. St. Supp. 1909, p. 239):

"For Fees of Clerks, \$240,000: Provided, that each clerk of the District and Circuit Courts shall, on the first days of January and July of each year, or within thirty days thereafter, make to the Attorney General, in such form as he may prescribe, written returns for the half-year ending on said days, respectively, of all fees and emoluments of his office of every name and character, and of all necessary expenses of his office, including necessary clerk hire, together with the vouchers for the payment of the same for such last half year; and the word 'emoluments' shall be understood as including all amounts received in connection with the admission of attorneys to practice in the court, all amounts received for services in naturalization proceedings, whether rendered as clerk, as commissioner, or in any other capacity, and all other amounts received for services in any way connected with the clerk's office."

Frank H. Mason was indicted for embezzlement. On demurrer to the indictments. Overruled.

Asa P. French, U. S. Atty., and J. B. Ferber, Asst. U. S. Atty.
Boyd B. Jones and George L. Wilson, for defendant.

PUTNAM, Circuit Judge (orally). I will first take up the indictments relating to the alleged embezzlement of moneys, which I think are Nos. 45, 46, and 47. There are two classes of counts here. Counts 2, 3, and 4 relate specifically to surplus fees and emoluments of the clerk of the United States District Court, and as such clerk he is charged by those counts with embezzling that surplus. The other counts cover a disposition of funds in his hands without alleging the origin of them; but they all charge embezzlement. The expression "to embezzle" was settled in the Court of Appeals for this circuit as sufficient, the same as the words "steal, take, and carry away," to show a willful conversion unlawfully and fraudulently to one's own use. *Jewett v. United States*, 100 Fed. 832, 837, 41 C. C. A. 88, 53 L. R. A. 568; *Dickinson v. United States*, 159 Fed. 801, 802, 86 C. C. A. 625, 626. In all these counts the description of the funds alleged to have been embezzled is sufficient, because the grand jury specifies an amount, and says that it is unable to give further information. Under several decisions of the Supreme Court, that is sufficient, and my recollection is that it is sufficient until disproved. Counts 2, 3, and 4 relate, however, clearly to moneys which came into Mason's hands as fees and emoluments, and no fair consideration of the counts can leave out that limitation. All the other counts, while they have been discussed as based on this statute or that statute, contain finally a general charge of em-

bezzlement, which is sufficient, as I have said, although perhaps they contain other matters which may be regarded as surplusage. They are so framed that, with reference to alleged embezzlements, the United States can rest them upon any statute which they will fit in a general way. Therefore all those counts must stand on these demurrers. The demurrers, however, are not to each indictment as a whole, but to each and every count. So, notwithstanding some counts are good, other counts may be adjudged invalid.

A supposed fundamental question made by the parties is as to the nature of the title by which the clerk of the District Court holds the moneys he receives as fees and emoluments. The Supreme Court has characterized the nature of this title in two different ways; but in each case in a mere dictum relating not at all to any essential matter, each being disposed of on fundamental points to which the dictum had no necessary relation. Expressions in the case of *United States v. Hill*, 123 U. S. 681, 8 Sup. Ct. 308, 31 L. Ed. 275, would indicate that, in the view of the court, the moneys, until some step was taken under the statutes other than the mere collection of them from litigants, are the moneys of the clerk. The other expression, cited by the United States, which was repeated by the Circuit Court of Appeals in this Circuit in *United States v. Mason*, 129 Fed. 742, 64 C. C. A. 270, was again a mere dictum, but has a different outlook. To determine this precise point we have to look back to the time when these moneys were undoubtedly the moneys of the clerk as they were received. That was the law of the United States courts in accordance with the law of Great Britain generally that fees and emoluments are the property of the person receiving them, and this to such an extent that under the common law many offices were sold outright, and allowed to be sold; the purchase money being based upon the amount of fees and emoluments which the holder of the office might receive. There was no question about that until the statute of 1853, now Rev. St. §§ 823, 828 (U. S. Comp. St. 1901, pp. 632, 635). To that time the whole question of the clerk's fees and emoluments was mostly a matter of tradition. Then the statute undertook to regulate the fees and emoluments of clerks, and did so to a certain extent, leaving still a large remnant as a matter of judicial practice. In *United States v. Hill*, 120 U. S. 169, 7 Sup. Ct. 510, 30 L. Ed. 627, the clerk prevailed on a question of usage necessary to enable the court to construe the act of 1853 (Act Feb. 26, 1853, c. 80, 10 Stat. 161). All this indicates the nature of the right which we are considering. Yet whether under the present statutes the fees and emoluments received by him are the clerk's moneys, quasi moneys, or whether they are moneys of the United States when they are received, and whether the surplus in his hands is his moneys until he has made the return which the statute requires, or whether they are moneys of the United States, one thing is clear—that by settled usage, and undoubtedly by the law, the clerk never deposits the fees and emoluments under the subtreasury system of the United States. He always holds them in his own hands until he makes his return, when by the statute he is required to pay the surplus to the United States. He uses to some extent those moneys for his family expenses and for his own expenses; and there can be no question that an interpretation of

the law which permits this is a reasonable one and a necessary one, because, aside from those moneys, the clerk is not supposed to have any resources for his support during the six-months period which his returns cover. Such is the practice, and such I have no doubt is the law; and so those moneys have never been covered by the subtreasury acts. Therefore there is always a margin of doubt and question—sometimes large, sometimes small—but a margin of doubt and question as to what portion of those moneys belongs to the United States; that is, what is the surplus, and what portion belongs to the clerk.

As the result, there are two roads marked out by the statutes of the United States, one that of the subtreasury moneys, or moneys which the clerk necessarily pays into the subtreasury, or some depository, and which can be drawn only by checks countersigned by the judge, and the other that of the moneys collected by the clerk as fees and emoluments, always an uncertain, undetermined amount until finally closed by an adjudication of the department satisfactory to the clerk, or by civil litigation in the courts. In view of the fact that section 5490 of the Revised Statutes (U. S. Comp. St. 1901, p. 3704), on which the United States orally bases one of its counts, will, on examination, be found to be a part of the subtreasury act (Act Aug. 6, 1846, c. 90, § 9 Stat. 63), it has no relation to these proceedings, so far as they concern fees and emoluments of the clerk's office, although I agree with the district attorney that the statute is a regulatory statute, intended to guard the finances of the United States by clear rules, and to point out positively the place where the moneys shall be deposited, and what shall be done with them. The subtreasury system points out one path; but what we have here relates to that uncertain state of accounts of which I have spoken, and to the moneys which the clerk is not required to deposit instantly, but which he may apply in part to his own personal uses or to his family uses, and which travel an entirely different road. That in my judgment is marked out by what was section 833 of the Revised Statutes, coupled with section 844. The two go together as parts of the act of 1853 about fees, and must be read together.

I may, however, call attention to another statute which has not been explained to me; that is, Act Feb. 22, 1875, c. 95, 18 Stat. 333 (U. S. Comp. St. 1901, p. 648), and sequence. Section 5 of that act (page 621) provides in substance that, if any clerk shall willfully refuse or neglect to make any report, certificate, or statement, or other document, required by law to be by him made, or shall willfully refuse or neglect to forward any such report, certificate, statement, or document to the department, officer, or person to whom by law the same should be forwarded, the President may remove him. Then the act provides further, in section 6 (page 622), that, if any such neglect or refusal occurs, the clerk is guilty of a misdemeanor, and may be punished by fine not exceeding \$1,000 or by imprisonment not exceeding one year.

Now, to my mind, there is, in all this, a plain, straight-forward system from the beginning to the end, distinguishing these matters before us, so far as fees and emoluments are concerned, from all the statutes which relate to the subtreasury of the United States. They are entirely separate and distinct systems. The United States are entitled to be protected by these statutes, and the clerk also is entitled to be

protected by them; and, so far as they can relieve him from unjust litigation and from being charged with embezzlement, he is entitled to be relieved. Under sections 833 and 844, which provide, not only for the semiannual returns, but also that, when the returns are made, and not sooner, the clerk shall pay into the treasury of the United States the amounts shown by them to be due from him, it is my opinion that the clerk cannot be charged in any way criminally for any disposition of any part of the fees and emoluments received by him as fees and emoluments under any general provisions of the statutes of the United States with reference to embezzlement. If the clerk fails to make a return, or refuses to make a return, he may be proceeded against under the act of 1875; and whether in the event he refuses or neglects to avail himself of the opportunity of explaining his finances given him by sections 833 and 844 of the Revised Statutes referred to, or whether in the event he refuses or neglects to pay over a surplus which has been definitely ascertained on an adjustment of his accounts or by a civil suit, he can be proceeded against criminally under any other statute than that of 1875, I have no occasion to ascertain at present. Certainly I regard any proceeding of the character I am discussing, relating to moneys received by the clerk as fees and emoluments, as futile in law unless they allege that he refused to make his return, or unless they allege that, if he made the return, he refuses to make payment at the end of the time provided by section 844. These allegations are lacking in the present case.

Therefore the judgment will be that the three counts which do not relate to moneys received by the clerk as fees and emoluments are sufficient in law, and the respondent will be directed to answer over to them. So far as the other three counts are concerned, those which relate to moneys received by him as fees and emoluments, the counts are not sufficient in law, and are adjudged invalid; and, so far as those counts are concerned, the judgment will be that the respondent goes without day.

I will now take the other indictment. There the difficulty is a very serious one indeed. Whatever my conclusion, I have very great doubts. The difficulty comes, not from any general rules of law, but from the fact that Congress saw fit in an appropriation act where it did not belong to make a provision of the crudest character. Section 833 of the Revised Statutes provided for a semiannual return by the clerk, as well as by the district attorney and the marshal. Then at the close it contained the following: "Said returns shall be verified by the oath of the officer making them." Act June 28, 1902, c. 1301, 32 Stat. 419, was a general sundry civil appropriation act, making appropriations for the fiscal year ending June 30, 1903. It was approved June 28, 1902, which was two days before the semiannual return of the clerk, the respondent here, was required to be made in accordance with section 833 of the Revised Statutes. It made no reservation of that return, but contained a repealing clause at page 481 that "all laws or parts of laws in conflict with the provisions of this act be and the same are hereby repealed." For a long time my mind was much taken up with the rules in reference to the effect of repealing statutes, but difficulties underlie that. Two statutes cannot stand in the same place any more than two persons can.

stand in the same place; and this statute, which was found in the bowels of the appropriation act, modified the form of return to be made, and omitted the requirement for an oath. In the form of the return some changes were very evidently important to be made. One was a mere matter of form, namely, it omitted the marshal and the district attorney, each at that time on a salary, and the other included specifically certain items which it classified as fees and emoluments which were not clearly included in any previous act. The provision does not purport to be an amendment. It contains on its face no reference to the Revised Statutes; that is, to the section in question, 833. It simply is made out of whole cloth. It reads, in fact, the same as though there had been no previous statute. Now, the repealing provision of the Revised Statutes does not seem to reach this case exactly. It does not seem to reach the case so far as the return of the clerk due July 1, 1902, was concerned. That is left in the air; but I need not trouble on this account, because there is no practical question about it. This act of 1902 did, however, occupy the place occupied by section 833 of the Revised Statutes, and therefore in a certain sense, at least, it repealed it by inevitable effect.

The expressions of the Supreme Court are not always complete with reference to what are repealing statutes by implication. They ordinarily say that by implication a new statute does not repeal if it is possibly reconcilable with the old statute. The Supreme Court guards itself very carefully in that way, but it has sometimes failed to speak of the effect by implication of a statute which covers the same ground as a previous statute, when it is impossible for the two to stand together. However, the question is not one of repeal, but whether or not Congress intended to bring forward from the Revised Statutes to the act of 1902 the provision for an oath. The difficulty in my mind is that that provision for an oath is for an oath to the return declared in section 833, while now I am asked to establish an oath to a return which is different, essentially different, in its subject-matter. Right there is where the question lies in my mind. If, however, I do not bring forward the provision for an oath in section 833, I repeal section 844 of the Revised Statutes, because section 833 relates to the same return as section 844, which requires that the clerk pay over the moneys. I would have to hold that Congress has unintentionally repealed all provisions for paying after the return is made. It is easy to imagine extreme cases where a re-enactment of a statute would bring forward what was not in terms re-enacted. Take a criminal statute imposing a penalty of life imprisonment, or of hanging, in case of murder! The statute, as your Massachusetts statutes do, may define murder, the different degrees of murder, with a great deal of detail. Let the Legislature re-enact a new description of the details of the offense, but omit in terms to re-enact the penalty! Both statutes could not stand together, but no court would venture to hold that the penalty was lost. That would be an extreme case. This here, which is a matter of regulation, requires a longer stretch on the part of the court than the extreme case which I suggest. Nevertheless, with great doubt, and with the possibility of a revision of my views at a subsequent stage of the case, I think that I must hold that the provision for an oath has been brought forward by

the intention of Congress or the inevitable condition of things, and that the court cannot disregard it.

The other objections to the indictment of which I am speaking are not so serious. They are not free from doubt, but still they are objections on which the views of the court are clearer. I have no doubt, although there is no express provision, that the oath may be taken by the district judge. There is a settled rule of law, of the common law, that a judge of a superior court is a magistrate who can take any oath which the law requires, either in court or out of court; and this rule has been adopted by the common practice in the United States in the federal courts, and applies to the judges of those courts. I think that Mr. Justice Swayne in the case cited here so holds; and the Supreme Court in the case cited by him also so holds. At any rate, that is the settled practice. So the only question would be as to the effect of the act of 1902—whether the oath was required. If I am right in my view that the oath was required, then I am clear that the district judge had the right to take the oath. I am also clear that, if there was any question with reference to this return under the act of 1902 for investigation by the judge of the District Court, he had a right to take the oath in reference thereto whether there was any provision of statute therefor or not. But there does not seem to be any statute which rests upon the district judge any right or obligation to investigate that return. Therefore the case stands entirely, so far as we have gone, upon the correctness of my views whether or not I am entitled to hold, and should hold, that the provision for the oath in section 833 was brought forward into the act of 1902.

There is one other question; that is, that the indictment fails to allege that the return was made within the time fixed by statute. I look upon this matter of time as a mere regulation, which, of course, in my judgment, cannot reach the vitals of this case; and therefore I cannot sustain that point.

The judgment on this indictment will be that the indictment is adjudged sufficient, and that the respondent must answer over.

The counsel will submit the proper interlocutory judgment on each indictment, according to this opinion.

HANNEMAN v RICHTER.

(Circuit Court, E. D. New York. March 10, 1910.)

1. CURTESY (§ 2*)—CURTESY CONSUMMATE—ABOLITION.

Curtesy consummate, by virtue of 2 Gen. St. N. J. p. 2014, § 9 (P. L. 1864, p. 698), was not abolished by the married women's act of March 25, 1852 (P. L. p. 407), as amended by Act March 27, 1874 (2 Gen. St. pp. 2012, 2013, §§ 1-3).

[Ed. Note.—For other cases, see Curtesy, Cent. Dig. §§ 3, 4; Dec. Dig. § 2.*]

2. ESTOPPEL (§§ 116, 118*)—PRESUMPTION.

An act or election claimed to constitute an estoppel must be clearly and definitely proved, and cannot be presumed, in the absence of any testimony by which the election is shown.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 306, 308; Dec. Dig. §§ 116, 118.*]

3. CURTESY (§ 11*)—ESTOPPEL.

Where one entitled to a life use of his wife's real estate as tenant by the curtesy qualified as trustee under his wife's will, bequeathing to him the property in question in trust for testatrix's daughters and sister to hold and divide when the daughters became of age, etc., and made no objections to the provisions of the will or to the obligation taken by him to carry out such provisions, but nevertheless held the property for 22½ years and appropriated the rents to his own use with full knowledge of the trust, it cannot be urged after his death that he had elected to waive his curtesy rights, in the absence of proof showing some act equivalent to an election or to a specific waiver thereof.

[Ed. Note.—For other cases, see Curtesy, Dec. Dig. § 11.*]

Bill by Louis Hanneman against Matilda G. Richter, as executrix, etc. On motion to dismiss. Granted.

Andrew G. Cropsey, for plaintiff.

Richard B. Kelly, for defendant.

CHATFIELD, District Judge. The plaintiff brought this action (since removed into this court) in equity, as the representative and next of kin of his deceased wife and as guardian of their infant child, against the defendant, individually and as representative and next of kin of one Ludeman, the father of both the plaintiff's deceased wife and of the defendant. For a number of years prior to his death Ludeman acted within the state of New Jersey as trustee under the will of his wife, and during that period had under his control a certain house at Union Hill, from which he collected the rents. He qualified as such trustee immediately after the death of his wife, by whose will he was named as executor and trustee for their children; one of the children being, as has been said, the wife and testator of the plaintiff, and another the defendant herein.

The situation has been further complicated by a proceeding in voluntary bankruptcy in this court against the plaintiff as an individual, in which the claim urged in the present action is scheduled as an asset of the bankrupt. Further, in 1901, the plaintiff herein brought an action in New Jersey to partition the real estate in question, and in that action demanded an accounting for rents from the defendant here, as executrix of her father's will. It further appears that in 1901 the defendant in the present action sued the plaintiff (Hanneman) upon a debt for money loaned by her mother, who it will be remembered was Hanneman's mother-in-law; the amount of this loan having been specifically bequeathed to the defendant and her sisters by their mother's will. Various defenses were interposed, one of which is said to have involved the question raised in the present action; but judgment was allowed to go by default, and the bankruptcy proceeding on behalf of Hanneman was intended to relieve him from this judgment along with the other

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

claims. It also appears from the record that Ludeman collected the rents from the premises in question some 22½ years subsequent to the death of his wife, and that after his own death, the defendant in the present action collected these rents for at least 1½ years. In the action for an accounting, brought in New Jersey, the defendant in the present action paid over the share belonging to Hanneman's wife's estate of the rents for the aforesaid 1½ years, and thus removed it from the scope of the present suit.

The motion to dismiss the present action for lack of prosecution has been made, and the plaintiff has appeared in court by his attorney and admitted that, unless he can prevail in his contention upon one question of law, he has no foundation for the present action. In order, therefore, to avoid the expense and difficulty of taking testimony and printing the necessary record, the plaintiff has demurred to the answer of the defendant, on the ground that upon the facts shown, which are substantially as recited above, the answer is insufficient as a matter of law. The purpose of the demurrer is really an attempt to obtain a ruling upon the sufficiency of the plaintiff's claim, rather than the insufficiency of the defendant's answer thereto; but, whichever way the question is raised, the determination is comparatively simple.

When Mrs. Ludeman, the mother of the defendant and of the plaintiff's wife, died in 1878, she left, and attempted to dispose of by will, the real property above referred to. Her husband, the testator of the defendant, was living, and immediately entered into possession of that property. Children having been born of that marriage, Ludeman was entitled to a life use of the real estate as tenant by curtesy. The provisions of the wife's will were as follows:

"I give and bequeath to my beloved husband, Henry Ludeman, in trust for my two daughters, Amanda and Matilda M. G. Ludeman, and my sister, Hermina Elizabeth King, of Hamburg, in Germany, until my two daughters aforesaid shall have arrived at the age of twenty-one years all my real estate situated in the township of West Hoboken, aforesaid, in three equal shares, share and share alike, as they three shall determine, after my youngest daughter aforesaid shall have arrived at the age of twenty-one years. And I further give and bequeath to my daughter Amanda, my gold watch, and to my daughter, Matilda, any remaining articles of jewelry I may die possessed of, and all of my silverware and wearing apparel to be equally divided between my two daughters aforesaid, after my decease, and if any or either of the three devisees aforesaid should die prior to the execution of the trust aforesaid, then and in that case the real estate aforesaid shall go to the survivors or survivor of them."

The trust does not specifically provide for payment of the income of said property before its distribution; but Ludeman's rights as tenant by curtesy would be lost if he waived his claim, and if he himself as trustee, or if any other trustee, took possession of the property and administered it as a trust under Mrs. Ludeman's will, with an accumulation of the income or a payment thereof to the beneficiaries. An administration of the trust might even be had in connection with the rights of the tenant by curtesy, until the youngest daughter reached the age of 21 years. The trust, then, being capable of execution, the tenant by curtesy could waive any further rights and free the property from his life estate. But no affirmative release of his tenancy is shown,

and the only question is whether mere qualification as executor and trustee should be deemed as a waiver. Such a question arises more often in connection with dower, where a specific bequest must be accepted in lieu of dower if the two rights are in conflict.

It is not disputed that Ludeman qualified as trustee, and that he made no objection to the provisions of the will, or to the obligation taken by him to carry out those provisions. On the other hand, the record shows no act on his part which by itself is equivalent to an election, or to a specific waiver of his rights as tenant by curtesy. His holding of the property for 22½ years, and the appropriation of rents, to his own use during all of that period, with full knowledge by him that he was at the same time trustee for the benefit of his own daughters, and bound to turn over and account for the property disposed of by the will of his wife, from which property he was receiving the benefits, makes it impossible to hold that he unwittingly appropriated what he intended to faithfully account for as trustee. If Ludeman did not intend to recognize the trust, and never did anything equivalent to such an admission, then he never did anything which was equivalent to an election in favor of himself as trustee, or to a waiver of his rights as tenant by curtesy. His qualification as trustee was merely potential and precautionary, and must have been followed by some affirmative act showing that he was holding the property in his fiduciary capacity, and in conflict with his own life use, before he can be estopped. Especially in his absence and after his death, such estoppel would in effect determine that he did not claim the rights which he admittedly seems to have exercised, with full knowledge of the trust in question.

A number of cases have been cited from the New Jersey Reports to the effect that under the provisions of the New Jersey Statutes (2 Gen. St. p. 2014, § 9; P. L. 1864, p. 698) tenancy by curtesy consummate was not abolished by the married women's act of March 25, 1852 (P. L. p. 407), as amended by Act March 27, 1874 (2 Gen. St. pp. 2012, 2013, §§ 1-3). *Porch v. Fries*, 18 N. J. Eq. 204; *Vreeland v. Ryno*, 26 N. J. Eq. 160; *Colgan v. Pellens*, 48 N. J. Law, 27, 2 Atl. 633. The New Jersey law seems to be entirely in accord with the general proposition that if a person is asserted to have done something contrary to his own interest, when in apparent possession of information as to his exact position, such election or act, claimed to be an estoppel, must be clearly and definitely proved, and cannot be presumed, in the absence of any testimony thereto. *Kerrigan v. Connolly* (N. J. Ch.) 46 Atl. 227.

The question of law raised by the demurrer must be answered in favor of the defendant, upon the stipulation filed, to the effect that the plaintiff's rights in the present action shall depend upon the determination of this question. The motion to dismiss the suit upon the plaintiff's failure to produce any testimony in support of his position should be granted.

ULLMANN v. UNITED STATES.

(Circuit Court, S. D. New York. January 21, 1910.)

No. 5559.

1. CUSTOMS DUTIES (§ 66*)—SECRETARY OF THE TREASURY—INVALID DEPARTMENTAL REGULATION.

There is no statute granting to the Secretary of the Treasury the power to adopt article 1450, Customs Regulations 1899, permitting entry of imports by appraisement without invoice, where the invoice value greatly exceeds the general market value at the time of exportation.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 66.*]

2. CUSTOMS DUTIES (§ 75*)—DUTIABLE VALUE—EXCESSIVE INVOICE VALUE.

The provisions in Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139 (U. S. Comp. St. 1901, p. 1924), and Act June 10, 1890, c. 407, § 7, 26 Stat. 134, as amended by Act July 24, 1897, c. 11, § 32, 30 Stat. 211 (U. S. Comp. St. 1901, p. 1892), that "duty shall not * * * be assessed * * * upon less than the invoice * * * value," and that "duty shall be assessed upon the actual market value * * * at the time of exportation," when construed together, mean that the dutiable value shall in no case be fixed at less than the purchase price of the goods; and where, subsequently to the purchase of goods for import to the United States, the market value of such goods decreases, the goods are nevertheless dutiable on the basis of the price paid.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 181; Dec. Dig. § 75.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The Board of General Appraisers affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Joseph Ullmann. The Board's opinion (G. A. 6,918, T. D. 29,883) reads as follows:

HAY, General Appraiser. Certain sealskins were purchased by the protestant in the years 1904-1906, imported by him in 1907, and entered for duty at the price paid for them in the several years before mentioned. It is admitted that the price of like sealskins in the year 1907, when these were imported, was less than the price paid for the same in 1904-1906. The importer made application to the Secretary of the Treasury, under the provisions of article 1450 of the customs regulations of 1899, for permission to enter the merchandise by appraisement. This was denied. The appraiser returned the invoice value as correct, and the collector assessed the merchandise for duty on the value as stated in the invoices.

The protestant assigns this action as error, and three contentions are made by him in presenting his case: (1) That he should have been permitted to enter the merchandise by appraisement; (2) that the act of the appraiser was invalid, he having made no such appraisement of the merchandise as the law directs him to make; (3) that, the merchandise being subject to an ad valorem rate, duty should, under the provisions of Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139 (U. S. Comp. St. 1901, p. 1924), have been assessed on its actual market value or wholesale price at the time of exportation to the United States, which was the year 1907.

The first question is easily disposed of. Without considering the question of the Secretary's authority to make such a regulation, the very language of article 1450 is such that the right to enter by appraisement without an invoice is entirely dependent upon the approval of the Secretary of the Treasury in each case, and in the case before us the Secretary of the Treasury refused his approval.

The second ground—that the appraisement was invalid—cannot avail the protestant in event the language of section 7, 26 Stat. 134 (U. S. Comp. St. 1901, p. 1892), under which the collector acted, is held to modify and control all other provisions of the law with reference to the assessment of duty upon imported merchandise.

Coming, then, to the third ground, the substance of the importer's contention is that the concluding sentence of section 7—"Duty shall not, however, be assessed in any case upon an amount less than the invoice or entered value"—does not modify the provision of section 19 that "duty shall be assessed upon the actual market value or wholesale price of such merchandise * * * at the time of exportation to the United States"; that section 19, occupying a place subsequent in the act to section 7, is the later expression of the legislative will, and hence controlling; that, there being a conflict between the two provisions, the doubt that arises therefrom should be solved in favor of the importer.

It is a well-settled rule of construction that the last of two repugnant provisions of the same act shall prevail. *Powers v. Barney*, 5 Blatchf. 202, 19 Fed. Cas. 1234 (No. 11,361). Founded, as it is, upon the necessity for some rule by which repugnant provisions of the same act may be construed, rather than upon any sound principle, this rule is not without exceptions. One of these exceptions is where an examination of the repugnant provisions and the entire body of legislation on the subject, and also the previous history of legislation touching the same subject-matter, reveals the fact that the intention of the lawmaking body was that the earlier provision should modify and control the later. *Kansas Pacific Ry. Co. v. Yanz*, 16 Kan. 583. Tested by this exception, we find that the provision of section 7 above quoted was intended by Congress to be the dominant and controlling thought in establishing the value in the assessment of duty upon imported merchandise.

Examining these provisions historically, we find that the provision in section 7 existed in some form before our law made any provision requiring in all cases the appraisement of merchandise at its foreign market value at the time of purchase. It has been carried through all the laws on the subject since April 20, 1818, and in many of the old statutes there is added to this provision "any law of Congress to the contrary notwithstanding." While not in identical language, both the provision in section 7 and that in section 19 were part of the law at the time of the passage of the act of 1890, and the provision now contained in section 7 had theretofore been construed for many years, not only by the courts, but in the practical administration of the law, as controlling and modifying the provision now contained in section 19, as well as all other provisions of the law relative to the value upon which duty should be assessed upon imported merchandise. Congress is presumed by the law to be familiar with these facts, and in the absence of express language could not be held to have intended to change the practice. In addition to these considerations, which we believe to be controlling, the rule of *stare decisis* applies with unusual force, for both before and since the customs administrative act of 1890 it has been uniformly held that the concluding provision of section 7 is controlling, and that it is the duty of the liquidating officer to assess duty upon an amount not less than the invoice and entered value. *Downing's Case*, G. A. 6,732, T. D. 28,814; *Isler & Guye's Case*, G. A. 6,234, T. D. 26,920; *Kimball v. Collector*, 10 Wall. 436, 19 L. Ed. 964; *Daloz v. U. S. (C. C.)* 171 Fed. 275, T. D. 29,807.

The protests are overruled.

Kammerlohr & Duffy (John G. Duffy, of counsel), for importer.

D. Frank Lloyd, Deputy Asst. Atty. Gen. (Thomas M. Lane, of counsel), for the United States.

MARTIN, District Judge. The importation consisted of sealskins purchased in London in the years 1904, 1905, and 1906, and imported in April, July, and September of 1907. There was a substantial reduction in the market value of the merchandise in question between

the time of purchase and the time of importation. Assessment was made on the purchase price. The importer filed protest, claiming that duty should have been assessed upon the fair market value at the time of importation, under the provisions of section 19, customs administrative act of 1890 (U. S. Comp. St. 1901, p. 1924), as amended in 1897, and by virtue of article 1450 of the Customs Regulations of 1899, which provides:

In cases where it has been conclusively shown that the invoice value of an importation was far beyond the general market value of similar goods at the time of exportation, entry by appraisement without invoice may be allowed, with the approval of the Secretary of the Treasury in each case.

The Board of Appraisers sustained the collector, and the case comes into court upon appeal by the importer.

There is no statute granting to the Treasury Department the power to adopt such an article as above set forth. It evidently came into existence to meet specific cases of fraud practiced upon purchasers by vendors. Section 19 of the act aforesaid, read in connection with section 7, means this: That whenever imported merchandise is subject to an ad valorem duty, the duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in wholesale quantities at the time of exportation to the United States in the principal markets of the country from whence imported, which shall in no case be fixed at an amount less than the purchase price thereof in said market.

It is claimed by the importer that, as section 19 follows section 7, it should be construed as in conflict with the provisions of section 7 and a modification thereof. I do not concur in that view, as the sections construed as above set forth are not in conflict. For further discussion of the questions involved in this appeal I refer to the well-considered opinion of the Board of General Appraisers by Judge Hay.

The decision of the Board is affirmed.

UNITED STATES v. THOMAS PROSSER & SON.

THOMAS PROSSER & SON v. UNITED STATES.

(Circuit Court, S. D. New York. January 27, 1910.)

Nos. 5,393, 5,389.

1. CUSTOMS DUTIES (§ 26*)—CLASSIFICATION—MACHINED FORGINGS—"DEGREE OR STAGE OF MANUFACTURE."

In Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 127, 30 Stat. 160 (U. S. Comp. St. 1901, p. 1637), relating to forgings of whatever "degree or stage of manufacture," the words quoted relate only to different stages of the forging process, not extending beyond the completion of that process; and forms that, after being subjected to the final forging process, are further advanced into completed articles practically ready for use, such as axles, piston rods, etc., are removed from said provision into that for manufactured metal in paragraph 193, 30 Stat. 167 (U. S. Comp. St. 1901, p. 1645).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 26.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CUSTOMS DUTIES (§ 26*)—STEEL SHAPES.

Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135, 30 Stat. 161 (U. S. Comp. St. 1901, p. 1638), relating to steel shapes, does not include in that provision articles so far completed as to be practically ready for use.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 26.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

These are cross-appeals from a decision by the Board of Appraisers (G. A. 6,822, T. D. 29,326), which sustained protests of the importers against the assessment of duty by the collector of customs at the port of New York.

D. Frank Lloyd, Deputy Asst. Atty. Gen., for the United States.
Brown & Gerry (James L. Gerry, of counsel), for importers.

MARTIN, District Judge. The merchandise in question consists of steel crank shafts, crank axles, piston rods, connecting rods, and cross-heads, which were invoiced under their respective names; and duty was assessed at 45 per cent. ad valorem under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 193, 30 Stat. 167 (U. S. Comp. St. 1901, p. 1645), as "manufactures of steel not otherwise specially provided for." That paragraph, so far as it relates to the question at issue, reads as follows:

"Articles or wares not specially provided for in this act, composed wholly or in part of iron, steel, * * * or other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem."

The importers contend that they should have been assessed as forgings of steel at 35 per cent. ad valorem under paragraph 127, and are covered by this language in said paragraph:

"Forgings of iron or steel, or of combined iron and steel, of whatever shape or whatever degree or stage of manufacture, not specially provided for in this act, thirty-five per centum ad valorem. * * *"

Members of the Board of Appraisers have disagreed as to which rate of duty should be assessed. The Board which the Court of Appeals held was the lawful Board to consider the subject held that the merchandise in question are forgings, while the government in its appeal insists upon a classification as "manufactures of metal" under paragraph 193. The importers further contend that, if the merchandise is not dutiable as forgings, it is dutiable under paragraph 135, which relates to steel shapes; but in argument this claim was not pressed, and I have no question that the articles involved in this appeal do not come under that paragraph.

The serious question involved here is what is the meaning of the words "whatever degree or stage of manufacture," used in paragraph 127. Did Congress intend by those words to include the development of forgings into specific articles ready for use, however extensive or expensive the finishing process may be, or do those words simply refer to the different stages of the forging processes, as shown by the testimony of the government's experts? That is, forgings in every

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

stage or degree in the processes of development from the puddling of pig iron to the hammering out into specified forms ready for finishing at the machine shop. Should not this paragraph (127) be construed to read "forgings of iron or steel, whatever shape they may be hammered or pressed into, or in whatever degree or stage of development the manufacture thereof may be, not specially provided for in this act, 35 per centum ad valorem"?

The importer's evidence tends to show that anything that was once a forging is always a forging. If this contention prevails, the blade of a jackknife, having been made of a forging, remains a forging. Under such a construction of the law, the provision in paragraph 193 that iron or steel partly or wholly manufactured shall be assessed at 45 per cent. ad valorem is practically without application, or, if it has any application, it is certainly unjust, in that a piece of steel that has found its way into a manufactured product and escaped the forging processes must pay a duty of 45 per cent. ad valorem, while if it has once been a forging the duty shall only be 35 per cent. ad valorem. This would be crude legislation, and illogical, and in my opinion it is an unwarranted construction.

The evidence on the part of the government is that forgings like a steel billet cease to be such when they have advanced to a more finished or perfected article. As I construe these two paragraphs, it is a question of fact as to whether these articles, after having been forged, were so far developed by a finishing process that they have been advanced from the condition of a forging to that of a manufactured metal. The evidence seems to be conclusive that the articles in question were designed for use in steam engines, and were so far completed as to be practically ready for use. Under the facts developed by the evidence these articles should be classified as manufactured metal, unless we adopt the importer's view—once a forging always a forging—and in that I do not concur. It is not in harmony with the decision of the Supreme Court in *Saltonstall v. Wiebusch*, 156 U. S. 601, 15 Sup. Ct. 476, 39 L. Ed. 549.

The decision of the Board of General Appraisers is overruled, and the assessment of duty by the collector at 45 per cent. ad valorem, under paragraph 193, is affirmed.

ADDERSON v. SOUTHERN RY. CO. et al.

(Circuit Court, N. D. Georgia. April 4, 1910.)

No. 2,222.

REMOVAL OF CAUSES (§ 61*)—CODEFENDANTS—SEPARABLE CONTROVERSY.

Where, in an action against a railroad company for the death of plaintiff's husband, plaintiff's declaration alleged several joint and concurrent acts of negligence between the railroad company, a nonresident corporation, and the conductor and engineer, joined as codefendants, who were citizens and residents of the district, and then charged that the engineer was incompetent, stating several acts of negligent operation on his part and charging that the railroad company employed him, knowing that he

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was incompetent, such allegation raised a separable controversy between plaintiff and the railroad company, authorizing a removal of the cause.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 115; Dec. Dig. § 61.*

A separable controversy as ground for removal of cause, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valletown Mineral Co.*, 35 C. C. A. 155.]

Action by Mrs. Louise Adderson against the Southern Railway Company and others. The case having been removed to the federal Circuit Court, plaintiff moves to remand. Denied.

S. D. Hewlett, for plaintiff.

McDaniel, Alston & Black, for defendant Southern Ry. Co.

NEWMAN, District Judge. This suit was brought originally in the state court by the plaintiff against the Southern Railway Company and Charles E. Perkins and John F. Chestnut, the engineer and conductor, respectively, of the train which it is alleged killed the plaintiff's husband. The case was removed by the defendant the Southern Railway Company, a nonresident corporation (the two individual defendants being citizens and residents of this district), to the Circuit Court of the United States, on the ground of a separable controversy between it and the plaintiff. A motion is now made to remand the case to the state court, for the reason that there is no separable controversy.

The plaintiff's declaration alleges several joint and concurrent acts of negligence between the railway company and the individual defendants, and then proceeds:

"Petitioner alleges that Chas. E. Perkins was an incompetent person; that the said Chas. E. Perkins did not blow at public crossings and stations, and ran his engine at a great and reckless rate of speed; that the said Perkins failed to check and to continue checking his train at public crossings; and that the said Perkins failed to signal the approach of the said engine and train of cars in thickly populated communities where pedestrians used the track of defendant company, and said Perkins failed to anticipate the presence of pedestrians on the track of defendant company in thickly populated communities, all of which facts were known to defendant company, and the defendant company was willfully and wantonly careless and negligent in allowing the said Perkins to operate the said engine by reason thereof."

This allegation that the railway company employed an incompetent person, well knowing him to be such, and was in that respect guilty of willful and wanton negligence, is made a ground of separable controversy in the petition for removal. A similar question to this was before the Supreme Court of Georgia in *Southern Railway Company v. Edwards*, 115 Ga. 1022, 42 S. E. 375. The opinion of the court, by Lumpkin, P. J., is short, and I quote it in full:

"An action was brought by Edwards, an employé of the Southern Railway Company, against it and Russell, one of its engineers, for personal injuries which Edwards suffered in consequence of having been struck by a lump of coal which fell from the tender of a passing locomotive of which Russell was in charge. The company, which is a nonresident of this state, is here upon a bill of exceptions assigning error upon the refusal of the trial court to grant an order removing the case to the federal court. The plaintiff in his petition alleges that both the company and Russell were guilty of a number of speci-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fied acts of negligence, one of which was overloading the tender with coal. It is in one paragraph of the petition also alleged that the company was negligent 'in not providing said engine with an engineer who was careful and prudent, and who would not have permitted said tender to be thus overloaded.'

"In *Railway Co. v. Dixon*, 179 U. S. 131 [21 Sup. Ct. 67, 45 L. Ed. 121], it was held that: 'When concurrent negligence is charged, the controversy is not separable.' The decision in this case, therefore, seems to be authority for the proposition that, in so far as related to the joint acts of negligence, the case made by the plaintiff's petition would not be one which could properly be removed to the United States court. Be that as it may, however, we are quite confident that, because of that paragraph of the petition specially mentioned above, the cause was removable. That paragraph certainly did not charge an act of 'concurrent negligence,' for it cannot be true that the company's negligence in providing a careless and incompetent engineer was an act in which the latter participated. Indeed, the plaintiff does not undertake to allege that this was so, but makes his charge of negligence with respect to employing an incompetent engineer against the company alone. As to this particular matter, therefore, there was a 'separable controversy' between the plaintiff and the company. The alleged negligent act of employing such an engineer, with resulting damages to the plaintiff, would, in and of itself, have given rise to a distinct cause of action involving a controversy wholly between citizens of different states, and a suit of this kind would certainly have been removable. It makes no difference that in the present case such a controversy exists in connection with others that may not be separable. The fact that there is in the suit 'a controversy which is wholly between citizens of different states, and which can be fully determined as between them,' brings the case within the removal act of 1887 [24 Stat. 552, c. 373 (U. S. Comp. St. 1901, p. 508)]. *Black's Dillon's Removal of Causes*, § 139. See, also, section 143, and cases cited. That there is a separable controversy must appear from the plaintiff's pleadings. *Id.* § 141. When removal is proper, the effect is to carry the entire case into the federal court. *Id.* § 142.

"The court erred in not granting the order of removal."

I think the reasoning of the court in that case is entirely sound, and, being so, it is conclusive of the case here. As stated by Judge Lumpkin, "it cannot be true that the act of negligence in providing a careless and incompetent engineer was an act in which the latter participated," and it is not so alleged in the declaration now before this court. After stating the fact of Perkins' incompetency, etc., it is alleged that:

"The said defendant company was willfully and wantonly careless and negligent in allowing the said Perkins to operate said engine."

In my opinion a separable controversy clearly appears, and consequently the case was properly removed to this court, and the motion to remand to the state court must be overruled.

EDWARDS et al. v. BAY STATE GAS CO. OF DELAWARE.

(Circuit Court, D. Massachusetts. March 31, 1910.)

No. 230.

CLERKS OF COURTS (§ 54*)—CLERKS OF UNITED STATES COURTS—DEPOSITS—COMMISSIONS.

Rev. St. § 995 (U. S. Comp. St. 1901, p. 711), provides that all moneys paid into any United States court, or received by the officers thereof, in any cause pending or adjudicated therein, shall be forthwith deposited with the Treasurer, Assistant Treasurer, or a designated depository of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

United States, in the name and to the credit of the court; and section 828 provides that the clerk shall be allowed, for receiving, keeping, and paying out money in pursuance of any statute or order of the court, 1 per cent. of any amount so paid. *Held*, that a clerk is not entitled to commissions on part of a fund in the hands of a receiver appointed by the court, not deposited in a designated United States depository, but under order of the court, in a national bank to the credit of the receiver, subject to checks drawn by the receiver and countersigned by the judge of the court.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 77; Dec. Dig. § 54.*]

In Equity. Suit by Jacob Edwards and others against the Bay State Gas Company of Delaware. On petition of Charles K. Darling, as Clerk of the Circuit Court of the United States for the District of Massachusetts, for an allowance of commissions out of funds paid into court. Denied.

See, also, 172 Fed. 971.

The United States Attorney, for petitioner.
Homer Albers, for defendant.

PUTNAM, Circuit Judge. This is a petition of the clerk that he be allowed a statutory commission of 1 per cent. on the sum of \$91,552.27, accumulated as herein set out. The claim is purely statutory, and rests on sections 995 and 828, Rev. St. (U. S. Comp. St. 1901, pp. 711, 635). Section 995 is as follows:

"All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the Treasurer, an Assistant Treasurer, or a designated depository of the United States, in the name and to the credit of such court: Provided, that nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court."

Section 828 relates to the fees of the clerk, and contains the following:

"For receiving, keeping, and paying out money, in pursuance of any statute or order of court, one per centum on the amount so received, kept, and paid."

The entire fund to which the petition relates was \$218,369.42. From this fund there have been paid, by special orders of this court, various sums as follows:

Patterson & Major.....	\$65,000 00
Henry A. Wyman.....	5,500 00
Whipple, Sears & Ogden.....	5,655 26
Morse & Friedman.....	10,966 18
B. G. Davis.....	1,864 36
Hiram M. Burton and Arthur A. Folsom.....	313 10
A. S. Hall.....	107 89
James H. Hoffecker, Jr.....	160 04
B. L. M. Tower Adm'rs.....	579 67
Walter K. Barton.....	1,305 77
	<hr/>
	\$91,552 27

The present petition relates directly only to the total amount paid out, namely, \$91,552.27; but the entire amount, \$218,369.42, may be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

involved herein. There have been no authoritative decisions, no course of decisions, and no customary practice, which assist this petition; so that the court is compelled to rely on the words of the statute in their ordinary and normal interpretation.

The fund in question was deposited by a receiver appointed by this court in the National Shawmut Bank, which bank is not a depository designated by the court in accordance with section 995, Rev. St., which we have cited, and the money was not deposited in accordance with the provisions of that section; nor was the drawing out of the funds to the extent which we have mentioned done in compliance with section 996 of the Revised Statutes as amended. That section is limited to money deposited as provided in section 995. The fund was a part of a fund in the hands of a receiver appointed by this court. The receiver had been discharged as to all assets except this particular fund; but the receivership was expressly retained as to it, and the moneys were deposited in the National Shawmut Bank under an order of court, of which the part material hereto was as follows:

"It is further ordered that the balance of money in the hands of the receiver, so far as subject to the jurisdiction of this court, be transferred to and deposited forthwith in the National Shawmut Bank of Boston on such terms as to interest as the receiver may best be able to arrange, and that said deposit stand to the credit of the receiver, subject to checks from time to time drawn by the receiver and countersigned by a judge of this court, and be checked out only in that manner."

Under the provision of section 828, Rev. St., which is the only authority on which the clerk's right to a commission rests, four things must be combined, namely: First, receiving; second, keeping; third, paying out; and, fourth, in pursuance of a statute or order of court. The order of court exists; but the clerk neither received, kept, nor paid out. The deposit was in the name and to the credit of the receiver, and not, as required by section 995, "in the name and to the credit of" the court. So far as any order of the court called for by section 996 is concerned, there is no specific requirement that there should be separate orders or any formal order with reference to the drawing out of the fund; but, as the checks were to be countersigned by a judge, it is plain that such orders were contemplated, and such orders were in fact made. Consequently, the fourth requirement of section 828 is found here. On the other hand, as the clerk did not receive, he did not keep; and, as the checks were to be countersigned by the judge, and, of course, drawn by the receiver, the clerk had no part in "paying out."

There can be no doubt that he entered all the orders relating to the disbursement of the fund in question, and also assisted the court in keeping due record of disbursements, so that the court would not countersign checks improvidently drawn by the receiver; but this was only a part of his clerical duty, and cannot be said to have had any proper relation to technically "receiving, keeping, or paying out," in the sense of the statute. If the case were left merely on this statement, it might be regarded as too technical; but the underlying distinction is that, on one side, sections 995, 996, and, consequently, 828, relate to moneys which are required by statute to be deposited in ac-

cordance with section 995; while whatever occurred in the pending case relate, on the other hand, simply to a continuance of the receivership with a view to closing it out or winding it up. The fundamental conditions in reference to the fund here not only literally, but substantially, distinguish the subject-matter of the petition at bar from the statutory case with reference to which the clerk is entitled to his commissions. The elaboration of the various statutes relating to moneys passing through the hands of the clerk in *Howard v. United States*, 184 U. S. 676, 22 Sup. Ct. 543, 46 L. Ed. 754, and the closing paragraph of the opinion of the court in *United States v. Kurtz*, 164 U. S. 49, 53, 17 Sup. Ct. 15, 41 L. Ed. 346, assist to illustrate this proposition.

Some suggestions have been made that what has been accomplished by the clerk, although in the line of his clerical duty, is yet of somewhat an extraordinary character, and that the clerk might be entitled to an allowance on that account in accordance with some decisions which have been cited to us. Without expressing any opinion on that proposition, we will only add that the petition before us is not framed in that aspect, and that a petition framed in that aspect, if offered, would come up more properly after the entire fund of \$218,369.42 is substantially disposed of, so that it could be examined in the light of the entire history thereof, rather than in a fragmentary way.

The petition filed by the clerk on November 22, 1909, for an allowance of commissions, as amended, is dismissed.

McKINNON v. MORSE et al.

(Circuit Court, S. D. New York. March 9, 1910.)

1. BANKS AND BANKING (§ 254*)—NATIONAL BANKS—ULTRA VIRES TRANSACTIONS—DIRECTORS' LIABILITY—BILL—CAPACITY TO SUE.

A bill by a stockholder's agent of an insolvent bank against directors to recover moneys lost by ultra vires transactions of the president and vice president, in which defendants participated, alleging that at a stockholders' meeting held pursuant to law plaintiff was elected as shareholders' agent to wind up the affairs of the bank in place of a receiver, and that he gave bond, as required by law, and is the duly qualified agent of the shareholders to act in the place of the receiver, sufficiently showed complainant's capacity to sue.

[Ed. Note.—For other cases, see *Banks and Banking*, Dec. Dig. § 254.*]

2. BANKS AND BANKING (§ 253*)—NATIONAL BANKS—ULTRA VIRES TRANSACTIONS—STOCK SPECULATIONS.

Where directors of a national bank engaged in or knowingly permitted stock speculation by the president and vice president with the bank's funds, such directors were liable for the losses sustained.

[Ed. Note.—For other cases, see *Banks and Banking*, Dec. Dig. § 253.*]

3. BANKS AND BANKING (§ 254*)—ACCOUNTING—ADEQUATE REMEDY AT LAW.

Where a stockholder's agent of a national bank sought to recover from directors losses sustained by stock speculations of the president and vice president with the directors' knowledge and participation, a bill in equity for an accounting was sustainable, though a recovery at law could be had as to some of the transactions pleaded.

[Ed. Note.—For other cases, see *Banks and Banking*, Dec. Dig. § 254.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Bill by John W. McKinnon, as agent for the shareholders of the National Bank of North America in New York, against Charles W. Morse and others. On demurrer to the petition. Overruled.

Underwood, Van Vorst & Hoyt, for complainant.

Gifford, Hobbs & Beard, for defendants.

COXE, Circuit Judge. The defendants Havemeyer and Flagler demur to the bill filed by the complainant, as agent for the shareholders of the National Bank of North America, to recover moneys alleged to have been lost by Curtis and Morse, president and vice president, respectively, of the bank, in ultra vires transactions which were well known to the defendants and in which they participated. The action was originally commenced by Charles A. Hanna, as receiver, but the complainant having been elected as shareholders' agent pursuant to law moved, on notice to the defendants, to be substituted as complainant in the place and stead of Mr. Hanna, which motion was granted.

The bill alleges, in substance, that pending the prosecution of this suit instituted by Hanna as receiver a meeting of the shareholders of the bank was held pursuant to law, and the present complainant was duly elected as shareholders' agent to wind up the affairs of the bank in place of the said receiver. That he gave a bond as required by law and is the duly qualified agent of the shareholders to act in the place and stead of the said receiver. These allegations are criticised by the demurrer, it being asserted that the averments in the bill that the meeting of shareholders was duly called, the complainant duly elected and the bond duly given are insufficient in law.

I am of the opinion that this criticism is not well founded. It is not necessary to plead evidence. It is enough if the averment be sufficient to inform the defendants of the capacity in which the complainant sues, and definite enough to sustain the proof showing his title. I have no doubt that under allegations of the second paragraph of the bill the complainant may introduce proof showing that the meeting of creditors was properly called and legally held, that he was then and there elected shareholders' agent and gave the bond as required by law. Unless the complainant's title be admitted, such proof must be given at the trial. If not given, or if the proof be insufficient, the bill will be dismissed, but the allegations are sufficient to sustain the proof showing that the complainant has legal capacity to sue.

The other grounds of demurrer may be considered generally and it will greatly simplify the discussion if it be remembered that the bill is based upon the proposition that the defendants are charged with using the funds of the bank in stock speculations.

The bill alleges with great particularity various transactions in which the funds of the bank were used in the purchase of stocks of a highly speculative and fluctuating character. It avers that the defendants knew of these transactions, assented thereto and ratified the same by receiving profits therefrom.

If these allegations be true the liability of the defendants is established. Stock speculation is no part of the business of a national bank.

First National Bank v. Exchange Bank, 92 U. S. 122, 128, 23 L. Ed. 679; Bank v. Converse, 200 U. S. 425, 439, 26 Sup. Ct. 306, 50 L. Ed. 537. Directors who engage in or knowingly permit it are unfaithful to their trust and are liable for losses thus occasioned. They are chosen as the guardians of the funds of the bank to protect them from forbidden and unlawful uses and are not permitted to subject them to hazardous and ultra vires risks for their own benefit or for the benefit of others. If they knowingly permit the fund, which it is their duty to guard, to be plundered, they are liable and must restore the lost property. The bill does not charge the defendants with liability because of ignorance and neglect of duty as in Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662, but it alleges actual knowledge and affirmative participation in the unlawful acts of the officers of the bank, which produced the losses complained of.

The complainant asks for an accounting showing the amount of the losses occasioned by the wrongful acts of the defendants less the amounts due from him to them, respectively. It may be true that a recovery at law could be had as to some of the transactions stated in the bill but that furnishes no reason why equity may not take cognizance of the controversy and determine it in a single suit.

In Cooper v. Hill, 94 Fed. 582, 587, 36 C. C. A. 402, 407, the court says:

"This is a suit to compel the restoration of a trust fund of \$20,864.82 which the appellants unlawfully diverted from that fund, and it involves an accounting of the money diverted between the receiver and the appellants. It is therefore a suit against officers of a bank to execute a trust and to compel an accounting, and it avoids a multiplicity of suits at law. This court has repeatedly held, for reasons which now seem to us obvious, and which are stated at length in our opinions, that equity has jurisdiction of such a suit. Hayden v. Thompson, 36 U. S. App. 362, 367, 17 C. C. A. 592, 594, and 71 Fed. 60, 62; Cockrill v. Cooper, 57 U. S. App. 578, 29 C. C. A. 529, 535, 538, and 86 Fed. 7, 12, 16."

The demurrers are overruled, the defendants to answer within 20 days after the service upon them of a copy of the order.

In re WRIGHT.

(District Court, W. D. New York. April, 1910.)

No. 2,407.

1. BANKRUPTCY (§ 148*)—ASSETS—INSURANCE AGENT'S FUTURE COMMISSIONS.

Where an insurance agent's contract entitled him to an interest in renewal premiums on policies previously written, when collected, so long as the contract was in force, and in case of his death his widow or estate was entitled to receive such interest for five years, less a fee for collection, such interest was property which passed to the agent's trustee in bankruptcy as a part of the assets of his estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 148.*]

2. BANKRUPTCY (§ 408*)—TRANSFER OF ASSETS—CONCEALMENT OF PROPERTY WITH INTENT TO DEFRAUD—"REFUSAL OF A DISCHARGE."

Where, pending bankruptcy proceedings against a general insurance agent, the referee erroneously determined that the bankrupt's interest in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

renewal premiums under his contract was not a part of his estate, and pending review thereof, on which the referee's decision was reversed, the bankrupt collected all or nearly all his earned commissions and appropriated them, such act did not warrant the "refusal of a discharge" under Bankr. Act July 1, 1898, c. 541, § 14, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), providing for the denial of a discharge in case the bankrupt has destroyed or concealed his property with intent to hinder, delay, or defraud his creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 408.*]

3. BANKRUPTCY (§ 417*)—DISCHARGE—REVOCATION—FRAUD.

The fraud for which a bankrupt's discharge may be set aside must relate to actual fraud theretofore knowingly practiced by the bankrupt, such as might have been urged against the granting of a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 869; Dec. Dig. § 417.*]

4. BANKRUPTCY (§ 250*)—ASSETS—DISPOSITION BY BANKRUPT.

Where, pending review of a referee's determination in bankruptcy proceedings that certain commissions on renewal premiums to which the bankrupt was entitled did not constitute assets, the bankrupt collected and appropriated such commissions, after which the referee's decision was reversed, it was the trustee's duty to follow and recover such commissions in the interest of creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 250.*]

5. BANKRUPTCY (§ 417*)—DISCHARGE—REVOCATION—PETITION—AMENDMENT.

A petition for revocation of a bankrupt's discharge could not be amended by the pleading of a new objection after the expiration of one year from the date of the discharge.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 417.*]

In the matter of bankruptcy proceedings as to William F. Wright. On application for revocation of discharge. Denied.

See, also, 157 Fed. 544, 85 C. C. A. 206.

Charles P. Norton, for petitioning creditor and trustee.

George P. Keating, for trustee.

Van Gorder, Holt & Crane and Elijah W. Holt, for bankrupt.

HAZEL, District Judge. This is an application for the revocation of the discharge of the bankrupt William F. Wright from his debts. The important question submitted is whether such discharge was obtained by him through his fraud. The claim is that he connived with his employer, the Union Central Life Insurance Company, to cancel an existing contract for services and substitute therefor another contract of employment by which he was to receive for his services a stipulated annual salary in lieu of his interest under the former contract in renewal premiums on policies, and that he wrongfully collected \$5,508.66, commissions on earned renewal premiums on insurance policies. That the interest of the bankrupt in his unexpired contract of agency was an asset of the bankrupt estate passing to his trustee was decided in *Re Wright*, 157 Fed. 544, 85 C. C. A. 206, affirming (D. C.) 151 Fed. 361.

The present record shows that on October 26, 1906, the referee in bankruptcy decided that the commissions earned by the bankrupt at the time of his adjudication in bankruptcy did not pass to his trustee, as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the contract involved relations of confidence and trust, and therefore the benefits to be derived therefrom did not belong to the bankrupt estate. On February 23, 1907, the District Court reversed the referee, holding that the commissions on premiums becoming due after the bankruptcy under the renewal policies obtained by the bankrupt inured to the bankrupt estate. The order reversing the referee was entered on March 12, 1907, and subsequently, on March 15th, the bankrupt regularly obtained his discharge without objection by any creditor. During the intervening time between the decision of the referee and the decision by this court the bankrupt at different times collected all or nearly all his earned commissions, and accordingly the trustee contends that in appropriating or collecting such commissions the bankrupt violated section 14 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]) and destroyed or concealed his property with intent to hinder and delay or defraud his creditors. I do not agree with this contention. The payment of the commissions by the insurance company and the collection thereof by the bankrupt before the decision of this court was rendered and while the decision of the referee stood unreversed did not constitute intentional fraud against the creditors. That the referee was not affirmed in his ruling is immaterial.

The special master has rightfully found, I think, that the fraud by which the discharge was obtained must have related to fraud theretofore knowingly practiced by the bankrupt. It must have been an actual fraud, such as could have been urged against the granting of the discharge. In the present case it may be assumed that there was no substantial foundation for the charge of fraud at the time the discharge was applied for or granted, as neither the trustee nor the petitioning creditor opposed it, or requested that it be delayed until the appeal from the decision of the District Court overruling the referee could be decided by the Circuit Court of Appeals. No one interested in the proceedings applied for an order restraining the bankrupt from canceling the contract or collecting his earned commissions on premiums, as might have been done directly after the petition in bankruptcy was filed or the facts were ascertained. The trustee, however, is not entirely deprived of his remedy. As already indicated, the Circuit Court of Appeals held that the insurance commissions collected by the bankrupt since the filing of the petition, but earned under the contract, belong, not to the bankrupt, but to the trustee. Hence, in the interest of creditors, it is his duty to follow the assets of the bankrupt estate wherever they may be found, even though the right to recover is closed to him in this proceeding to revoke the discharge.

The petitioning creditor also moved the court to amend the petition for revocation, and for further reference to the special master, on the ground of newly discovered evidence; i. e., that the bankrupt omitted from his schedule an unliquidated claim or cause of action against one Lockhart. Concededly an application for the revocation of a discharge must have been made within one year after the discharge, and, such period from the time of the discharge herein having expired, the amendment should not be allowed. Under the prior bankrupt act, such

an amendment was not permitted after the expiration of the time limited by the act. In *re Sims* (D. C.) 9 Fed. 440; *Mall v. Ullrich* (D. C.) 37 Fed. 653. Under the present act Judge Purnell, in *Re Shaffer* (D. C.) 104 Fed. 982, made a similar ruling, and I hold, therefore, that the objecting creditor is precluded at this time from attacking the order discharging the bankrupt.

So ordered.

UNITED STATES v. SCHURMAN et al.

(District Court, W. D. Michigan, S. D. March 24, 1910.)

Food (§ 20*)—MISBRANDING—MISLEADING LABELS—INFORMATION—LEAVE TO FILE.

Defendants manufactured and sold in interstate commerce "Dutch Tea Rusk." The packages were marked "Genuine Dutch Tea Rusk," and stated that the contents were "made in Holland, Mich., by the Michigan Tea Rusk Company, Holland, Mich.,"; the word "Holland," where it first occurred, in type so large and prominent as to hold the attention and mislead purchasers into supposing that the article was a genuine importation from Holland. A hearing was had under the rules of the Department of Agriculture, in which respondents claimed that the markings were not misleading, but offered to change the labels as directed by the government, if found otherwise. *Held* that, since defendant's violation of Pure Food and Drug Act June 30, 1906, c. 3915, § 8, 34 Stat. 771 (U. S. Comp. St. Supp. 1909, p. 1193), prohibiting the branding of an article of food so as to purport to be a foreign product when it was not so, was doubtful, leave would not be granted to file an information prior to notice of adverse finding by the Department and an opportunity to alter the labels as directed.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 20.*]

Application by the United States for leave to file an information against George Schurman and others for violations of the pure food act. Denied.

George G. Covell, U. S. Atty.

DENISON, District Judge. The district attorney presents a sworn information, accompanied by affidavits, supposed to show a violation of the Pure Food Act of June 30, 1906. It appears that the respondents are engaged in business at the city of Holland, in this district, manufacturing and shipping to different states an article of food called "Dutch Tea Rusk." The point of the complaint must be that the article is misbranded, because so "labeled or branded as to deceive or mislead the purchaser, or purport to be a foreign product when not so" (section 8, Foods, Second); and this conclusion is based on the fact that respondents mark their packages as containing "Genuine Dutch Tea Rusk," and say that it is "made in Holland, Mich., by the Michigan Tea Rusk Company, Holland, Mich.," having the word "Holland," where it first occurs, in type so large and prominent as to hold the attention and thus mislead purchasers into supposing that the article is a genuine importation from the country of Holland.

Obviously, a jury could not be affirmatively instructed that these

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

markings did constitute a violation of the statute. Such tea rusk are largely used in the Netherlands, are popular among Hollanders, are manufactured in this state in a community that is largely made up of Netherlanders, and doubtless find their chief market in different parts of this country among people of the same nationality. The respondents have a perfect right to call their product "Dutch Tea Rusk." This is no more misleading than to speak of English muffins, or French rolls, or German fried potatoes. If the article, in composition and manufacture, is identical with a similar article made in the Netherlands, it is, in one sense, "genuine." Whether the word "genuine" is here used in a true or in a misleading sense depends on the inferences to be drawn from all the circumstances. The undue prominence given to the name "Holland" would tend to strengthen the inference that a misleading was intended; but this inference would be only argumentative, and the most that can be said for the case made against the respondents is that it probably would require a submission to the jury, and that the jury would be quite at liberty to find that the article did not "purport to be a foreign product."

The motion papers also show that, at a hearing held under the rules of the Department of Agriculture, the respondents made a full statement of the circumstances, insisting that these markings were not misleading, but offering, if the Department should think otherwise, immediately to change the labels as might be directed by the Department. So far as the motion papers show, the conclusion of the Department that the label was improper has been in no way communicated to the respondents, nor have they been informed what changes, if any, the Department would require. In case of a clear violation of the statute, there is no occasion for such notice or opportunity to make a change in the label; but in a case like this, where the violation is doubtful, and where the respondents seem to have acted in good faith in being willing to comply with the law and the rules, if they could find out what the law and the rules were, it is extremely improbable that any jury would find, beyond a reasonable doubt, the existence of the essential misleading, and, upon the same principle which requires a grand jury not to indict unless it is reasonably probable that a conviction might follow, this information should not be filed.

The application will be denied, with leave to renew the same at any time upon a further showing that after notice from the Department of its conclusion, or after knowledge of this disposition of this motion, the respondents did continue or shall continue to use the word "genuine" upon their labels or to give undue prominence to the word "Holland."

In re SCHOCKET.

In re BLANKENSTEIN'S PETITION.

(District Court, D. Rhode Island. March 24, 1910.)

No. 805.

BANKRUPTCY (§ 476*)—COSTS—RECLAMATION PETITION—DISMISSAL.

Where a claimant of property in the hands of a bankrupt's trustee filed a reclamation petition, which was subsequently dismissed as fraudulent and unsustainable, the proceeding being analogous to a suit in equity, the trustee was entitled to an allowance against the petitioner, as a part of the costs, of the charges and expenses properly incurred in preserving the property during the pendency of the petition and directly resulting from such proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 898, 899; Dec. Dig. § 476.*]

In the matter of the bankruptcy proceedings of Chona Schocket. On petition by the trustee to review the referee's taxation of costs on the dismissal of a reclamation petition. Reversed in part.

Leonard Zisman, for claimant.

James H. Rickard, for trustee.

BROWN, District Judge. The trustee petitions for review of the referee's taxation of costs upon Blankenstein's reclamation petition. This petition was dismissed; the referee finding that Blankenstein's claim of title to certain personal property was without merit and fraudulent. Upon this finding Blankenstein filed a petition for a review, which was subsequently abandoned.

The trustee included in his bill of taxable costs expenses incurred by him in keeping the goods until the time of the final abandonment of Blankenstein's petition for a review. The referee, being in doubt as to his authority to allow these items in taxing costs, disallowed all items for the expense of keeping the goods pending the reclamation proceedings and the petition for review thereof.

Blankenstein's petition prayed for a return to him of specific personal property which was in the hands of a receiver when he filed his petition, and which subsequently came into the hands of the trustee upon his appointment. The relief sought—i. e., a return of specific property—was inconsistent with a sale by the trustee. Neither Blankenstein nor the trustee made application for a sale of the property and to hold the proceeds in lieu thereof.

The trustee contends that the reclamation proceedings prevented a sale, and gave rise to expenses in preserving the property; that these expenses were the result of a fraudulent claim, and should not be cast upon the estate, but should be borne by the petitioner for reclamation and taxed against him.

While it is doubtful if this expense falls strictly within the usual meaning of the term "costs of suit," and while no statutory provision in terms covers a charge of this character, yet in a proceeding in equity the taxation of similar charges seems to have been allowed. In *Burns v. Rosenstein*, 135 U. S. 449, 10 Sup. Ct. 817, 34 L. Ed. 193, which related to proceedings in equity, the court said:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"The allegations of the original bill justified the issuing of the attachment. It was right that the property taken under it should be cared for, and, as the court found that the plaintiffs were entitled to a decree against the defendants, a judgment for costs properly followed; and we perceive no reason why the plaintiffs should not have been allowed, as part of their costs, a reasonable amount for the expenses incurred in preserving the attached property, and for which they became primarily liable to the officer keeping it. We cannot say, upon the record before us, that the court below exceeded its discretion in apportioning the expenses thus incurred."

A court of equity, in extending an order for the taxation of costs so that it may include charges and expenses properly incurred, seems to proceed rather upon considerations of the substantial equities of the parties than upon ordinary statutory provisions concerning costs. 3 Daniell's Chancery (1st Am. Ed.) p. 1586.

The petitioner in reclamation having made application to a court exercising chancery powers in the administration of the bankrupt's assets, seeking a determination of his right to have returned to him specific property held by the trustee for the benefit of the creditors, is justly chargeable for such necessary expenses in the custody of the goods as were occasioned by the proceedings instituted by him, and which would not have been incurred, but for his intervention. To cast upon the property belonging to the creditors the costs of preservation pending the fraudulent claim of an intervener is contrary to equity. I am of the opinion that the court has authority to so extend an order for the taxation of costs against the intervener as to include a direction to tax charges and expenses of custody, as well as ordinary costs. Such charges and expenses should cover only the custody and expense which were the direct result of the intervention proceedings. Charges for expense of keeping, that would have been necessary irrespective of the filing of the reclamation proceedings, should be disallowed.

The finding of the referee is affirmed as to other items of costs, but is reversed as to disallowance of all items for custody, and the petitioner for review may make application to the referee for further taxation in accordance with this opinion; the referee to be at liberty to determine the proper amount of said charges and the reasonableness of the fees for keepers.

In re WINDT.

(District Court, D. Connecticut. March 24, 1910.)

No. 2,285.

1. ATTACHMENT (§ 184*)—VACATION—GIVING OFFICER'S RECEIPT.

The giving of an officer's receipt for attached property does not discharge the attachment lien under the Connecticut law.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 587; Dec. Dig. § 184.*]

2. BANKRUPTCY (§ 59*)—"ACT OF BANKRUPTCY"—SURETY—FAILURE TO DIS-SOLVE.

An attachment having been levied on the property of an alleged bankrupt, petitioner's intestate executed an officer's receipt and obtained the property as the debtor's surety, which he then delivered to the debtor, tak-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing a mortgage note as security. After waiting until four months from the date of attachment had almost expired, the surety filed a petition in bankruptcy against the debtor, because he had not removed the attachment. *Heid*, that the debtor's failure did not constitute an "act of bankruptcy," within Bankr. Act July 1, 1898, c. 541, § 3, par. "a," subd. 3, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), in that the debtor suffered or permitted, while insolvent, a creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of the property affected by such preference, vacated or discharged the same; it not appearing that there had been any sale or final disposition of the property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 81, 82; Dec. Dig. § 59.*]

For other definitions, see Words and Phrases, vol. 1, p. 118; vol. 8, p. 7562.]

3. BANKRUPTCY (§ 76*) — ACTS OF BANKRUPTCY — INVOLUNTARY PETITION — BANKRUPT'S SURETY.

A surety for a debtor in attachment, having executed an officer's receipt, cannot force the debtor into bankruptcy because he permitted four months, lacking five days, to expire without removing the attachment lien, under the rule that one cannot force another into bankruptcy by the use of alleged debts which, by operation of law, would be extinguished by the adjudication, since an adjudication against the debtor would dissolve the attachment lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 100; Dec. Dig. § 76.*]

In the matter of bankruptcy proceedings against Jacob Windt. Petition for adjudication dismissed.

Kenealy & Keating, for petitioners.

Clement A. Fuller, for Childs.

Louis J. Curtis, for Fleissner.

PLATT, District Judge. The facts set forth in the petition, tersely epitomized, are as follows:

On June 16, 1909, Jacob Windt, the respondent, was doing business as a bottler in Darien, Conn. One Childs sued him on a claim of \$8,000, and attached all the personal property used by him in his business on a writ returnable to the September term of the superior court in Fairfield county.

Martin J. Gray, since deceased, and now represented by his administrator, John F. Gray, obtained the property from the attaching officer by entering into the usual joint and several obligation on the part of himself and Windt to keep said attached property at their risk and expense and to deliver the same in good order on demand, and in case of failure so to do to pay the sum of \$2,500, or as much thereof as should be recovered in the suit of Childs v. Windt. This contract is one well understood in our state law, and is commonly known as an "officer's receipt."

Gray then delivered the property back to Windt, taking a mortgage note for \$2,500 to secure himself. He then waited until four months from the date of the attachment had almost expired, and on October 16, 1909, brought this petition, in which he insists that both note and officer's receipt represent provable debts, which can be used as the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

basis for preferring a charge against Windt that he had given a preference to Childs by permitting the attachment and not removing it before it had rested long enough to have become perfected into a lien which would be valid as against the trustee after adjudication.

The question is practically this: Can one who helps a debtor out by acting as surety for him on an officer's receipt force him into bankruptcy, because he takes no further action about the attachment, and by his inaction has permitted the four months to have come within five days of expiring? The demurrer proceeds mainly on the grounds that he had no provable debts and that the giving of the receipt acted as a removal of the lien upon the property. I do not think that the second ground of demurrer is effective, because under our state law I do not understand that an officer's receipt vacates or discharges the attaching lien.

As to the first ground, it appears that the act of bankruptcy which the petitioners attempt to take advantage of is subdivision 3 of paragraph "a" of section 3 (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]), viz.:

"Suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference."

In the first place, I am not satisfied that it appears by the petition that any "sale or final disposition" of the property attached had been arranged for at the time the petition was brought. The preference, therefore, had not gotten into such a situation that it was the duty of Windt, under the subdivision invoked, to vacate or discharge it, and of course he could not commit the act of bankruptcy until such a situation actually existed. Indeed, the petitioners admit that there was not to be any sale, and as to "final disposition" there was not such a state of things as, in my opinion, the Congress intended to cover by the language of said subdivision.

But, leaving these considerations aside, and taking the case as presented and argued upon the demurrer, it seems clear that an adjudication upon this petition would dissolve the Childs attachment lien. With such dissolution would disappear also the obligation of the administrator's decedent to respond to the officer on the receipt, and the mortgage note given to secure him from loss thereby would fail for lack of consideration.

I do not think that one can force another into bankruptcy by the use of alleged debts, which by operation of law will be extinguished, and therefore not provable, the instant the adjudication exists.

Let the petition be dismissed, with costs.

In re RATLIFF.

(District Court, N. D. Alabama, S. D. March 19, 1910.)

No. 8,513.

1. SALES (§ 215*)—TRANSFER OF TITLE—REQUISITES—BILL OF SALE.

Delivery of personal property, pursuant to a verbal agreement to transfer the same from debtor to creditor in payment of the debt, was sufficient to pass title without a written bill of sale, and this, though the evidence of the debt was not surrendered until a subsequent date; it being agreed that the debt was satisfied by the delivery, and there being no understanding that further papers were to be prepared and executed to complete the transaction.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 574; Dec. Dig. § 215.*]

2. BANKRUPTCY (§ 161*)—TRANSFER OF GOODS—TIME OF MAKING.

Where there was a valid transfer of goods by a bankrupt to his creditor in payment of the debt, sufficient to pass title, more than four months before the filing of an involuntary bankruptcy petition against him, the fact that the bankrupt, within the four months period, on doubting the validity of the transaction, sought advice and attempted to perfect it by filing a claim of exemption with reference to the goods transferred, and then executing a bill of sale to the creditor, did not affect the creditor's vested right to the goods, though the subsequent proceedings were assented to by him.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261-263; Dec. Dig. § 161.*]

3. BANKRUPTCY (§ 161*)—TRANSFER OF GOODS—TIME OF MAKING—ESTOPPEL.

Where a debtor, more than four months before the filing of a bankruptcy petition against him, had validly transferred certain personal property to a creditor, the fact that within the four months period he executed a bill of sale to the creditor, who asserted to the petitioning creditors' attorneys that he claimed under the bill of sale, did not estop the bankrupt from claiming that the goods were validly transferred more than four months before filing the petition, in resistance of bankruptcy adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261-263; Dec. Dig. § 161.*]

In the matter of bankruptcy proceedings against J. W. Ratliffe. On an involuntary petition for a bankruptcy adjudication, and answer thereto. Denied.

Steiner, Crum & Weil and F. E. St. John, for petitioning creditors.
Ward & Weaver, for bankrupt.

GRUBB, District Judge. This matter came on for hearing upon the involuntary petition, seeking the adjudication of the bankrupt, and upon his answer. The original demand for a jury trial was withdrawn. All the averments of the petition were admitted by the bankrupt's answer, except the commission of the act of bankruptcy charged in it. The act of bankruptcy relied on for adjudication consisted in an alleged preference given to the bankrupt's brother-in-law, one Harris, by transferring to him, in payment of a debt of \$1,000, a stock of merchandise valued, according to the inventory taken contemporaneously with the transfer, at about \$900. The bona fides of the debt was not disputed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The contested questions were (1) whether the transfer was made within four months of the filing of the petition in bankruptcy, and (2) whether a preference can be based on a transfer of exempt property by the bankrupt to a creditor, though within the four months period.

The conclusion of the court upon the first inquiry renders unnecessary any decision of the second. The facts are briefly stated as follows:

The bankrupt and the transferee were brothers-in-law. The bankrupt was indebted to the transferee for a year before the transfer in the sum of about \$1,000 for borrowed money, evidenced by a promissory note. Each ran a general country store. The two stores were about a mile apart. About December 1, 1907, the bankrupt paid the transferee on this debt \$90. On December 16th the bankrupt and the transferee made an agreement by which the bankrupt delivered to the transferee his stock of goods, by hauling it in wagons from the bankrupt's store to that of the transferee, and the transferee accepted the goods in full payment of, and canceled, the balance due on the debt. An itemized inventory was taken, showing the value of the stock to be slightly less than the amount of the indebtedness. The inventory accompanied the delivery of the goods, and was the only writing evidencing the transfer at the time delivery was made. The bankrupt testified that his recollection was uncertain as to whether the note was surrendered December 16th, or not until December 24th. The transferee testified with positiveness that its surrender accompanied the delivery of the stock. Each testified that the transaction was completely consummated on December 16th, and that it was not then contemplated that any further papers should be drawn up between the parties, or that any further steps were to be taken to complete it. About December 24th the bankrupt became doubtful as to the legality of the form of the transaction and consulted his attorney. The attorney advised him to file a claim of exemption to the stock transferred and then execute a bill of sale to it to his brother-in-law. After such advice was received, and in pursuance of it, a claim of exemption was filed on December 24th to the stock theretofore delivered to the transferee, and a bill of sale executed by the bankrupt to the transferee covering it.

If the transaction is to take effect from December 16th, it is beyond the four months period, and not the subject of a preference. If not effective until December 24th, it is within the four months period, and, the other elements being present, would constitute a preference. No written bill of sale was essential to pass title to the personal property transferred to the creditor in payment of the debt. Delivery, pursuant to such a verbal agreement, would be legally sufficient, though the note was not surrendered until later. However, the more satisfactory evidence is to the effect that it was surrendered contemporaneously with the delivery of the stock. This would be true, provided it was understood by the parties that the debt was to be satisfied by the delivery of the goods, and there was no understanding that further papers were to be prepared and executed to complete the transaction. In these provisos, both agree. There was a complete change of possession of the stock on December 16th, and it hardly seems that so troublesome a re-

moval would have been attempted until the agreement was understood to be final by the parties to it.

My conclusion from the evidence is that there was a valid and complete transfer by delivery of the goods in consideration of the cancellation of the debt on December 16th, more than four months before the filing of the petition.

Did the subsequent filing of the exemption by the bankrupt, and executing a bill of sale to the transferee, change the status? If the original transaction was legally sufficient to vest title to the goods in the transferee, the title could be divested out of him only by an agreement between the parties, the legal effect of which was to rescind the original agreement. Such was not the effect of the acts done by the bankrupt on December 24th. On the contrary, they were done to make the original transaction—i. e., the payment of the debt with the goods—more binding. The giving of a further assurance or muniment of title could not have the effect of impairing the vested right of the transferee, acquired by the original transaction, though assented to by him. The giving of such assurance or muniment of title within the four months of property the title of which had passed out of the bankrupt beyond the four months could not operate as a preference, or be the foundation of an act of bankruptcy on the part of the bankrupt, since the creditors had no claim on the property when such further assurance or muniment was given by the bankrupt.

Whatever might be the effect of the assertion by the transferee to the attorneys for the petitioning creditors, made before the petition was filed, that he claimed the property under the written bill of sale, dated within the four months, in a proceeding against him, as claimant, to set aside the transfer as a preference, it is clear it could not operate to estop the bankrupt in this proceeding from resisting adjudication by reason of it.

The petition is therefore dismissed, at the costs of the petitioning creditors.

THE O. H. VESSELS.

(District Court, E. D. Pennsylvania. March 16, 1910.)

No. 39.

1. MARITIME LIENS (§ 11*)—REPAIRS—WHAT CONSTITUTE.

Providing a barge with a cover to protect her cargo from the weather to fit her for a particular business constitutes repairs, and not construction.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 15; Dec. Dig. § 11.*]

2. MARITIME LIENS (§ 30*)—REPAIRS.

Repairs made on a vessel in a foreign port under a contract with a charterer, but confirmed by the master and with the knowledge of the managing owner, entitle the repairer to a lien, although the charter party contained a provision, not known to him, and of which he was not notified, that they should be made at the expense of the charterers.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 37, 38; Dec. Dig. § 30.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Admiralty. Suit by John Kramer's Sons against the barge O. H. Vessels. On final hearing. Decree for libelants.

Henry R. Edmunds, for libelants.

Willard M. Harris, for respondent.

J. B. McPHERSON, District Judge. The testimony in this case is conflicting upon several material points, but I shall not discuss it in detail. To find the facts appears to be more important than to refer specifically to the evidence by which they seem to be established.

The O. H. Vessels is a steam barge registered at the port of Wilmington in the state of Delaware. In February, 1909, she was chartered by Luther R. Vessels, the managing owner, to H. J. Schock and F. W. Litchfield, and was under the command of John W. Kelly, the master appointed by the charterers. She was then an uncovered boat, and as the charterers desired to use her in transporting perishable freight on the Delaware river it was necessary to protect her from the weather. In other words, while it was desired to fit her for a particular kind of business, no alteration was contemplated that would materially change her construction. Essentially, nothing was to be done except to provide a cover that would protect the cargo from the wet and the heat, and a change so slight should, I think, be described as repairs, and not as construction. *The Iris*, 100 Fed. 104, 40 C. C. A. 301; *The Ella* (D. C.) 84 Fed. 471.

Delivery of the boat had been promptly made to the charterers, and toward the end of February she was in the port of Philadelphia. A contract to do the work referred to was made in that port with the libelants, John Kramer's Sons, and the needful repairs were accordingly put upon the boat during the month of March. Soon afterwards the charter was apparently abandoned, the barge was surrendered to her owners, and the present action was brought to determine whether the boat can be properly charged with a lien for the libelants' bill. As it seems to me, there is little room for doubt upon this point. It is true that the charter party provides that the barge is to be delivered by a specified date "for the purpose of having such improvements made at (the charterers') own expense as will enable said steam barge to properly carry perishable freight"; but the existence of the charter party was not known to the libelants, and they were not informed that the repairs were to be made at the charterers' own cost. The contract was originally made with Litchfield, but before the work was begun the master of the barge confirmed the agreement, and the managing owner, who was employed on board as the engineer, also knew of it and gave the libelants clearly to understand that the boat could be held for their bill in case the money could not be collected from the charterers. As it seems to me, the situation is briefly this: A boat is under charter, and repairs are needed in a foreign port. The charterers are under obligation to pay the cost, but the libelant has no knowledge of this provision. The master of the boat in effect becomes a party to the original contract, and the managing owner of the boat, being on board and having full knowledge of everything that is done, allows the repairman to believe that he will have a lien for

the cost of his work. If under such circumstances the boat is not bound, it is not easy to see how a lien for repairs can ever attach. All the elements of such a lien are present. The repairs are necessary, and the work is done in a foreign port, where presumably a lien will attach; the master agrees that the work shall be done, and takes part in it by continually giving orders and by superintendence: the managing owner is present, has full knowledge of the situation, also gives orders, and directs how part of the work shall be done, and practically agrees to a lien if the charterers do not pay. In support of the barge's liability, it is, I think, only necessary to refer to *The Emily Souder*, 84 U. S. 670, 21 L. Ed. 683, *Insurance Co. v. Baring*, 87 U. S. 163, 22 L. Ed. 250, *The Patapsco*, 80 U. S. 329, 20 L. Ed. 696, and *The Vigilant* (C. C. A., 3d Circuit) 151 Fed. 747, 81 C. C. A. 371. To these may be added *The Kate*, 164 U. S. 458, 17 Sup. Ct. 135, 41 L. Ed. 512, *The Valencia*, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, and Judge Bradford's careful and satisfactory opinion in *The Ella*, supra.

A decree may be entered in favor of the libelants, with costs.

MECKY v. GRABOWSKI et al.

(Circuit Court, E. D. Pennsylvania. March 3, 1910.)

No. 331.

COURTS (§§ 290, 292*)—JURISDICTION OF FEDERAL COURTS—UNFAIR COMPETITION—PATENT RIGHTS.

Unfair competition in trade is not a federal question, and a suit therefor is not within the jurisdiction of a federal court, where the parties are citizens of the same state; nor is that issue drawn within such jurisdiction because the bill also alleges infringement of a patent growing out of the same acts of defendant.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 832, 834; Dec. Dig. §§ 290, 292.*]

Jurisdiction of cases involving federal questions, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Mining Co.*, 35 C. C. A. 7.]

In Equity. Suit by Johanna Mecky, administratrix of the estate of August Mecky, against Frank J. Grabowski and Charles F. Atwater, trading as the Eagle Wheel Manufacturing Company. On demurrer to bill. Sustained in part.

Robert M. Barr, for complainant.

Howson & Howson, for defendants.

HOLLAND, District Judge. In this case the bill charges patent infringement and unfair competition in trade. Both the complainant and defendant are residents of this state. Defendant demurs to the whole bill on the ground (1) of multifariousness, and (2) of failure of the bill of complaint to aver title to the patent in suit, and further demurs to the jurisdiction of the court so far as concerns that part of the bill which relates to the charge of unfair competition.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

As to the question of complainant's failure to aver title to the patent in suit, this may be disposed of by allowing the complainant to amend in that particular; and it is so ordered.

The defendant is not only charged with infringing the patent of this seat for a velocipede, but it is also averred that he makes a machine which is an exact copy of the complainant's, for the purpose of deceiving the trade in the sale of the same; in other words, there is an allegation of unfair competition in connection with the averment of infringement of the patented article.

The alleged infringement of the patent is a federal question, and can be maintained in the United States courts, even if both parties to the suit be citizens of the same state. The question, however, of unfair competition, is not a federal question, and cannot be maintained in the United States courts, where the parties to the suit are both residents of the same state. *Elgin National Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; *Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co.*, 134 Fed. 571, 67 C. C. A. 418. In the latter case, however, it does not appear from the record that unfair competition was charged in the bill; but it was urged in the brief of complainant. In the former, a charge of unfair competition, in connection with a charge of infringement of a trade-mark, is alleged, and the court held that, as the averment in the bill to the effect that the trade-mark had been infringed could not be sustained, the question of unfair competition, not being a federal one, could not be maintained, and the Court of Appeals, directing the bill be dismissed, was affirmed.

It would appear that the question of unfair competition, not being a federal one, cannot be maintained in a federal court where there is no diversity of citizenship, as in this case. The question then arises whether or not the fact that it is connected with a federal question in the same bill and arises out of that same question, to wit, the infringement of a patent, will draw the question of unfair competition within the right of the court to take cognizance of the same. In *Woods Sons Co. v. Valley Iron Works (C. C.)* 166 Fed. 770, under the peculiar circumstances of that case, it was held:

"That under the established rule in equity that, having taken cognizance of a case upon any ground on which jurisdiction is given, the court will proceed to dispose of the whole controversy between the parties, even though there may be certain phases of it as to which, by themselves, it would not."

This principle, however, that a court of equity, having taken cognizance of a case, will dispose of the whole controversy, even though there may be phases of it as to which, by themselves, it would not have jurisdiction, has application, not to the jurisdiction of the court under the Constitution and statutes, but to its jurisdiction as a court of equity, and relates principally to the application of legal as well as equitable remedies, where there is one ground of proper equity jurisdiction.

The contention of the defendant as to the unfair competition is sustained in the case of *Cushman v. Atlantis Fountain Pen Co. et al.*, 164

Fed. 94, in which it was held by Judge Lowell, of the Circuit Court, that a bill to restrain the infringement of a patent, which presents a federal question, does not draw within the jurisdiction of the Circuit Court a further issue as to unfair competition in trade, although it grows out of the same acts of defendant. In the case at bar, the question of unfair competition can be fully and properly determined by the proper tribunal, entirely independent of a question of patent infringement, and the complainant has full recourse to the state courts for that purpose.

As to the averments in the bill, therefore, of an unfair competition, the demurrer is sustained.

UNITED STATES v. MARSCHING & CO.

(Circuit Court, S. D. New York. November 4, 1909.)

No. 4,116.

CUSTOMS DUTIES (§ 24*)—CLASSIFICATION—COLORS CONTAINING LEAD.

The provision for "colors * * * not containing quicksilver, but * * * containing lead," in Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 54, 30 Stat. 154 (U. S. Comp. St. 1901, p. 1630), is a more specific enumeration of colors containing lead than the provision for "colors * * * not otherwise specially provided for," in paragraph 58, 30 Stat. 154 (U. S. Comp. St. 1901, p. 1630).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 24.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision of the Board of General Appraisers (G. A. 6,144, T. D. 26,689) sustained the importers' protests against the assessment of duty by the collector of customs at the port of New York. The Board's opinion reads as follows:

McCLELLAND. General Appraiser. * * * The special reports of the appraiser set forth that the merchandise "consists of various enamel colors used in decorating porcelain and glass." * * * Although the return of the appraiser on the invoices—"colors"—is the same in each case, and the special reports above quoted treat the merchandise involved in each of these protests as being the same and used for the same purposes, the samples thereof, offered and received in evidence on the hearing, differ from each other in appearance and composition. These samples were submitted for analysis to the official chemist in the appraiser's office at the port of New York, and he reports on them as follows:

"Exhibit 1, protest 125,610, pink, No. 4: Tin, gold, and silver; lead oxide; lime; alumina; soda; silica; traces of iron oxide.

"Exhibit 1, protest 125,611, enamel, 649: Lead and zinc oxides; lime; silica; traces of iron oxide."

The record before us is not as complete as we wish it might have been. But one witness was examined on the hearing—a member of the protesting firm. And since there was no attempt on the part of the government to controvert his testimony, we see no reason why it should not be accepted, in so far as it may be a guide in the determination of the issues involved. As to the first item—Exhibit 1, 125,610, pink, No. 4—the witness frankly states that the merchandise is a color used for decorating chinaware. And as to the second item—Exhibit 1, 125,611, enamel, 649—the evidence is that it is to give a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

white glaze or polish to glass. Before being applied to the glass it is mixed with water, and in the form of a paint is put on the glass with a brush and then fired.

We have no doubt that on the record before us the finding is justified that each of the two kinds of merchandise involved is a color; but it does not follow that the collector's classification is correct. One of the claims of protestants is that the merchandise is dutiable at 5 cents per pound under the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 54, 30 Stat. 154 (U. S. Comp. St. 1901, p. 1630), which reads: "Vermillion red, and other colors containing quicksilver, dry or ground in oil or water, ten cents per pound; when not containing quicksilver, but made of lead or containing lead, five cents per pound." And paragraph 58, 30 Stat. 154 (U. S. Comp. St. 1901, p. 1630), under which the collector's classification was made, reads: "All paints, colors, pigments, lakes, crayons, smalts and frostings, whether crude or dry or mixed, or ground with water or oil or with solutions other than oil, not otherwise specially provided for in this act, thirty per centum ad valorem."

It would seem as though the sole question to be determined is under which of these two paragraphs should classification be made, and we are of opinion that the language of paragraph 54 for colors "when not containing quicksilver but made of lead or containing lead," is more specific than that of paragraph 58 for "paints, colors, * * * not otherwise specially provided for," and must control in determining these issues.

The claim in the protests that the merchandise is dutiable at 5 cents per pound under paragraph 54 is therefore sustained as to the items noted.

D. Frank Lloyd, Dep. Asst. Atty. Gen. (Charles D. Lawrence, of counsel), for the United States.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

PLATT, District Judge. Decision affirmed.

FREDERICK HOLLENDER & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 3, 1910.)

No. 3,327.

CUSTOMS DUTIES (§ 37*)—CLASSIFICATION—PRINTED BEER MATS—"PRINTED MATTER."

In Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 433, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1676), the term "printed matter" does not include beer mats, consisting of round pieces of wood pulp upon which have been printed German verses, and the name and advertisement of beer dealers.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 37.*

For other definitions, see Words and Phrases, vol. 6, pp. 5563, 5564; vol. 8, p. 7763.]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below affirmed the assessment of duty by the collector of customs at the port of New York, on the authority of a former decision, in which the Board states its grounds of decision as follows (G. A. 5,582, T. D. 24,997):

FISCHER, General Appraiser. The merchandise in question consists of so-called beer felts. The articles are circular pads or mats, made of wood

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pulp, about 4½ inches in diameter and one-eighth of an inch in thickness, and there is printed on one surface thereof the name and address of the concern for whom they were made. They are used in saloons and restaurants as table mats for beer or wine glasses. The local appraiser returned the same as "manufactures of paper." * * * The importers claim that the merchandise is dutiable as printed matter. * * * The merchandise is neither a manufacture of paper nor printed matter. An examination of the samples before us shows that the articles are manufactures of pulp, and therefore fall within the provisions of paragraph 433 (Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1676]), which reads as follows: "Indurated fiber ware and manufactures of wood or other pulp, and not otherwise specially provided for, thirty-five per centum ad valorem."

This Board, in passing upon certain printed paper bags, * * * June 26, 1902, said: "The articles are printed bags, and have become by a process of manufacture a distinct article for use of such, and the printing thereon is merely incidental thereto and not a controlling feature." * * * So here the articles are manufactured articles of utility, and are not printed matter; for the printing is merely incidental, and is not an essential or controlling feature. Paper boxes and other articles commonly have printing thereon to denote the name of the concern using them, together with a description of the goods packed therein; yet no one will seriously contend that such printing will make the articles printed matter.

We find that the merchandise is a manufacture of pulp, and we accordingly overrule the protest; and the decision of the collector will stand.

Kammerlohr & Duffy (John G. Duffy, of counsel), for the importers.

D. Frank Lloyd, Deputy Asst. Atty. Gen. (William K. Payne, Asst. Atty., of counsel), for the United States.

MARTIN, District Judge. No evidence was taken in this case. It rests solely upon the exhibit, which consists of a round piece of wood pulp upon which is printed a German verse and the name and advertisement of a dealer in beers, circular in form and designed for use as a beer mat. It was assessed under paragraph 433 as a manufacture of pulp at 35 per cent. ad valorem. It is apparent from the exhibit that it has been advanced through processes of manufacture into a completed commercial article and adapted for a practical use. The printing thereon is incidental.

I concur in the opinion of the Board of General Appraisers, and affirm its decision.

SUN KWONG ON V. UNITED STATES.

(Circuit Court, S. D. New York. November 13, 1909.)

No. 5,575.

CUSTOMS DUTIES (§ 30*)—CLASSIFICATION—SALTED CABBAGE—"PREPARED OR PRESERVED" VEGETABLES—"NATURAL STATE."

Hanks and balls of dried and salted cabbage, the salting and manipulation of which were done as a preparation fitting the cabbage for cooking purposes, and intended to be permanent, are dutiable as vegetables "prepared or preserved," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170 (U. S. Comp. St. 1901, p. 1649), and not as vegetables in their "natural state," under paragraph 257, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1650).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 30.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below affirmed the assessment of duty by the collector of customs at the port of New York. The opinion filed by the Board of General Appraisers reads as follows, so far as pertinent:

WAITE, General Appraiser. These Chinese commodities, consisting of dried and salted cabbage, some varieties tied up in hanks or bundles and others rolled into balls, are claimed by the importers to be dutiable as vegetables in their "natural state," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 257, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1650). They were assessed as "prepared" vegetables, under paragraph 241, 30 Stat. 170 (U. S. Comp. St. 1901, p. 1649).

From the record and an examination of the commodities, it is evident that the salting is done as a preparation fitting the cabbage for cooking purposes—seasoning, in other words—because the drying in itself would be sufficient to preserve it, if only the preservation was in mind when it was prepared for shipment. We think the salting and manipulating for the purposes mentioned constitute a preparation, and remove the cabbage from the class of vegetables in their "natural state." A great variety of vegetables of this nature are imported; and it is exceedingly difficult to determine where the dividing line is between vegetables in their natural state and prepared vegetables, under the present condition of the law as set forth in the decisions of the courts. We think, however, it is safe and logical to hold that, wherever the commodity has gone through a preparation which is intended to be permanent or serves to prepare it in the way of seasoning for food, it is so far removed from a vegetable in its natural state as to be dutiable under paragraph 241 as a prepared vegetable.

We so hold in regard to the above-described merchandise, overruling the protests as to such goods.

Kammerlohr & Duffy (Joseph G. Kammerlohr, of counsel), for importer.

D. Frank Lloyd, Deputy Asst. Atty. Gen. (Thomas M. Lane, Asst. Counsel, of counsel), for the United States.

PLATT, District Judge. I think that these hanks and balls of salted cabbage received too much attention in China to warrant their classification as cabbage in its "natural state," under paragraph 257 of the tariff act of 1897. It was properly classified, under paragraph 241 of said act, as a "prepared or preserved" vegetable.

Decision of the Board affirmed.

UNITED STATES v. SHERWOOD.

(District Court, W. D. New York. April 6, 1910.)

POST OFFICE (§ 48*)—USE OF MAILS TO DEFRAUD—INDICTMENT.

In an indictment for using the mails in furtherance of a scheme or artifice to defraud, in violation of Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), it is sufficient to allege in the indictment that the scheme or artifice having been devised by the defendant was to be effectuated by the use of the mails, and that defendant, in furtherance of such intention and scheme or artifice, deposited a letter which was to be delivered by medium of the post office, so that an indictment charging that the artifice or scheme to defraud was to obtain a sum of money by threats, intimidation, etc., and that such scheme was to be effectuated by open

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

ing correspondence and communication with K. by means of the post office establishment, was not objectionable for failure to charge that accused wrote the letter, that he knew of its contents, or because the letter failed to state a scheme to defraud, would not have deceived a person of ordinary prudence or because K. was not indebted to the sender. [Ed. Note.—For other cases, see Post Office, Cent. Dig. § 72; Dec. Dig. § 48.*

Nonmailable matter, see note to *Timmons v. United States*, 30 C. C. A. 79.]

Sidney Sherwood was indicted for using the mails in furtherance of a scheme to defraud. On demurrer and motion to dismiss the indictment. Denied.

M. B. Jewell and Thomas L. Newton, for defendant.
James O. Moore, Asst. U. S. Atty.

HAZEL, District Judge. The defendant demurs to the indictment, and charges that it is defective, in that it fails to allege (1) that the accused wrote the letter which was transmitted through the mails; (2) that he knew its contents; (3) that the letter in terms fails to state a scheme to defraud; (4) that the addressee was not indebted to the sender; and (5) that the letter delivered through the mails was not one that would deceive a person of ordinary prudence.

None of these allegations are essential to the validity of the indictment. It is sufficient, under section 5480, Rev. St. (U. S. Comp. St. 1901, p. 3696), to allege that the scheme or artifice to defraud, having been devised by the defendant, was to be effectuated by the use of the mails, and that the defendant, in furtherance of such intention and scheme or artifice, deposited a letter which was to be delivered by medium of the post office. *O'Hara v. United States*, 129 Fed. 554, 64 C. C. A. 81. That the indictment does not allege that Kenyon did not owe the defendant the amount specified in the letter is not material. It is alleged with sufficient positiveness that the artifice or scheme to defraud was to obtain a sum of money by threats, intimidation, etc., and that such scheme or artifice was to be effected by opening correspondence and communication with Kenyon by means of the post office establishment. The incriminating letter does not pretend that Kenyon was indebted to the defendant, and it is fairly open to the inference that the defendant was endeavoring to obtain money not owing to him by fraudulent means. On the whole, the charge is thought specific enough to apprise the defendant of the character of the accusation against him and what he will be required to meet on the trial.

Motion to dismiss the indictment is denied, and the demurrer overruled.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In re NORRIS.

(District Court, W. D. New York. April 6, 1910.)

No. 3,508.

1. BANKRUPTCY (§ 288*)—TRANSFER OF ASSETS—CLAIM AGAINST THIRD PERSON.

Where a bill of sale executed by a bankrupt to his wife was claimed to be in fraud of creditors, the referee was authorized to grant an order against the wife to show cause why such sale should not be set aside and to assert her claim to the property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

2. BANKRUPTCY (§ 293*)—JURISDICTION—CLAIMS BY THIRD PERSONS.

The bankruptcy court has power to ascertain whether an adverse claim to property of the bankrupt, made by a third person in possession, is in fact well founded, or is fictitious or colorable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417; Dec. Dig. § 293.*]

3. BANKRUPTCY (§ 301*)—ASSETS—DISPOSITION—INJUNCTION.

Where a bankrupt's transfer of assets to his wife was claimed to be in fraud of creditors, and the trustee was about to bring a plenary action against the wife to recover the property, the bankruptcy court was authorized, by Bankr. Act July 1, 1898, c. 541, § 23b, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3431), as amended by Act Cong. Feb. 5, 1903, c. 487, § 8, 32 Stat. 798 (U. S. Comp. St. Supp. 1909, p. 1312), to restrain the wife's disposition of the property during the pendency of such suit.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 464; Dec. Dig. § 301.*]

In the matter of the bankruptcy proceedings of Patrick J. Norris. On motion to continue a stay restraining disposition of property in possession of a third person claiming adversely. Granted.

Webb & Van Demark, for trustee.

William J. Maloney, for adverse claimant.

HAZEL, District Judge. The trustee of the bankrupt herein claims that the bill of sale executed by the bankrupt to his wife was in fraud of creditors, and that the injunction heretofore issued under section 2, subd. 15 (Act July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421]), should be continued until the title to the property specified in the bill of sale can be determined in a plenary action. The adverse claimant is the wife of the bankrupt, who has possession of the property and claims title thereto under a bill of sale to her from the bankrupt.

In view of the facts, as I understand them, an order to show cause by the referee in bankruptcy directed to Mrs. Norris to assert her claim would not have been improper. In *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, the Supreme Court decided that the court had power to require the deliverance of property to the bankruptcy court, where such property was held for and on account of the bankrupt. The court has power to ascertain, if an adverse claim be made by a third person in possession of the property, whether such claim is in fact well founded, or if it is fictitious or colorable. Such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

procedure was not adopted herein, and the moving papers indicate that a plenary action has been or will be begun by the trustee against the adverse claimant.

Under the circumstances, it would seem that the only safe way to protect the rights of the creditors is to continue the injunction until the rights of the parties have been determined by a proper tribunal. Formerly it was doubtful whether a court of bankruptcy could take jurisdiction to restrain the disposition of property in possession of a third person claiming title thereto; but the case of *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, and the amendment of 1903 (Act Feb. 5, 1903, c. 487, § 8, 32 Stat. 798 [U. S. Comp. St. Supp. 1909, p. 1312]) to section 23b of the bankruptcy act, removes any doubt that may theretofore have existed as to such power. If the proposed sale of the property, which is in the possession of the wife of the bankrupt herein, is not enjoined during the pendency of the plenary action, it is not difficult to perceive that the interests of the general creditors are liable to suffer. *Collier on Bankruptcy* (7th Ed.) p. 50. The contemplated action by the trustee should be brought within 10 days and be vigilantly prosecuted, and on this condition the injunction will be continued until the further order of the court.

So ordered.

In re SCHEIDT BROS.

(District Court, S. D. Ohio, E. D. February 24, 1908.)

No. 1,475.

BANKRUPTCY (§ 314*)—CLAIMS—DELINQUENT TAXES—PENALTY.

Since under the Ohio law (Rev. St. Ohio 1908, §§ 1094, 2855), imposing penalties for nonpayment of delinquent taxes, the penalty on delinquent personal property taxes takes the place of interest, a penalty added to a bankrupt's delinquent personal property tax was allowable as a claim against the bankrupt's estate, under Bankr. Act July 1, 1898, c. 541, § 64, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), specifying the claims entitled to priority.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec Dig. § 314.*]

In the matter of the bankruptcy proceedings of Scheidt Bros. On petition for review of an order disallowing a penalty for the nonpayment of delinquent taxes on personal property as a claim against the estate. Reversed.

E. F. O'Neal, for petitioner.

C. T. Marshall, for trustee.

SATER, District Judge. Section 2855, Rev. St. Ohio 1908, provides that immediately after the semiannual settlement for taxes in August of each year the county auditor shall add a penalty of 10 per cent. to all taxes on personal property remaining unpaid, as shown by the county treasurer's books. If the taxes be not then paid within the time named in section 1094, Rev. St. 1908, and the county treasurer

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

thereafter proceeds to collect them by distress, or action, or rule of court, or special effort in person or through his agent (*Hunter v. Borck*, 51 Ohio St. 320, 37 N. E. 714), a further penalty of 5 per cent. is added to them, for his use as compensation. Taxes on personalty, unlike those on realty, are not made a lien on any of the owner's property. The referee held that under section 57j of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]) the penalty is not allowable as a claim against the estate.

No question as to taxes accruing and penalties imposed subsequent to the institution of the bankruptcy proceedings is involved. Whatever may be the rule elsewhere, in Ohio the penalty takes the place of interest. *Bridge Co. v. Mayer*, 31 Ohio St. 317, 328. Its allowance is intended to cover interest until the delinquent taxes are put into judgment (*Wheeling & Lake Erie Ry. Co. v. Wolfe*, 13 Ohio Cir. Ct. R. 374), or are paid voluntarily, or are collected by special effort of the treasurer, in person or by his agent—in some manner other than by process of law. The penalty, being treated as interest, is collectible as a part of the tax itself. 27 Am. & Eng. Ency. Law, 777, 778, 779. Under section 64 of the bankruptcy act, the referee should have directed payment of both taxes and penalty. *Re Kallak* (D. C.) 147 Fed. 276.

Referee reversed.

HALL v. TEVIS.

(Circuit Court, S. D. New York. March 29, 1910. On Application for Order to Show Cause for Reargument, April 1, 1910.)

REMOVAL OF CAUSES (§ 86*)—PROCEEDINGS—CITIZENSHIP—ASSIGNED CLAIMS—PETITION FOR REMOVAL.

Where a suit by the transferee of a note was removed to the federal courts, but the removal petition contained no allegation as to the citizenship or residence of the transferor, showing that the citizenship of the defendant and transferor was diverse, or that the action could have been originally brought in the Circuit Court for the particular district, the federal court had no jurisdiction.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 170; Dec. Dig. § 86.*]

Action by William Henry Hall against John Tevis. On motion to remand. Granted.

Charles Coleman Miller, for plaintiff.
Lodowick Holmes Jones, for defendant.

On Motion to Remand.

NOYES, Circuit Judge. In this action the plaintiff sues as transferee of a promissory note payable to the order of Melville D. Chapman. The petition for removal contains no allegations with respect to the citizenship or residence of said Chapman. Consequently it does not appear that Chapman and the defendant are citizens of different states, and that the Circuit Court of the United States has jurisdiction

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the controversy. Indeed, it does not appear—even if we go outside the petition for removal—that the action could have been brought originally in the Circuit Court for this district, and was properly removable to this court. The plaintiff could not waive the want of jurisdiction shown by the failure to allege diverse citizenship between the plaintiff's assignor and the defendant, and the proof is insufficient to establish a waiver of the jurisdiction of this particular Circuit Court.

The motion to remand is granted.

On Application for Order to Show Cause for Reargument.

Assuming that the court may go outside the petition for removal and into the removal record, nothing is to be found showing the citizenship of the plaintiff's assignor, Chapman. The only statement regarding his residence is in his affidavit, and this does not state his residence at the commencement of the action. Obviously the statements in the affidavit filed by the defendant in this court after the removal of the cause cannot be considered.

The application for an order to show cause is denied.

SOY KEE & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 21, 1910.)

No. 5,384.

CUSTOMS DUTIES (§ 26*)—CLASSIFICATION—"COIN SWORDS"—"COINS."

So-called "coin swords," which consist of copper coins corded together and securely fastened around an iron bar or rod covered by metal foil, and are used for ornamental purposes, are not within the provision for "coins," in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 530, 30 Stat. 197, but are dutiable under section 1, Schedule C, par. 193, of the act (U. S. Comp. St. 1901, p. 1682).

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 48-59; Dec. Dig. § 26.*

For other definitions, see Words and Phrases, vol. 2, pp. 1246, 1247.]

On Application for Review of a Decision by the Board of United States General Appraisers.

The Board of General Appraisers overruled the importers' contention that certain articles imported at the port of New York had been improperly classified as manufactures of metal, under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 193, 30 Stat. 167 (U. S. Comp. St. 1901, p. 1645), and should have been classified as "coins," under section 2, Free List, par. 530, 30 Stat. 197 (U. S. Comp. St. 1901, p. 1682). The Board's opinion reads in part as follows:

FISCHER, General Appraiser. This protest raises objection to the assessment of duty on certain copper-coin articles, invoiced as "copper-cash swords." * * * We find from the testimony offered and upon examination of the exhibits in the case that these so described swords are made up of a number of copper coins corded together and securely fastened around an iron rod or bar covered by metal foil. The articles are in the form of swords, and are metal novelties imported to serve generally a decorative purpose, as ornaments. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

real basis of the importers' protest is that the ornaments in question are "coins"; but we think it obvious from the description given that this claim is in error. The Board passed on precisely the same kind of goods in G. A. 6,720 (T. D. 28,773), following which we affirm the decision of the collector, assessing duty on the merchandise under the provision for articles not specially provided for, whether partly or wholly manufactured, composed wholly or in part of metal, and we overrule the protest.

Kammerlohr & Duffy (John G. Duffy, of counsel), for importers.
D. Frank Lloyd, Deputy Asst. Atty. Gen. (William K. Payne, Asst. Atty., of counsel), for the United States.

MARTIN, District Judge. Decision of the Board of General Appraisers affirmed.

INTERNATIONAL HIDE & SKIN CO. v. UNITED STATES.

(Circuit Court, S. D. New York. November 4, 1909.)

No. 5,326.

CUSTOMS DUTIES (§ 38*)—CLASSIFICATION—SHEEPSKINS—"FURS."

Sheepskins, purchased indiscriminately and imported unsorted, without regard to any particular use to which they might be adapted, and not shown to be used as furs, are not classifiable as "furs," or "fur skins," under Tariff Act July 24, 1897, c. 11, § 2, Free List, pars. 561, 562, 30 Stat. 198 (U. S. Comp. St. 1901, p. 1683).

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 38.*

For other definitions, see Words and Phrases, vol. 4, p. 3009.]

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below affirmed the assessment of duty by the collector of customs at the port of New York; the opinion filed by the Board of General Appraisers being as follows:

McCLELLAND, General Appraiser. The merchandise in question consists of sheepskins. The growth thereon was returned by the appraiser as wool of class 3, unwashed, upon which duty was assessed at the rate of 3 cents per pound, under tariff Act July 24, 1897, c. 11, § 1, Schedule K, pars. 358, 360, 30 Stat. 183 (U. S. Comp. St. 1901, pp. 1665, 1666), based upon the weight thereof as ascertained by the appraiser. The merchandise is claimed to be China sheepskins, used for manufacturing fur coats only, and entitled to free entry either under paragraph 561 or paragraph 562 of said act (section 2, Free List, 30 Stat. 198 [U. S. Comp. St. 1900, p. 1683]).

In abstract decision 17,754 (T. D. 28,634) the Board passed upon and determined a similar question in favor of the protestants' claim; but in that case, while it appears that the skins were of the China sheep, as in the case at bar, they were shown to have been carefully selected for use in the making of fur coats, while the record here shows that the skins involved were unsorted and purchased indiscriminately, without regard to any particular use to which they might be adapted. This is shown by the testimony of the secretary of the importing company. "Q. Do you know what these skins are used for? A. Yes, sir. Q. What is their use? A. Principally coats. Q. Did you sell them to manufacturers of fur coats? A. Some of them might have been sold to a mitten manufacturer or a glove manufacturer. It is pretty difficult to state without referring to our books. Q. Are the skins of a special character? A. Why, the short and the medium hair skins are sold for fur coat purposes, and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

long fur the skins are sold to mitten manufacturers to make a mitten out of.
 * * * Q. You purchased these skins indiscriminately in China, or did you purchase them as fur skins? A. Why, they are purchased indiscriminately."

It also appears from the testimony of this witness that one-third of the importation involved in protest 284,738 was sold unsorted to a tanner to be made into leather. Since there was no separation of the skins claimed to be suitable for use only in the making of fur coats from the ordinary skins with the wool on, it is impossible for the Board to make a finding of the percentages of each, and therefore the protests must be overruled, and the decision of the collector in each case affirmed.

Hatch & Clute (Walter F. Welch, of counsel), for importers.
 D. Frank Lloyd, Deputy Asst. Atty. Gen., for the United States.

MARTIN, District Judge. Decision affirmed.

JENNINGS et al. v. BURTON.

(Circuit Court, S. D. New York. February 14, 1910.)

COSTS (§ 266*)—COSTS ON APPEAL—EFFECT OF DETERMINATION ON NEW TRIAL.

Where plaintiffs recovered a judgment, which was reversed on writ of error, with costs to the plaintiff in error, the appellate court declining to modify the mandate by directing that the costs should abide the event, and they were thereupon paid, and the plaintiff prevailed on a second trial, he is not entitled to tax as a disbursement the amount paid in settlement of the judgment for costs of the first appeal.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1009-1016; Dec. Dig. § 266.*]

Action by Curtis M. Jennings and another against James H. Burton.
 On appeal from the clerk on taxation of costs. Affirmed.

Hyland & Zabriskie, for plaintiffs.
 Appell & Taylor, for defendant.

LACOMBE, Circuit Judge. In this case plaintiffs recovered a judgment on the first trial. A writ of error was sued out by defendant, and the Court of Appeals reversed the judgment for error on the trial, with costs of such appeal to plaintiff in error. The costs were subsequently taxed, and judgment absolute was entered for the amount in this court; the court declining to modify the mandate by directing that they should abide the event. They were thereupon paid. On a second trial, plaintiff prevailed, and is now about to enter judgment. He asks to be allowed to tax as a "disbursement," to be included with his costs, the sum he paid in settlement of the judgment for costs of the first appeal.

Reference is made to *Hamilton v. Aslin*, 3 Watts (Pa.) 222; but I am satisfied that there is no authority for the practice in this court. The appellate tribunal imposed costs for error committed on the trial, for which defendant in error must be held responsible, and to allow reimbursement in the way suggested would practically be to annul its decision. I have consulted with the other Circuit Judges before filing this memorandum.

The clerk's decision as to certain witness fees is correct.
 Taxation affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

EXPANDED METAL CO. et al. v. BRADFORD et al.

(Circuit Court, E. D. Pennsylvania. March 3, 1910.)

No. 14.

COSTS (§ 246*)—SECURITY—EXTENT OF LIABILITY OF SURETY.

The surety on a bond for costs on appeal from the United States Circuit Court to the Circuit Court of Appeals is liable, not only for the costs in the Circuit Court of Appeals; but also for those incurred in the court below.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 947-950; Dec. Dig. § 246.*]

Action by the Expanded Metal Company and others against Eugene S. Bradford and others. Rule on the Fidelity & Deposit Company of Maryland to show why judgment should not be had and execution issued against it as surety on an appeal bond. Rule made absolute.

Ernest Howard Hunter, for complainants.
Stanley Williamson, for Surety Co.

HOLLAND, District Judge. This was a rule on the Fidelity & Deposit Company of Maryland to show cause why judgment should not be had and execution issued against it as surety on the appeal bond. The Fidelity & Deposit Company of Maryland was the surety on the defendant's bond for costs on appeal to the Circuit Court of Appeals. The bond is in the sum of \$500. The costs in the Circuit Court of Appeals amount to \$185, and the costs in the Circuit Court are \$257.61. The total for which the complainant contends the Surety Company is liable is \$442.61. The latter, however, insists that it is only liable for the amount of the costs in the Circuit Court of Appeals, to wit, \$185, and that the costs incurred in the court below are not covered by the bond.

There are decisions both ways, but it is not an open question in this District, as Judge McPherson, in the case of Joseph Punter et al. v. Schooner Joseph B. Thomas, 158 Fed. 559, in the District Court, in admiralty (No. 2 of 1904), held that the surety on a bond given on an appeal to the Circuit Court of Appeals is liable for the costs in the court below. So long as there is no decision to the contrary by the Circuit Court of Appeals of this Circuit, the view taken by Judge McPherson will be followed.

The rule, therefore, is made absolute. Judgment awarded against the Surety Company for the sum of \$442.61, and execution permitted to be issued by the complainant for the collection of the same.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LYNCH v. BRONSON et al.

(District Court, D. Connecticut. March 2, 1910.)

No. 1,568.

BANKRUPTCY (§ 293*)—ACTION BY TRUSTEE—JURISDICTION.

An action by a trustee in bankruptcy to recover damages from defendants, upon allegations that they conspired with the bankrupt, knowing him to be insolvent, and pursuant to such conspiracy he purchased goods on credit, which he turned over to defendants for less than their value, is one merely to recover damages for the conspiracy, and not to set aside a fraudulent transfer of property, within Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), and is not brought within the jurisdiction of the bankruptcy court by section 23b, as amended by Act Feb. 5, 1903, c. 487, § 8, 32 Stat. 798 (U. S. Comp. St. Supp. 1909, p. 1312.)

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 411; Dec. Dig. § 293.*

Jurisdiction of federal courts in suits relating to bankruptcy, see note to Bailey v. Mosher, 11 C. C. A. 313.]

Action by Edward W. Lynch, trustee, against J. Harmar Bronson and others. On demurrer to complaint. Demurrer sustained.

See, also, 160 Fed. 139.

Hobart L. Hotchkiss, for plaintiff.

Slade, Slade & Slade, for defendants.

PLATT, District Judge. My decision on a plea to the jurisdiction in this case will be found in 160 Fed. 139.

The plaintiff stood upon his complaint, which is now attacked by demurrer. Jurisdiction was retained because of the expressed will of Congress as found in section 67e of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]), as amended (Act Feb. 5, 1903, c. 487, § 16, 32 Stat. 800 [U. S. Comp. St. Supp. 1909, p. 1316]). Under that section it seemed to the court that the plaintiff might by amendment so recast his complaint as to give us concurrent jurisdiction with the state court.

As the matter now stands, however, the complaint appears to state nothing more nor less than a suit by reason of a conspiracy to recover damages. It is, therefore, in no sense within the provisions of section 67e.

The demurrer must be sustained.

KWONG YUEN SHING v. UNITED STATES.

(Circuit Court, S. D. New York. November 13, 1909.)

No. 5,496.

CUSTOMS DUTIES (§ 30*) — CLASSIFICATION — PREPARED MEAT — "POULTRY DRESSED."

Duck meat in tins, some salted and dried, and some packed in oil, is not "poultry * * * dressed," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 278, 30 Stat. 172 (U. S. Comp. St. 1901,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

p. 1652), but is rather classifiable as "meats of all kinds, prepared or preserved," under par. 275, 30 Stat. 172 (U. S. Comp. St. 1901, p. 1652).

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 76; Dec. Dig. § 30.*

For other definitions, see Words and Phrases, vol. 6, p. 5476; vol. 5, pp. 4456, 4457.]

On Application for Review of a Decision by the Board of United States General Appraisers.

The opinion by the Board of General Appraisers reads as follows:

WAITE, General Appraiser. The importations here in question consist of certain duck meat imported from China. It was assessed at 25 per cent. ad valorem under the provision in paragraph 275, tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1652]), for "meats of all kinds, prepared or preserved." It is claimed by the importers to be dutiable at 5 cents per pound, under paragraph 278, as "dressed poultry."

Considerable testimony has been taken. The meat appears to be the flesh of ducks, which has been treated in different ways. Some of the importations consist merely of parts of the fowl, such as the feet, legs, and gizzards; others consist of the body of the duck, from which the head, feet, and viscera have been removed. In all cases the meat has been salted and dried and packed in tins, and in some instances it is packed in peanut oil.

From the evidence given in these cases, we are satisfied that the meaning of the term "dressed poultry" was well settled at the time of the passage of this act, and referred to poultry which had been plucked, or from which the feathers had been removed. It also applies, we think, to poultry which has been drawn, as well as plucked. Such being the commodity known as "dressed poultry," we do not think the importations in question are such as were intended to be covered by the provision in paragraph 278 for "dressed poultry" at the time of the passage of the act. The preparation which this article has undergone does not unfit it for use as food, but in our judgment may rather be considered as a preparation which adds to its flavor and desirability when it is prepared for food. The preparation is, in our judgment, sufficient to remove it from the classification of dressed poultry. Note *Smith v. United States* (C. C.) 168 Fed. 462, T. D. 29,646.

We therefore overrule the protests, and sustain the finding of the collector.

Kammerlohr & Duffy (Joseph G. Kammerlohr, of counsel), for the importer.

D. Frank Lloyd, Deputy Asst. Atty. Gen. (Thomas M. Lane, Asst. Counsel, of counsel), for the United States.

PLATT, District Judge. The importations in question consist of certain duck meat imported from China. I think "meats of all kinds, prepared or preserved" (paragraph 275, act of 1897), better describes the importations than does "poultry * * * dressed" (paragraph 278). This latter term certainly cannot be said to aptly describe, either in a common or tariff sense, articles which have been treated before importation as these have admittedly been.

The decision of the Board is therefore affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

NATIONAL WATER CO. v. HERTZ.

(Circuit Court, D. New Jersey. April 13, 1909.)

No. 5,406.

TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNFAIR COMPETITION—IMITATION OF NAMES AND LABELS.

Complainant and its predecessors in business, having sold water for many years throughout the United States under the name of "White Rock Lithia Water," were entitled to an injunction restraining defendant from selling water taken from public wells under the name "Beacon Rock Lithia Water," in bottles of the same shape, size, and color as complainant's bottles, bearing labels of the same general appearance as those used by plaintiffs, and containing other language raising a reasonable but false, inference that defendant had no proprietary right in the source from which its water was derived, but was the "sole agent" of such a proprietor in vending the water.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

In Equity. Suit by the National Water Company against Maurice Hertz, trading as the Camden Bottling Company, to restrain an alleged unlawful competition in the sale of lithia water. Injunction granted.

Philipp, Sawyer, Rice & Kennedy, for complainant.
Wilson, Carr & Stackhouse, for defendant.

LANNING, Circuit Judge. This is an injunction case. It is much like the suit brought by the same complainant against O'Connell, reported in 159 Fed. 1001. In that case Judge McPherson allowed an injunction to restrain the defendant from vending water under the name of "High Rock Lithia Water" in such manner as would be likely to deceive purchasers of the complainant's product, known as "White Rock Lithia Water." The principles of that case will plainly control my decision in this. Judge McPherson's opinion in that case was affirmed by the Circuit Court of Appeals in 161 Fed. 545.

In the present case the defendant is putting upon the market water which he calls "Beacon Rock Lithia Water." The size, shape, and color of the bottles in which the defendant's water is marketed, and the color and general appearance of the labels on the defendant's bottles, all taken together, present an appearance which I am satisfied is quite likely to deceive purchasers using ordinary care. The defendant's label declares to the world that the water in the bottle to which the label is attached is "Beacon Rock Lithia Water." A reasonable inference from this language is that the water comes from some rock to which the name "Beacon" has been given. The fact is, however, that it comes from the public wells of the city of Camden, N. J.

Furthermore, the defendant does business under the name of "Camden Bottling Company." On the bottom of his label is printed the fol-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lowing: "Camden Bottling Company, Camden, N. J., Sole Agents." A reasonable inference from this language is that, although the Camden Bottling Company has no proprietary right in the source from which the water comes, it has a contract with the proprietor by which it is permitted to act as the proprietor's sole agent in vending "Beacon Rock Water." Of course, this is not true, since the water comes from the Camden water supply.

These facts, taken with the striking similarity of the defendant's packages to those of the complainant, satisfy me that the case comes well within the principles applied in the O'Connell Case.

A decree for injunction will be granted. Its terms will be settled on notice by the complainant to the defendant.

SCOTT v. LAZELL et al.

(Circuit Court, S. D. New York. January 28, 1910.)

EQUITY (§ 300*)—PLEADING—DEFENSES TO SUPPLEMENTAL BILL.

Defenses which have been considered on an original bill cannot be again set up by the same defendants in an answer to a supplementary bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 592; Dec. Dig. § 300.*]

In Equity. Suit by Charles H. Scott against Bessie Lazell, Agnes B. Cronin, the Grommet Manufacturing Company, and Isaac Marks. On exceptions to answer to supplementary bill. Exceptions sustained. See, also, 170 Fed. 1023.

MacDonald & MacDonald, for complainant.
Grafton L. McGill, for defendants.

HAZEL, District Judge. The exceptions filed by complainant to the answer interposed to the supplementary bill are allowed. The objectionable matter in paragraphs 8, 9, and 10 of the answer must be expunged. Defendants apparently have had their day in court (Scott v. Lazell, 160 Fed. 472, 87 C. C. A. 456) on the various defenses to which exceptions are filed.

As to whether the defendant Marks and the corporation were privies to the former judgment are questions of fact, which are not now before the court for decision.

So ordered.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BOLLINGER et al. v. CENTRAL NAT. BANK et al.

In re DUQUESNE BREWING CO.

(Circuit Court of Appeals, Ninth Circuit. April 4, 1910.)

No. 1,786.

BANKRUPTCY (§ 72*) — CORPORATIONS SUBJECT TO ADJUDICATION—MANUFACTURING CORPORATION—BREWERY—"MANUFACTURING PURSUITS."

A corporation, organized to build and equip a brewery and to manufacture and sell beer, was engaged principally in manufacturing pursuits, and subject to adjudication as a bankrupt, before its plant had been completed, or any machinery purchased or installed, and before any beer had been made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 17; Dec. Dig. § 72.*

For other definitions, see Words and Phrases, vol. 5, pp. 4346-4358.

What persons are subject to bankruptcy law, see note to Matoon Nat. Bank v. First Nat. Bank, 42 C. C. A. 4.]

Appeal from the District Court of the United States for the Southern Division of the Southern District of California.

In the matter of the bankruptcy proceedings of the Duquesne Brewing Company. On petition of the Central National Bank and others to have the corporation declared a bankrupt, to which S. W. Bollinger and another objected. From an order granting the petition, objectors appeal. Affirmed.

Murphey & Poplin, for appellants.

Shankland & Chandler, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HANFORD, District Judge.

GILBERT, Circuit Judge. The appellants assign as error that the District Court adjudicated the Duquesne Brewing Company a bankrupt upon a finding of the referee that the company was, at the time of incurring the debts due the petitioning creditors, a corporation engaged principally in manufacturing pursuits. The contention is that the brewing company was not at the time when the petition was filed against it, and never had been, engaged in manufacturing, and that therefore the court had no jurisdiction to adjudge it a bankrupt.

The facts are undisputed. The brewing company was incorporated with power to manufacture and buy and sell beer, ale, and malt liquors. To carry out the purposes of its incorporation, it purchased, at an expense of about \$20,000, a site upon which to build a brewery. It entered into a contract with the appellants to build the brewery, and to equip the same with machinery for the contract price of \$196,000. Upon that contract it paid about \$30,000. It incurred other debts of \$40,000. The buildings were only partially constructed, and no machinery was installed or purchased. A one-story building connected with the brewery was roofed over, the smoke-stack was started, the brewing house was completed, as were also the engine room, the bottling house, washhouse, rackhouse, and a part of the storeroom. A detached build-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing, used for stable, office, and bottling house, was nearly completed. The ice plant and rackroom had the roof on. The main building, which was to be five stories, had been completed as far as three stories. The corporation hired a superintendent to see that the plant and machinery were made in accordance with the contract; but it did not at any time manufacture any beer, or anything else, nor purchase raw material for that purpose.

The sole question in the case is whether, under this state of the facts, the corporation was engaged in manufacturing. If we are to give to section 4b of the bankruptcy act (Act July 1, 1891, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]) a narrow construction, and hold that, in order to be engaged in a manufacturing pursuit, there must be the actual making of an article into a new form, or the fashioning of raw material into a finished product, for use, then the bankrupt in this case was not engaged in manufacturing, or in any manufacturing pursuit; for it had manufactured nothing, and had taken no actual step in the process of manufacturing, and it was, therefore, not subject to be adjudged an involuntary bankrupt. This was the view of the law taken in *Re Toledo Portland Cement Co.* (D. C.) 156 Fed. 83, in which it was held that a corporation organized for the purpose of making cement, which had not completed its plant, nor taken any step in the process of manufacturing, was not engaged in a manufacturing pursuit.

But, if the kind of corporation referred to in the act as amenable to bankruptcy is to be determined by the nature of the business of which it is in pursuit, and in which it has taken active steps to engage, and in the pursuit of which it has incurred debts and committed acts of bankruptcy, then the brewing company was engaged in manufacturing in the sense contemplated by the act. Such was the construction given the act in *Re White Mountain Paper Company* (D. C.) 127 Fed. 180, affirmed by the Circuit Court of Appeals for the First Circuit in *White Mountain Paper Co. v. Morse*, 127 Fed. 643, 62 C. C. A. 369, and in *Re Bloomsburg Brewing Co.* (D. C.) 172 Fed. 174, and such it seems to us is its reasonable construction.

It was the intention of Congress by the act to define the nature of the corporations that should be subject to bankruptcy proceedings, and its purpose is, we think, to include those corporations which are formed for the purpose of manufacturing, and which are pursuing the preliminary steps towards carrying out the purposes of their incorporation in preparing a plant and incurring liabilities with the actual intention of engaging in manufacturing, and that the operation of the law is not to depend upon whether or not the alleged bankrupt has, at the time when the petition is filed against him, actually proceeded so far as to become engaged in producing a manufactured product. In *White Mountain Paper Co. v. Morse & Co.*, Judge Putnam said:

"Statutes of this general class are not construed in a literal or narrow way; but, like customs legislation, they are held as addressing themselves to the general purposes for which they were enacted."

If the corporation here under consideration was not engaged in manufacturing, in what was it engaged? Clearly it was not engaged in the

mere occupation of constructing a brewery. It does not follow that it was not engaged in manufacturing from the fact that it had not yet had time to accomplish all that it undertook to do. If it had already done a substantial part of that for the doing of which it was organized, it was occupied in the pursuit in which it aimed to engage. The construction contended for by the appellant would lead to the conclusion that a corporation which had been actually engaged in manufacturing a finished product, but had wholly ceased its business, and was engaged in winding up its affairs, could not be proceeded against in bankruptcy for an act of bankruptcy committed by it in the course of liquidation. But such is not the law. *Tiffany v. La Plume Condensed Milk Co.* (D. C.) 141 Fed. 444, and cases there cited.

The judgment is affirmed.

MOCK v. STODDARD.

(Circuit Court of Appeals, Ninth Circuit. March 21, 1910.)

No. 1,725.

1. EVIDENCE (§ 418*)—PAROL EVIDENCE—WRITTEN CONTRACT—WRITTEN NOTES—SIGNATURE—CAPACITY.

Parol evidence that the members of a firm, who signed a note individually, did so in fact for and on behalf of the firm, and that the note was executed for a firm obligation, was not objectionable as contradicting the terms thereof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1909; Dec. Dig. § 418.*]

2. PARTNERSHIP (§ 173*)—INDIVIDUAL NOTES—PARTNERSHIP OBLIGATION—EVIDENCE.

Where the holder of a note, executed by partners individually, testified that he thought the individual signature was better than the signature of the firm, and that there was no difference, knowing that only those signing the note were members of the firm, and that the note was given for lumber furnished the partnership, it was sufficient to establish the note as a partnership obligation.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 305; Dec. Dig. § 173.*]

3. PARTNERSHIP (§ 35*)—MEMBERS OF FIRM—ESTOPPEL.

Where, when S. withdrew from a bankrupt firm, there was no evidence that the firm had any creditors, and, though it appeared that the firm's books and credit slips did not show the full amount of the firm's indebtedness to S., there was no showing that S. was responsible for the omission, or that credit had been given the firm on the faith that the firm's indebtedness to S. was no larger than shown by the books and credit slips, such fact, and the further fact that S. negotiated notes for the firm, did not estop him to deny that he was a member thereof.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 50; Dec. Dig. § 35.*]

Appeal from the District Court of the United States for the Central Division of the District of Idaho.

In the matter of the estate of the Stoddard Bros. Lumber Company, a bankrupt. From an order allowing the claim of George Stoddard in part, the bankrupt's trustee appeals. Affirmed.

For opinion below, see 169 Fed. 190.

Johnson & Johnson and L. F. Clinton, for appellant.

Campbell, Metson, Drew, Oatman & MacKenzie, for appellee.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

MORROW, Circuit Judge. The Stoddard Bros. Lumber Company, a partnership composed of A. K. Stoddard and Charles Moslander, doing business in Nampa, Idaho, was adjudicated a bankrupt on August 19, 1908, in the District Court of the United States for the District of Idaho, on the petition of certain creditors. The petition did not ask that the individual members of the firm should be adjudicated bankrupts, and no such adjudication was had. The partnership was originally organized April 1, 1896, by two brothers, George Stoddard and A. K. Stoddard, under the firm name of the Stoddard Bros. Lumber Company. On March 1, 1897, George Stoddard withdrew from the firm, selling his interest to A. K. Stoddard for the sum of \$5,000, for which he received the notes of A. K. Stoddard. About this time Charles Moslander became a member of the firm. Thereafter A. K. Stoddard and Charles Moslander continued to be partners under the firm name of the Stoddard Bros. Lumber Company. George Stoddard, with two other brothers, constituted the firm of Stoddard Bros., of Baker City, Or. Between these two firms there appear to have been a number of business transactions, conducted by George Stoddard. The latter also became an individual indorser upon notes for the benefit of the Idaho firm, which George Stoddard was finally required to pay.

When the Idaho firm was adjudicated a bankrupt, George Stoddard presented claims against the firm amounting to \$51,026.93 for the firm debts paid by him, including the renewed notes for the half interest sold to A. K. Stoddard. On presenting these claims to the referee in bankruptcy for allowance, they were objected to by the creditors and all disallowed; the referee holding with respect to the claim founded upon the renewed notes given for George Stoddard's interest in the firm that it was an individual debt of A. K. Stoddard, and not a partnership debt, and that as to two notes, of \$6,000 each, given to George Stoddard and signed by the individual members of the firm, namely, A. K. Stoddard and Charles Moslander, the referee held that they were also individual debts of the partners. The referee held, further, with respect to the other claims wherein George Stoddard had paid debts of the firm, that George Stoddard was either a member of the bankrupt firm or had conducted himself in such manner in reference to the general public as to induce others to believe that he was a partner, and that such claims should therefore be postponed until all the firm creditors had been paid. Upon petition the questions were certified to the District Judge for review. The District Judge affirmed the opinion of the referee in disallowing the claims based upon the renewed notes given by A. K. Stoddard for the interest of George Stoddard in the firm, but sustained the provable character of other claims against the bankrupt estate, amounting to \$46,651.93, less a liability of \$375 found against George Stoddard on account of the release

of a second mortgage, wherein it was held that the creditors had lost that amount, leaving a balance of \$46,276.93, which the referee was directed to recognize as a valid claim against the bankrupt estate. In *re Stoddard Bros. Lumber Co. (D. C.)* 169 Fed. 190. From this judgment of the District Court the appellant prosecutes the present appeal.

The first objection to be considered is the objection made to the evidence introduced for the purpose of showing that two notes, for \$6,000 each, dated April 5, 1904, and signed by Alexander K. Stoddard and Charles Moslander individually, were for and on behalf of the partnership. The objection to this evidence was sustained by the referee, but in accordance with equity procedure the evidence was taken and certified to the court by the referee as part of the record of the proceedings. The evidence is the testimony of George Stoddard as follows:

"Q. What were those notes given for, Mr. Stoddard? (Objection. * * * Sustained.) A. For lumber furnished the business. Q. The business of whom? A. Stoddard Bros. Lumber Company. Q. You may state who furnished the lumber. A. It was furnished by Stoddard Bros., of Baker City. Q. State who was the owner of that claim of Stoddard Bros. A. Why, Stoddard Bros. It was assigned to me. Q. Where did the lumber go that you shipped? A. It went to Nampa, Idaho. Q. Who used the lumber? Who had the lumber? A. Why, it was shipped to the Stoddard Bros. Lumber Company. Q. State whether or not it has ever been paid for? A. No, sir; it has not. Q. You may state, if you know, why those notes were signed individually, instead of Stoddard Bros. Lumber Company. A. Why, I don't know; the two parties were there, and they just signed them in that way. I thought there was no difference, knowing that they were the two that constituted the business. I thought the individual signature was really better than the company's signature."

It is contended that these notes were individual notes, and not partnership obligations, and were not provable pro rata with claims of partnership obligations; that in the execution of these notes in the form of individual obligations there was no mistake, accident, duress, or fraud; and that the notes were signed individually because the obligee "thought the individual signatures were really better than the company's signature." The preliminary objection that parol evidence was inadmissible to show that these notes were given for and on behalf of the partnership, on the ground that such evidence tended to contradict and vary the terms of written contracts, is not tenable. The evidence was not introduced for that purpose. There is no controversy as to the terms of the written contracts. The question is: Whose contracts were they? Here are two individuals whose names are signed to these notes. They were partners in business, and had been for many years. The holder of the notes introduced testimony tending to show that they were partnership notes, given for partnership obligations. This evidence was admissible under the well-known rule that evidence is always admissible to show that the signature to a written instrument, although that of an individual and prima facie for the purpose of acknowledging an individual liability, is in fact that of an agent for an undisclosed principal.

In *Salmon Falls Manufacturing Co. v. Goddard*, 14 How. 446, 454, 14 L. Ed. 493, the Supreme Court said:

"Extraneous evidence is also admissible to show that a person whose name is affixed to the contract acted only as an agent, thereby enabling the principal either to sue or be sued in his own name; and this, though it purported on its face to have been made by the agent himself, and the principal not named. *Higgins v. Senior*, 8 Mees. & W. 834; *Trueman v. Loder*, 11 Ad. & Ell. 589. Lord Denman observed, in the latter case, 'that parol evidence is always necessary to show that the party sued is the party making the contract, and bound by it. Whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand (or that of an agent), are inquiries not different in their nature from the question, Who is the person who has just ordered goods in a shop? If he is sued for the price, and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own.'"

Whether the evidence was sufficient to establish the liability of the partnership is another question. It is contended that the testimony of George Stoddard that he "thought the individual signature was really better than the company's signature" establishes the fact that he received the notes as the individual notes of the partners. But this interpretation of his testimony ignores his previous statement that he "thought there was no difference, knowing that they were the two that constituted the business," and the other statement that the lumber for which the notes were given was furnished to the Stoddard Bros. Lumber Company. In other words, he thought that the notes signed by the individual partners for lumber furnished the business of the partnership constituted a partnership as well as an individual liability. The weight of authority appears to sustain such liability.

In the case of *In re Warren*, 2 Ware, 322, Fed. Cas. No. 17,191, in bankruptcy, the court held that where two persons who are partners unite in drawing a bill or making a note, though they signed their several names and not that of the firm, if it is in fact for partnership purposes, it will be treated as a partnership liability.

In the case of *In re Thomas*, 8 Biss. 139, Fed. Cas. No. 13,886, in bankruptcy, the court held that, though a note is signed by the members of a firm with their individual names, yet if the consideration, when received, is treated as copartnership funds, the note is a firm liability.

In *Davis v. Turner*, 120 Fed. 605, 609, 56 C. C. A. 669, reversing *In re Jones* (D. C.) 116 Fed. 431, cited by appellant, the question arose under the present bankruptcy act. The Court of Appeals for the Fourth Circuit held that:

"The referee, however, in his report, which was confirmed by the court in bankruptcy, holds as a matter of law that, because the bond is signed by the members of the firm individually under their separate signatures and seals, it is an individual debt, and cannot be proven, as against the partnership of Jones, Raper & Co., until all the partnership debts have been paid in full. In this conclusion we think there is error, and that, although the paper bears the signatures and seals of the individuals composing the firm, yet, from the uncontradicted evidence, it appears affirmatively and fully that the debt was contracted by the firm, for its benefit, and that the whole proceeds of the note were used in the due course of the partnership business. The undisputed evidence in the case establishes the fact beyond controversy that the bond to Hinton was for a firm debt, and we so hold, and that, as such debt, it is provable against the estate of the partnership in bankruptcy."

In the case of *In re L. B. Weisenberg & Co.* (D. C.) 131 Fed. 517, 522, referring to the question whether parol evidence was admissible

to show that joint notes signed by the members of a bankrupt partnership were in fact firm debts, the court said:

"It has been pointed out that it is not a violation of that rule to add a party to a contract in writing, either as obligee or obligor, to the extent laid down in the case of *Nash v. Towne*. If this is so, it is hardly a violation thereof to show in this proceeding that the joint liability of the two members of the firm of L. B. Weisenberg & Co. was in fact the liability of the firm. * * * My conclusion, therefore, is that the bank had a right to show, if it could, that the joint notes held by it were the firm debts of the bankrupt firm of L. B. Weisenberg & Co. Did it show that said notes were in fact firm debts? There is a difference in the authorities as to whether the joint notes of the members of a firm executed in the strict partnership business for a consideration passing to the firm, nothing else appearing, are to be treated as debts of the individuals or of the firm. In the following cases they were held to be debts of the individuals, to wit: *In re Bucyrus Machine Co.*, Fed. Cas. No. 2,100; *In re Holbrook*, Fed. Cas. No. 6,588; *In re Herrick*, Fed. Cas. No. 6,420; *Strause v. Hooper*, 5 Am. Bankr. Rep. 225 [D. C.] 105 Fed. 590; *In re Jones*, 8 Am. Bankr. Rep. 626, 116 Fed. 431. The doctrine of these cases is approved in *Collier on Bankruptcy* (4th Ed.) 72, and in a note to the case of *Strause v. Hooper* by the author of that work—possibly, also, by *Bump and Loveland* in their works on Bankruptcy. Possibly the *Holbrook* Case is to be distinguished by the fact that the note in that case was signed also by other individuals, not members of the firm, as sureties, and it was the joint and several note of all, and not the joint note of less than all. Possibly, also, the *Herrick* Case is to be distinguished by same consideration. In the following cases the joint notes were held to be firm debts, on the ground that they were executed in the partnership business, and for a consideration passing to the firm, to wit: *In re Warren*, Fed. Cas. No. 17,191; *In re Thomas*, Fed. Cas. No. 13,886; *Davis v. Turner*, 9 Am. Bankr. Rep. 704, 120 Fed. 605, 56 C. C. A. 669. The same thing has been held in quite a number of state decisions, most of which have been cited by the counsel for the bank. And I think it may be correctly said that the decided weight of authority is to that effect."

In the case of *Strause v. Hooper* (D. C.) 105 Fed. 590, it was held that notes signed by both members of a partnership for money borrowed and put into the firm as capital were not provable against the estate of the partnership in bankruptcy. The facts in this case show that the money borrowed was obtained by the individuals for the purpose of contributing each his share to the capital of the partnership. These debts were of the character of the claims of George Stoddard in the present case, based upon the notes of A. K. Stoddard given to George Stoddard for his share of the partnership. It was correctly held by the court below that this was an individual debt, and not provable against the partnership. But there is a distinction between debts incurred by individuals for the benefit of the individuals in contributing capital to a partnership and debts incurred by a partnership in the business of and for the benefit of the partnership. This case is therefore not in conflict with the other cases that have been cited.

In re Bucyrus Machine Co., Fed. Cas. No. 2,100, *In re Holbrook*, Fed. Cas. No. 6,588, *In re Herrick*, Fed. Cas. No. 6,420, and *In re Webb*, Fed. Cas. No. 17,313, are cited by appellant as holding that notes given by the individual partners and not in the firm name are not provable against the partnership in bankruptcy, notwithstanding the notes were given for the benefit of the partnership; but these cases are all distinguishable, and in our opinion are not applicable to the facts in the present case.

It is next contended that George Stoddard so conducted himself after his withdrawal from the firm with reference to creditors and the world at large that he was estopped to deny that he was a partner in the firm. This conduct consists in the business of the firm being carried on in the name of the Stoddard Bros. Lumber Company; that after withdrawing from the firm he gave no notice to the public of such withdrawal; that he paid the debts of the firm, and that with one exception he had negotiated all loans procured for the firm, always acting as the firm's agent; that he failed to have the books of the firm show the full amount of the indebtedness due him.

The evidence is that George Stoddard had not been a member of the firm of Stoddard Bros. Lumber Company after March 1, 1897, and there is not a particle of testimony tending to show that any creditor of the firm believed or had reason to believe that George Stoddard was a member of the firm when credit was given. There was no evidence that when George Stoddard withdrew from the firm on March 1, 1897, the firm had any creditors. There were, therefore, no creditors to whom notice should have been given of such withdrawal. There was an effort made to show that the people of Nampa, where the business of the firm was located, regarded George Stoddard as a member of the firm. But the effort failed, and the fact was not proven. The fact that George Stoddard negotiated loans for the firm did not prove that he was a member of the firm, nor did the fact that he had become surety for the firm tend to establish that fact. It appears that the books of the firm and credit slips sent out by the firm in 1906 did not show the full amount of the indebtedness of the firm to George Stoddard; but it does not appear that he was in any way responsible for these omissions, nor does it appear that any credit was given the firm on the faith that the indebtedness of the firm to him was no larger than that shown by the books or credit slips. No one appears to have been misled or deceived to his prejudice by the conduct of George Stoddard, or by reason of his relations to the business of the firm. How, then, can it be said that he is estopped to deny that he was a member of the firm, and for what legal or equitable reason shall he be deprived of the right to prove the indebtedness of the firm to him? We find no grounds for such action in the record.

The District Court, in its opinion overruling the objection to such proof, said it should be overruled without prejudice to the right of any creditor in a proper proceeding to assert the responsibility of George Stoddard for any claim against the firm for which he might be liable by reason of the fact that he held himself out as a member of the firm, if in fact he did so hold himself out.

With a restatement of this qualification, the judgment of the court below is affirmed.

PETERSON et al. v. LARSEN.

(Circuit Court of Appeals, Ninth Circuit. April 4, 1910.)

No. 1,743.

ADMIRALTY (§ 118*)—APPEAL—REVIEW OF EVIDENCE.

Where questions of fact on appeal in admiralty depend on conflicting evidence, the decision of the District Judge, who had an opportunity to see the witnesses and judge their appearance, manner, and credibility, will not be reversed, unless it clearly appears that the decision is against the evidence.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 770; Dec. Dig. § 118.*]

Appeal from the District Court of the United States for the Northern District of California.

Libel in admiralty by Peter Larsen against H. H. Peterson and another to recover damages for personal injuries. Judgment for plaintiff, and defendants appeal. Affirmed.

James C. Sims, for appellants.

H. W. Hutton, for appellee.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

MORROW, Circuit Judge. The question in this case is one of fact. The libelant sustained certain injuries by reason of lumber falling upon him from a sling while he was employed in stowing lumber in the hold of the steamer Greenwood at Delmar Landing on the Mendocino coast. It appears from the evidence that the defendants were operating a wire chute or trolley for carrying lumber from the landing to the steamer Greenwood. This wire chute consisted of a wire cable stretched from an elevated point on shore out to a buoy anchored several hundred feet from shore. The vessel is brought under the wire and anchored, with her sides parallel to and about 600 feet from the shore, with the hatch of the vessel directly under the wire. The wire carries at this point a block to stop the sling over the hatch. A sling load of lumber had been carried to the vessel, when the lumber slipped out, and, falling into the hold of the vessel, struck and injured the libelant.

The evidence on the part of the libelant tends to show that the falling of the lumber was caused by the negligence of an employé of the defendants in operating a donkey engine on shore in such manner that the sling load of lumber which fell upon the libelant was allowed to go down the chute or trolley so rapidly that it struck the block violently and knocked the lumber out of the sling, which, falling into the hold of the vessel, injured the libelant. The evidence on the part of the defendants tends to show that the lumber slipped out of the sling because an employé of the vessel, operating a donkey engine on board the vessel, with tackle for lowering the lumber from the wire trolley into the hold, neglected to lower the sling promptly upon reaching the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

block, and, while suspended, it acquired a swinging motion, and dropped the lumber out of the sling and into the hold.

The testimony is conflicting as to the material facts. The deposition of the master of the *Greenwood* was taken and read to the court. All the other witnesses, five for the libelant and seven for the defendants, appeared before the court, and were examined and cross-examined in the presence of the court; and the court, having the advantage of seeing and hearing these witnesses and observing their conduct under examination, had an opportunity to judge of the value of the testimony and determine which of the conflicting statements should be believed. The court did not think it seemed probable that, when the sling reached the vessel, any of the lumber which it carried could have been thrown out of it, and upon the deck, unless the sling itself had been brought up against the check block on the trolley in the manner described by the witnesses for the libelant. The court accordingly found the facts to be as stated in the libel, and awarded a decree in favor of the libelant for \$1,200.

We have carefully read the testimony in the record, and, applying a well-settled rule in this class of cases, we are not able to say that the court was in error in the conclusion it reached as to the cause of the accident. "The rule is well settled that in cases on appeal in admiralty, when the questions of fact are dependent upon conflicting evidence, the decision of the District Judge, who had the opportunity of seeing the witnesses and judging their appearance, manner, and credibility, will not be reversed, unless it clearly appears that the decision is against the evidence. *The Albany* (C. C.) 48 Fed. 565, and authorities there cited." *The Alijandro*, 56 Fed. 621, 624, 6 C. C. A. 54; *The City of Naples*, 69 Fed. 794, 796, 16 C. C. A. 421, 423; *The Columbia*, 73 Fed. 226, 237, 19 C. C. A. 436, 447; *The Captain Weber*, 89 Fed. 957, 958, 32 C. C. A. 452, 453; *Paauhau Sugar Plantation Co. v. Palapala*, 127 Fed. 920, 924, 66 C. C. A. 552, 556; *Perriam v. Pacific Coast Co.*, 133 Fed. 140, 144, 66 C. C. A. 206, 210.

The decree of the District Court is affirmed.

MASNER v. ATCHISON, T. & S. F. RY. CO

(Circuit Court of Appeals, Ninth Circuit. March 14, 1910.)

No. 1,752.

1. MASTER AND SERVANT (§§ 163, 190*)—INJURIES TO SERVANT—RAILROADS—SWITCHMEN—NEGLIGENCE.

Civ. Code Cal. § 1970, provides that an employer is not bound to indemnify his employé for losses suffered in consequence of the negligence of another servant, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employé, provided that the employer shall be liable for such injury when the same results from the wrongful act, neglect, or default of any agent or officer of the employer, superior to the employé, or of a person employed by the employer having the right to control and direct the employé's services. Plaintiff, a switchman, was injured, while attempting to adjust a coupling,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by a string of other cars striking one of the cars on which he was working, while they were being pushed down the track, without any one in charge of them. Plaintiff's foreman testified that the reason he sent the cars down without any one in charge was because he wanted to get his work done; that he could not have done the work put before him with the men he had if every cut of cars had been ridden; and that he had had accidents before in the same operations. *Held* to show negligence of the foreman in allowing cars to run down the track without any one in charge of them, and also negligence of the railroad company in failing to provide a sufficient number of switchmen to do the work required.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 328-330, 449-474; Dec. Dig. §§ 163, 190.*]

2. MASTER AND SERVANT (§ 240*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where a switchman was injured while attempting to open a coupling at night while the work of switching was going on, without signaling his foreman to stop, by reason of certain other cars striking those on which the switchman was working, he having testified that he looked to see if there were any more cars before he placed himself in a dangerous position and saw none, and it appearing that if he had stopped the cars it would have been contrary to custom and likely to have resulted in his discharge, he was not negligent in attempting to make the coupling without doing so, nor because he went between the cars with his back to one of them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 751-756; Dec. Dig. § 240.*]

3. MASTER AND SERVANT (§ 267*)—EVIDENCE—MATERIALITY.

Where, in an action for injuries to a switchman while preparing a coupling to couple certain cars, it appeared that plaintiff looked up the track and saw no other cars coming, before he went between them, and that he did not refrain from signaling his foreman to stop because he was afraid of being discharged, but because no occasion for such a signal appeared, a question asked of plaintiff's foreman as to what he would have done if plaintiff had signaled to stop was immaterial.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 267.*]

4. NEGLIGENCE (§ 136*)—QUESTION FOR COURT OR JURY.

The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion from them.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 136.*]

In Error to the Circuit Court of the United States for the Southern Division of the Southern District of California.

Action by Charles B. Masner against the Atchison, Topeka & Santa Fé Railway Company. Judgment for defendant, and plaintiff brings error. Reversed, with instructions.

Burt Chellis and J. W. Swanwick, for plaintiff in error.

E. W. Camp, W. J. Clotfelter, and A. H. Van Cott, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

MORROW, Circuit Judge. This is an action by the plaintiff in error to recover damages for personal injuries occasioned by the alleged negligence of the defendant in error. The main question involved in this case is whether the court was right in granting defendant's motion for a nonsuit at the close of plaintiff's testimony.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It appears from the evidence that plaintiff was employed by the defendant as a yard switchman in defendant's yard at Barstow, Cal. The west end of the Barstow yard is downgrade, and the cars do not stand on the tracks at this point unless the brakes are set. There were five men in the crew of switchmen at this end of the yard. A Mr. Wagner was foreman and had charge of the work. He had full control and directed the switchmen in their work.

In switching cars from one track to another at this end of the yard, it is necessary to have a man on the top of each cut of cars when going for a distance of 14 car lengths or more to hold them with brakes and keep them from running down the switch and striking and damaging other cars and their contents. On the morning of December 14, 1907, the plaintiff, who prior to that time had been at work in the yard as a switchman for 57 nights, rode down the switch track with a coal car followed by a tank car and a box car. Plaintiff was on the coal car. These cars were not coupled together, and as they moved down the track they bumped together. Plaintiff, accordingly, set the brake on the coal car on which he was riding and got down to adjust the coupling between that car and the tank car so that the two cars would couple when brought together. While attempting to adjust the coupling, a number of cars—four or five—were sent down the switch for a distance of 14 car lengths or more, without any one in charge, and these cars striking forcibly against the cars, the coupling of which plaintiff was attempting to adjust, caught the plaintiff's right arm in the coupling and crushed it so that it had to be amputated. The cut of four or five colliding cars had been sent down the switch by the foreman, Wagner. Upon the trial of the case Wagner testified:

"I cut off the string of cars that injured him (the plaintiff). Nobody went down with that bunch. It is at least 14 car lengths from where I cut them off to where he was injured. * * * The reason I took the chances of sending the cut of cars down without anybody on it was that we wanted to get done work. I had all I could handle ahead of me working right along. I could not have done the work put before me with the men I had to do it with if every cut of cars had been ridden. * * * I have cut off other cuts of cars before this one without anybody on them, lots of them, and have had accidents by so doing, more than once; the worst one I consider was when a brakeman got killed and nobody on them. I have also injured cars all the way from driving in a drawbar to putting them out of service."

This evidence tended to establish the fact that the defendant was negligent either by the negligent act of the foreman in allowing the cars which caused the accident to run down without a switchman and strike the car upon which plaintiff was working, or because of the failure of the company itself in not providing a sufficient number of switchmen to do the work required.

It is provided in section 1970 of the Civil Code of California that.

"An employer is not bound to indemnify his employé for losses suffered by the latter in consequence * * * of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employé; * * * provided, nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect, or default of any agent or officer of such employer, superior to the employé injured, or of a person employed by such employer having the right to control or direct the services of such employé injured."

The testimony was clearly sufficient in either view to establish the liability of the defendant under this statute.

But it is contended that the plaintiff was guilty of contributory negligence in going in between the cars to adjust the coupler without signaling the foreman to stop. The plaintiff testified that the cut-off lever which hooked on to the drawbar would not work from the brake handle on the outside, so he went in between the cars to adjust the coupler by hand. Armstrong, one of the switchmen in plaintiff's crew, testified:

"When a coupler is not in working order, the switchman has to open it with his hand; there is no other way."

The foreman testified:

"I would not have expected him to have stopped me with the cars in that position which required him to go in between and fix them. It would have surprised me if he had. He was not reckless. * * * The reason why I did not expect him to give a stop signal was that it would delay the game and keep the work back. It was a part of his work to get in there and see that the cars were coupled up right. It was expected of him to see that they are kept coupled without stopping me every time he wanted to make a coupling. * * * It was not the custom of the switchmen to stop work in order to fix the coupling. They never did it with me; that is, unless it could not actually be done without stopping the work. * * * Masner might have done more than he did by getting off and stopping me, but he would not have done it very often, though."

The inference to be drawn from this testimony is that the situation did not require the plaintiff to signal the foreman to stop the work of switching, and had he done so he would have been discharged from the service.

It is further contended that it was the duty of the plaintiff to listen for cars coming down the switch before putting himself in a dangerous position between the cars, particularly with his back to the tank car. The plaintiff testified:

"I got off the car I was on, left the brake on it, and went over and looked up the track, saw nothing was coming, and knew the coupler had to be fixed so it would make the cars come together. I no more than got hold of the couplers before three or four or five cars or six bumped into the cars ahead of me, hit me in the back, and drove me against the coupler."

Armstrong, one of the switchmen, testified:

"It was a dark night. A man could not see cars moving at the upper end coming down the stretch."

The testimony of the plaintiff that he did look up the track and saw nothing was coming tended to exonerate him from the charge of negligence in going between the cars without looking for danger; and certainly the court could not infer from the testimony that he was negligent by reason of the single fact that he went in between the cars with his back to the tank car. We do not know, or can we infer from the testimony, that the plaintiff took a specially dangerous position in that respect, and, besides, upon a motion for a nonsuit the plaintiff is entitled to the benefit of all inferences in his favor which the jury could have been justified in drawing from the testimony. *Sonnenberg v. Southern Pac. Co.*, 159 Fed. 884, 886, 87 C. C. A. 64, 66. In our

opinion the testimony tended to show that plaintiff was not guilty of contributory negligence, and, uncontradicted, the testimony would have justified the jury in so finding.

The only other question relates to the action of the court in rejecting testimony which, in view of a new trial, should be determined. When the witness Wagner was upon the stand, he was asked by plaintiff's attorney: "What would you have done if he had stopped you?" The defendant objected to this question as calling for incompetent, irrelevant, and immaterial testimony. The witness had already testified that if the plaintiff had stopped him he would not have done it very often—clearly intimating that the plaintiff would have been discharged from the service if, under the circumstances, he had signaled the foreman to stop the work of switching. But in this connection we must not overlook plaintiff's testimony that he looked up the track and saw no cars coming down the switch. There was therefore no apparent danger calling for a signal from the plaintiff to the foreman; that is to say, the plaintiff did not refrain from signaling the foreman because he was afraid of being discharged, but because it did not appear that there was any occasion for such signal. In this state of the evidence, we do not see how the answer of the witness to the question could have been material.

But upon the question whether the evidence was sufficient to go to the jury we think the court was in error. The language of the Supreme Court in *Kreigh v. Westinghouse & Co.*, 214 U. S. 249, 256, 29 Sup. Ct. 619, 622 (53 L. Ed. 984), is peculiarly applicable to this case:

"This case was taken from the jury when only the plaintiff's evidence had been introduced, and when the plaintiff had the right to have it submitted to the jury in its most favorable aspect if it fairly tended to show liability on the part of the master."

What the Supreme Court said in *Gardner v. Michigan Central Railroad*, 150 U. S. 349, 360, 14 Sup. Ct. 140, 144 (37 L. Ed. 1107), is also applicable:

"Upon the whole, we see no ground for excepting this case from the rules governing other cases involving questions of fact. The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion from them, or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish. *Railway Company v. Ives*, 144 U. S. 407, 417 [12 Sup. Ct. 679, 36 L. Ed. 485]; *Railway Co. v. Cox*, 145 U. S. 593, 606 [12 Sup. Ct. 905, 36 L. Ed. 829]; *Railroad Company v. Miller*, 25 Mich. 274; *Sadowski v. Car Company*, 84 Mich. 100 [47 N. W. 598]."

Under this rule, the case should have been left to the jury under proper instructions.

The judgment of the Circuit Court is reversed, with instructions to grant a new trial.

NORFOLK & W. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. March 4, 1910.)

No. 944.

1. RAILROADS (§ 254*)—OPERATION—SAFETY APPLIANCE ACT—PENALTIES.

The duties imposed on railroad companies to equip their cars with safety appliances by the safety appliance act of Congress (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], as amended by Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1909, p. 1143]) are absolute duties, and relief from the penalty for noncompliance cannot be obtained by showing reasonable care and want of intentional violation of the act.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 765, 766; Dec. Dig. § 254.*]

Duties of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

2. RAILROADS (§ 229*)—OPERATION—SAFETY APPLIANCE ACT—CONSTRUCTION.

The safety appliance act, requiring cars used in interstate commerce to be so equipped as to couple automatically by impact without the necessity of men going between the ends of the cars, requires that the device itself must be in such repair as to be capable of operation; and hence an instruction that the possibility of uncoupling by crawling under the car, or by climbing over it, or by going around the end of the train, does not prevent the existence of a "necessity" within the statute of men going between the ends of the cars in order to uncouple, and, if the uncoupling lever at either end of any car is so inoperative that it is necessary in order to uncouple to go between the cars to go around the car, or crawl under it, then the car is in such a condition of disrepair that it is unlawful to use it in the movement of interstate commerce, was not erroneous, where the proof showed that the coupling apparatus of the freight car in question was out of repair and inoperative.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. § 229.*]

3. RAILROADS (§ 229*)—OPERATION—SAFETY APPLIANCE ACT—CONSTRUCTION—GRAB IRONS.

The safety appliance act (Act March 2, 1893, c. 196, § 4, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], as amended by Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1909, p. 1143]), requiring the equipment of all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce with grab irons, is applicable to passenger as well as freight cars.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. § 229.*]

4. COMMERCE (§ 27*)—SUBJECTS OF REGULATION—RAILROADS—SAFETY APPLIANCES.

Where a train is composed of cars, some of which are, and some of which are not, engaged in interstate traffic, the whole train is subject to the safety appliance act, and it is immaterial whether the car not properly equipped is coupled to a car containing interstate commerce or not in order to establish a liability on the railroad company.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

5. TRIAL (§ 235*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

Where, in an action by the United States to recover a penalty against an interstate railroad company for failure to comply with the safety appliance act, the government inspectors testified to discovering the defects

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

alleged, while the railroad company's inspector testified that he inspected the cars in question, and did not discover the defect, instructions that the testimony of the railroad company's inspectors could only be considered in so far as it tended to contradict the testimony of the government inspectors, and as tending to contradict the government's evidence on that point, were erroneous, as declaring the evidence solely contradictory in character and as tending to give undue weight to evidence of the government's inspectors, and also because the evidence of the railroad company's inspector was positive, and not negative.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 539; Dec. Dig. § 235.*]

Cross-Writ of Error to the District Court of the United States for the Western District of Virginia, at Lynchburg.

Action by the United States of America against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error, and plaintiff sues out a cross-writ of error. Plaintiff's writ dismissed, and judgment reversed on defendant's writ.

This was an action of debt brought by the United States to recover penalties authorized by the safety appliance act. The declaration contained nine counts. Upon trial in the court below the plaintiff abandoned its claim to recover under the second count and dismissed it. Of the remaining counts, the first charged the railroad company with operating its freight car 21158 in interstate commerce with coupling apparatus out of repair and inoperative, contrary to section 2 of the original act as amended by section 1 of the act of March 2, 1903. The second, third, fourth, fifth, and sixth counts charge the hauling by the company in a train containing interstate traffic its passenger cars numbered 512, 527, 547, and 524, respectively, without the same being equipped with the grab irons or handholds required by section 4 of the act as so amended. The seventh and ninth counts charge the hauling in a train wherein was a car engaged in interstate traffic, a Pullman parlor car, "Blanche," and a Pullman parlor car, "Margaret," respectively, unequipped with such grab irons. The eighth count charges the company with hauling its passenger car 533 at the time engaged in interstate traffic without such equipment. Demurrer to the declaration and each count thereof was entered, overruled, and exception taken. The defendant plead the general issue and filed a specification of grounds of defense. The plaintiff filed 149 interrogatories, which, on motion of the defendant, were stricken out, to which action the plaintiff excepted. A trial resulted in a verdict and judgment for \$800 for the plaintiff. Seventeen bills of exceptions were saved to defendant to the rulings of the court in admitting certain testimony and rejecting certain other, the giving of certain instructions, the refusal to give certain others, to the overruling of the demurrer and of motions to direct verdict for defendant, to set aside the verdict and grant a new trial, and to the rendering of judgment. The defendant has sued out this writ of error, and the plaintiff has sued out a cross-writ of error, assigning as basis therefor the action of the court in striking out the interrogatories filed by it and the refusal to require the production of certain documentary evidence.

Theodore W. Reath and Roy B. Smith (Robertson, Smith & Wingfield, on the brief), for Norfolk & W. Ry. Co.

Thomas L. Moore, U. S. Atty., and Phillip J. Doherty, Special Asst. U. S. Atty. (Wade H. Ellis, Assistant to the Atty. Gen., and Samuel H. Hoge, Asst. U. S. Atty., on the brief).

Before GOFF and PRITCHARD, Circuit Judges, and DAYTON, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

DAYTON, District Judge (after stating the facts as above). Neither in brief nor oral argument has the cross-writ of error sued out by the United States been discussed by counsel. It may be assumed to have been abandoned, but, whether this be true or not, an examination of the record and the alleged errors assigned by it has fully convinced us that its grounds are without merit and it will be dismissed. Counsel for both sides in oral argument and in the very able briefs filed by them have reduced the errors assigned to five propositions.

First. Should the demurrer to the declaration have been sustained because it did not charge the appliance to be defective because of negligence and want of care on the part of the company?

Second. Did instruction No. 2 given by the court for the plaintiff in effect require of the defendant different appliances than those required by the safety appliance act?

Third. Does section 4 of the act, requiring grab irons, apply to passenger cars?

Fourth. Does this act reach or can it apply to cars containing domestic commerce not connected with or coupled to cars containing interstate commerce?

Fifth. Was it error to give instructions Nos. 4, 5, and 7 for the plaintiff, to the effect that the evidence of the company's inspector was negative, while that of the government's inspectors was positive, in character?

We will consider these questions in the order set forth. That the duties imposed upon railroad companies to equip their cars with the safety appliances required by these acts is an absolute one and relief from the penalty for noncompliance cannot be obtained by showing reasonable care and want of intentional violation we regard as fully determined by this court in *Atlantic Coast Line R. Co. v. United States*, 94 C. C. A. 35, 168 Fed. 175. Nothing need be, if indeed anything can be, added here to re-enforce the logic of that decision. It may be stated that in our judgment this ruling has been fully sustained and upheld in such cases as *St. Louis, Iron Mt. R. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; *Southern Ry. Co. v. Carson*, 194 U. S. 136, 24 Sup. Ct. 609, 48 L. Ed. 907; *U. S. v. Colo. & N. W. R. Co.*, 85 C. C. A. (Eighth Circuit) 27, 157 Fed. 321, 15 L. R. A. (N. S.) 167; *U. S. v. Atchison, T. & S. F. Ry. Co.*, 90 C. C. A. (Eighth Circuit) 327, 163 Fed. 517; *U. S. v. Denver & R. G. Ry. Co.*, 90 C. C. A. (Eighth Circuit) 329, 163 Fed. 519; *Chicago, M. & St. P. Ry. Co. v. U. S.*, 91 C. C. A. (Eighth Circuit) 373, 165 Fed. 423, 20 L. R. A. (N. S.) 473; *Chicago, B. & Q. Ry. v. U. S.*, 95 C. C. A. (Eighth Circuit) 642, 170 Fed. 556; *Chicago Junction Ry. Co. v. King*, 94 C. C. A. (Seventh Circuit) 652, 169 Fed. 372; *Wabash R. Co. v. U. S.*, 97 C. C. A. (Seventh Circuit) 284, 172 Fed. 864; *Donegan v. Balto. & N. Y. Ry. Co.*, 91 C. C. A. (Second Circuit) 555, 165 Fed. 869; *U. S. v. Southern Ry. Co. (D. C. S. D. Ill.)* 135 Fed. 122; *U. S. v. Phila. & R. Ry. Co. (D. C. E. D. Pa.)* 160 Fed. 696; *U. S. v. Wheeling & L. E. Ry. Co. (D. C. N. D. Ohio)* 167 Fed. 198; *U. S. v. Southern Ry. Co. (D. C. W. D. N. C.)* 170 Fed. 1014.

In view of this great weight of authority with which we are in full accord and against which stands alone, so far as we can discover, the two opinions of the Circuit Court of Appeals for the Sixth Circuit in *St. Louis & S. F. R. Co. v. Delk*, 86 C. C. A. 95, 158 Fed. 931, and *United States v. Illinois Central R. R. Co.*, 170 Fed. 542, 95 C. C. A. 628, we do not deem it incumbent upon us to certify the question to the Supreme Court as suggested by counsel, and especially so as that court has awarded a writ of certiorari in the *Delk* Case. We hold, therefore, that the court below did not err in overruling the demurrer to the declaration.

Did instruction No. 2 in effect require of the company different appliances than those required by the act? This instruction, which related especially to the freight car 21158 whose coupling appliance was charged in the first count to be defective, was:

"(2) In the second section of the statute it is provided as follows: '* * * It shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.' The court instructs you that passing from one side of a train to the other by going over the couplers between the ends of the cars is 'going between the ends of the cars' within the meaning of the statute. The court also instructs you that the word 'necessity' as used in the second section of the statute does not mean absolute necessity, and also does not imply a physical impossibility of uncoupling except by going between the ends of the cars. *The possibility of uncoupling by crawling under a car, or climbing over a car, or by going around the end of a train, does not prevent the existence of a 'necessity' within the meaning of the statute of men going between the ends of the cars in order to uncouple. If the uncoupling lever at either end of any car is so inoperative that it is necessary in order to uncouple to go between the cars, or to go around the train, or to climb over a car, or crawl under a car, or to climb over or crawl under the couplers, then such car is in such condition of disrepair that it is unlawful to use it in the movement of interstate traffic.*"

That part of the instruction italicized is the part objected to, and it is insisted that, in effect, it charged the jury that an appliance must be furnished with a lever on both sides of each end of every car, thus requiring an appliance not designated by the act. It is suggested that it might be true that the coupling lever on one side could not be worked but the one on the other side could, and a perfectly safe way existed at the time for the brakeman to go across the top or platform of the car to use the other lever to work the same coupling, and that under such circumstances the company would have furnished exactly what the act requires, namely, an automatic coupler which could be operated by one of the levers without the necessity for men going between the ends of the cars. And yet it is insisted, under this instruction, such evidence would result in a fine for an offense purely imaginary, not designated or within the letter or spirit of the law. The four cases of *Morris v. Duluth, S. S. & A. Ry. Co.*, 47 C. C. A. 661, 108 Fed. 747, *Gilbert v. Burlington, C. R. & N. Ry. Co.*, 63 C. C. A. 27, 128 Fed. 529, *Suttle v. Choctaw, O. & G. R. Co.*, 75 C. C. A. 470, 144 Fed. 668, and *Union Pac. R. Co. v. Brady*, 88 C. C. A. 579, 161 Fed. 719, are cited to show that it is negligence to go between the ends of cars merely because the coupling could not be worked by one of the levers if the coupling could

have been operated by the other on the far side of the car from the brakeman. It is to be noted that these four cases, all decided by the Circuit Court of Appeals for the Eighth Circuit, were cases wherein brakemen were seeking to recover for negligence on account of inoperative coupling appliance on their sides of the cars which led them to go between the cars to pull the coupling pins when operative levers to pull these pins existed on the opposite sides of the cars. It is also to be noted that this same court in five cases hereinbefore cited has held in construing the safety appliance acts the duty of railroad companies to equip all their cars with the required safety appliances is an absolute one, not permitting the defense of reasonable care and lack of intentional violation. Its position is set forth in this matter in the Gilbert Case, where it is held that the safety appliance act making it the absolute duty of the companies to equip their cars with couplers which can be uncoupled "without the necessity of men going between the ends of the cars" imposes upon the employes the correlative duty of using these couplers when furnished, and of refraining from unnecessarily going between the ends of cars to uncouple them, and a failure of a servant to observe this duty directly contributes to his injury and bars his recovery.

But, returning to the crucial question involved here, it is necessary for us to observe carefully the language of the act. It does not specify any particular coupling device to be used except to the extent that it shall couple automatically by impact, and which can be uncoupled without the "necessity of men going between the ends of the cars." It does not determine how many levers shall be furnished to operate a coupling device, nor where such levers shall be placed. If one be sufficient in connection with the device to perform the work of operation, but one is required. On the other hand, there is no restriction upon the placing of two such levers, one on each side, on the end of any or all its cars, if the companies desire or deem it conducive of more effective operation of the coupling automatically by impact without the necessity of men going between the ends of the cars. But, while this is true, these levers, whether one or more, become parts of the coupling device itself, and we think a fair construction of the statute requires us to hold that the device itself must be in such repair as to be capable of operation, and if the levers furnished to operate it, whether one or two at the end of the car, should, as such parts of it, be kept in condition to operate it; that, if there be two, one on each side of the end of a car, and one be maintained in a condition capable of operation and the other not, the latter is calculated only to deceive the employé and under some conditions perhaps create a necessity, in other conditions at least a temptation, to be negligent and step between the cars to uncouple them by hand. The defective lever has no business there and should be either made operative or taken away, as it renders, in the true sense of the statute, the coupling device, of which it is a part, defective.

In the language of Van Devanter, Judge, in *U. S. v. Denver & R. G. Co.*, 90 C. C. A. 329, 163 Fed. 519:

"We cannot assent to the contention which is founded upon it, namely, that an inoperative coupler—that is, one which cannot be properly manipulated preparatory to effecting a coupling or an uncoupling, as the case may be, without

a man going between the ends of the cars—is yet to be regarded as conforming to the statute, because another coupler (we would say also the same coupler by means of a different lever) capable of being so manipulated can be coupled therewith and uncoupled therefrom without a man going between the cars if he submits to whatever of inconvenience or risk may be incident to getting at the lever of the operative coupler (or as we would add of the operative lever of the coupler)."

We admit that, when a word like "necessity" is used in a statute, it is very difficult and generally inexpedient by a general instruction to a jury to attempt to define by specific illustrations its scope which will depend largely upon circumstances, but we do not think the giving of this instruction, under the circumstances and evidence adduced in this case, involved substantial error.

As regards the third proposition involved here, whether section 4 of the act requiring grab irons is applicable to passenger cars, counsel on both sides have presented exhaustive and interesting reviews of the history of this legislation to aid us in determining the intent of Congress in this particular. We do not deem it necessary to discuss the question from this view point. It is admitted that the amendment of March 2, 1903, was declaratory of the original act. By its provisions the grab irons were required to be attached to "all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce," except to four-wheel cars, and cars and locomotives exclusively used in transportation of logs, exempted by section 6 of the original act. The Supreme Court in *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, held the word "car" used in sections 2, 6, and 8 of the original act to have been used in its generic sense intended to include "all kinds of cars running on the rails," and that it did include a locomotive which could not couple automatically with a dining car. Section 6, so construed, expressly prescribed a penalty for the use of "any car in violation of any of the provisions" of the act, of course including section 4—the grab iron section—which by the amended and declaratory act of March, 1903, was to apply to "all cars and similar vehicles used on any railroad engaged in interstate commerce." The *Johnson* Case has been cited and approved since in *Schlemmer v. Buffalo & Rochester, etc., Ry.*, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681. The contention that these cases not having under specific consideration this particular section 4 do not apply here, and leaves the question of its application to passenger cars, we think untenable. Nor do we think it can be successfully contended, as sought to be done by the fourth proposition, that the act does not apply to a car containing only domestic commerce, although hauled in a train with other cars containing interstate commerce unless it be coupled to a car containing interstate commerce. The overwhelming weight of authority is against such contention. As well said in *U. S. v. Erie R. R. Co.* (D. C.) 166 Fed. 352:

"A train composed of cars, some of which are and some of which are not engaged in interstate traffic, is subject to the regulation of Congress. A railway company cannot escape liability by mixing in the same train cars engaged in interstate traffic with cars engaged in intrastate traffic. All the cars in such a train must be provided with the automatic couplers and grab irons required by the act of March 2, 1893, for every such car is in fact 'used in moving interstate traffic.'"

See, also, *Schlemmer v. Buffalo & Rochester, etc., Ry.*, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681; *Wabash R. Co. v. United States*, 93 C. C. A. 393, 168 Fed. 1; *Chicago, M. & St. P. Ry. Co. v. United States*, 91 C. C. A. 373, 165 Fed. 423, 20 L. R. A. (N. S.) 473; *Chicago & N. W. Ry. Co. v. United States*, 93 C. C. A. 450, 168 Fed. 236, 21 L. R. A. (N. S.) 690; *United States v. Southern Ry. Co. (D. C.)* 170 Fed. 1014; *United States v. Balto. & O. Ry. Co. (D. C.)* 170 Fed. 456.

Finally, did the court below err, to the prejudice of the defendant, by giving, at the instance of the plaintiff, instructions 4, 5, and 7? These instructions were as follows:

"(4) The court instructs the jury that they can consider the evidence offered by the defendants relating to inspection of the alleged defective car, N. & W. 21158, at Bristol only in so far as it tends to contradict the testimony of the plaintiff's witnesses upon the point as to whether or not the defect as alleged in the declaration did really exist at the time that the said car left Roanoke, Va.

"(5) The fact that the defendant's witness testified that an inspection of N. & W. car 21158 was made at Bristol and that the alleged defect set out in the declaration was not discovered by him can only be considered as tending to contradict the evidence of the government's witness on that point, and its weight is for the jury."

"(7) The court instructs the jury that in passing upon the question of the conflict in the evidence of the government inspectors, and the inspector of the defendant railroad company at Bristol who testified to having inspected car N. & W. 21158, they must consider that one is positive testimony and the other is negative. The inspectors of the government testify that they inspected the coupling and saw that it was defective. Therefore the correctness of their testimony depends only on the fact whether or not they swore to the truth; while, on the other hand, in considering the testimony of the inspector of the railroad, there are two things to be taken into consideration: First, did he testify to the truth when he stated that he did not discover the defect in the coupling; second, if he did swear the truth when he so stated, then did he, in examining the train in the limited time in which he claimed to have inspected it, make such close and accurate inspection as to be able to give persuasive evidence in contradiction of the testimony of the government inspectors."

These instructions told the jury that the evidence of the inspector of the company, whose express duty it was to inspect all cars coming into his yard at Bristol with a view to discover and report these very defects in safety appliances, and who has testified that in discharge of that express duty he did inspect this particular car 21158 and found no defect in its coupling device, could only be considered "in so far as it tends to contradict" the testimony of the government inspectors; that such evidence could only "be considered as tending to contradict the evidence of the government on that point" (that is, whether defect in the coupling device existed or not); and that such evidence was negative as to the inspection, while that given by the government inspectors was positive. We think there is error in these instructions, and that they should not have been given for these reasons: First, because they held the evidence to be solely contradictory in character; second, because they tended to give undue weight to the evidence of the government inspectors; and, third, because the evidence of the company's inspector was not negative but positive. We think the District Court for the Western District of Ohio in *United States v. Balto. & Ohio R. R. Co.* (not reported, but published by the Interstate Commerce Commis-

sion in pamphlet form), Judge Cochran, charging the jury in a similar case, has rightly held:

"In considering the testimony of witnesses the jury should not give either more or less weight to the testimony of any witness because of the fact that such witness testifies on behalf of the government, or on behalf of the railroad company, but the jury should give to the testimony of each witness that weight which in its judgment it is entitled to from all the facts and circumstances in the case."

The District Court for the Northern District of Illinois in *Atchison, T. & S. F. Ry. Co.* (not reported, but published by the Interstate Commerce Commission) has reiterated and approved this proposition. The evidence of the company's inspector was not negative. It is to be remembered that he was employed by the company for the express purpose of inspecting cars and discovering and reporting these and other defects; that he has testified that in discharge of this express duty he inspected this train and this particular car in question; that he lifted all the rods or levers to see if they were in condition from one end of the train to the other, always in accord with a fixed practice of his inspection; and that he found no defect in the coupling device in question. This was positive evidence of a negative fact.

In 17 Cyc. 802, it is well said:

"The marked superiority of positive testimony is most commonly affirmed in those cases where the opposing testimony is what has been hereinbefore denominated 'strictly negative.' If there is evidence that the attention of a negative witness was specially directed to the fact, or it can be legitimately presumed or inferred that he was alert and would have observed had the fact occurred his testimony that he did not see or hear is not necessarily weaker than opposing positive and affirmative testimony, and may indeed be entitled to more weight than the latter. Where witnesses testify positively to a fact and other witnesses absolutely deny it, the rule of comparative value as between positive and negative testimony does not apply, and the only question is to which side, under all the circumstances, credit is due."

And a large number of authorities are there cited.

In a case directly in point, the District Court of the United States for the Western District of Pennsylvania (*United States v. Baltimore & Ohio R. Co.*, 170 Fed. 456) held:

"Positive testimony is to be preferred to negative testimony, other things being equal; but where it was the duty of an inspector on the part of the railroad company to inspect cars, and he says that he did inspect the cars that came in and did not see certain defective appliances, that is not such negative testimony that it should not receive the same consideration, other things being equal between the witnesses, as positive testimony."

See, also, *Denver & R. G. R. Co. v. Lorentzen*, 24 C. C. A. 592, 79 Fed. 291.

For this error in giving these instructions the judgment of the court must be reversed, and the cause remanded, with instructions to set aside the verdict and grant a new trial.

Reversed.

TENNILLE et al. v. HOWDEN.

(Circuit Court of Appeals, Fifth Circuit. March 15, 1910.)

No. 1,990.

ESTOPPEL (§§ 62, 78*)—DENIAL OF AGREEMENT—CONTRACTS RELATING TO PERSONAL PROPERTY—PART PERFORMANCE.

Defendant who held an option for the purchase of a tract of phosphate land in Florida, with another whom he had associated with him in the matter entered into a contract with complainants by which the latter agreed to procure the money to purchase the land and to form a company to mine the same on terms therein stated. Afterward, defendant stated that he had an opportunity to make a more profitable disposition of the option, and after negotiations complainants authorized him to do so providing the contract was satisfactory to them, and in such case they were to receive 45 per cent. of any profit made and defendant and his associate 55 per cent. The proposed contract was submitted to them and approved after the addition of a provision by them authorizing defendant to assign his interest therein or any part thereof. As executed, the profit was to accrue from royalties as the mines were worked. *Held*, on the evidence, that defendant clearly understood that complainants insisted on an assignment of their interest in the contract as a condition of surrendering their right to the option, and, by consummating the contract with such knowledge, assented to the same, and was estopped to deny such agreement; also, that the agreement was one which would be specifically enforced in equity, complainants' right to 45 per cent. of the profits of the contract being undisputed.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. §§ 62, 78.*]

Appeal from the Circuit Court of the United States for the Southern District of Florida.

In Equity. Suit by George F. Tennille and others against F. J. Howden. Decree for defendant, and complainants appeal. Reversed and rendered.

W. E. Kay and H. W. Johnson, for appellants.

Wm. H. Baker and David C. Barrow, for appellee.

Before PARDEE and McCORMICK, Circuit Judges.

McCORMICK, Circuit Judge. In the month of February, 1907, and for some years before that, F. J. Howden, the appellee, a subject of Great Britain, was living in Florida, and was the general manager of the Prairie Pebble Company, of which one Mr. Hull was president, largely engaged in mining and marketing phosphates. While so occupied, the appellee acquired from John A. Hertz, of the city of Charleston, S. C., an option to purchase 140 acres of phosphate land, described in the writing taken to purchase the same at the sum of \$40,000 cash, and the further sum of 10 cents per ton royalty for each and every ton of phosphate rock found in the property as determined by the prospect then being made by J. H. Pratt. This option the appellee endeavored to dispose of to the Prairie Pebble Company, but Mr. Hull, the president, with whom he attempted to negotiate, would not take the matter up at that time thinking that he could get the land later on,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

and that it was too small a proposition for him to handle, and, if his mine should ever reach into that neighborhood, he could buy it at a less price. The appellee, being connected with the Prairie Pebble Company officially, and closely engaged as the general manager thereof, could not spare the time to raise a company to handle the proposition himself, and consequently had to associate himself with some one who had the time to devote to it. At this time and under these circumstances he was introduced to Mr. Brown Caldwell by Mr. J. M. Lang, and took up the matter with him of forming a corporation to handle this property, and made him a proposal that if he (Caldwell) would secure the necessary capital they would share the emoluments that might arise from the disposition of the property, and entered into an agreement with him to that effect. Mr. Brown Caldwell had been working on a proposition with Mr. Lang in regard to Tennessee phosphate, which fell through, and Mr. Howden had brought up this Florida proposition to Mr. Lang, who could not handle it, and who turned it over to Mr. Caldwell by introducing him to Mr. Howden. Thereupon, Caldwell and Howden talked the matter over and agreed on certain divisions. They agreed that Caldwell should try to sell the property first to various parties, among whom were Swift & Co., of Chicago. This first interview between Howden and Caldwell was early in January, 1907, and about a month later it was reduced to writing. During this time Caldwell tried a number of people, and consumed a good deal of time in attempted negotiations, and the time of the option was beginning to run short, and Mr. Caldwell approached Mr. Basinger, who knew that Caldwell was trying to place the property, and told him that he would make an arrangement with him if he could find parties who would be interested in the formation of a company to handle the property in Florida. Mr. Caldwell was a resident citizen of Savannah, Ga., at the time these transactions were had; had resided there three years, and was operating a turpentine property in Florida, and actually engaged in operating turpentine stills, and happened to get in the fertilizer business through his acquaintance Mr. J. M. Lang. His turpentine business was conducted in the name of Caldwell Company, headquarters or general office in the city of Savannah. He was at one time during the period of his residence in Savannah acting the part of a promoter. He testifies that he became interested in this phosphate proposition of Howden's not wholly as a promoter, but that it was true that, as a side issue from his naval stores business or turpentine business, he was partly a promoter, and it was as a promoter that he first got in connection with the phosphate proposition involved in this suit, which led to his acquiring an interest in it. Mr. Basinger, acting upon Mr. Caldwell's suggestion to him to find parties who would be interested in the formation of a company to handle the properties in Florida, brought Mr. Tennille and Mr. Caldwell together, who made an arrangement to meet Mr. Armstrong later, which they did, and talked over the possibilities of their financing a company to operate the Hertz-Lockwood property. The result of that conference was to bring Mr. Howden to Savannah, and the four talked over a general plan of financing the company. At this first conference between Howden and Caldwell and Tennille and Armstrong

in Savannah, the details of the negotiations were not all settled, and Howden returned to Florida, leaving the matter to be conducted through Caldwell and correspondence.

The negotiation matured rapidly, and a written memorandum of agreement between the parties was prepared by Mr. Basinger, signed by Mr. Caldwell, Mr. Tennille, and Mr. Armstrong in the presence of Mr. Basinger, and forwarded to Mr. Howden at his home in Florida for his signature. He, before receiving this memorandum of agreement executed by the parties at Savannah, had received propositions from other parties, and, instead of completing the memorandum sent him by executing it himself, arranged to have the other parties meet him in Jacksonville, Fla., and they thereupon went to Jacksonville, taking Mr. Basinger with them, where they met Mr. Howden on March 14, 1907. He brought with him the memorandum that had been signed by the other parties and forwarded for his signature, and at the opening of this conference he completed that memorandum by affixing to it his signature. This writing, he testifies, was a much briefer memorandum than the detailed memorandum of agreement which was immediately drawn up by Mr. Basinger to embrace more clearly the features contained in the briefer writing. As soon as it was prepared it was duly executed by the parties. This agreement is made by Howden and Caldwell, of the first part, and Tennille and Armstrong, of the second part, and provides that in the event that the survey and prospect of the property shall show pebble phosphate of a described quality and quantity underlying the lands, the second parties agree and undertake to organize a corporation for the purpose of purchasing the property, mining the phosphate, and paying the owners of the same in accordance with the terms of the option, viz., the sum of \$40,000 in cash and the sum of 10 cents per ton of the phosphate as the same shall be mined, the cash payment to be available on or before April 1, 1907, at ——— in the state of Florida; and, further, that the first parties shall be paid for the option held by them upon the property in the manner following: The second party shall organize the proposed corporation as soon as it shall appear from the prospect that the property contains the quantity and quality of phosphate specified; that such corporation shall have a capital stock not exceeding in amount \$175,000, of which the sum of \$150,000 shall be sold for cash, and the remaining \$25,000 to be held in the treasury of the corporation and subject at any time to be taken up by the second parties for cash at par, or after dividends shall have accumulated on the same to the amount equal to the face value thereof, then this stock shall pass to and become the property of the second parties without further payment; that of the sum of \$150,000 of the capital stock of the corporation to be sold for cash, the first parties undertake and agree, by themselves or through their agency, to take the sum of \$60,000, and the second parties agree, in like manner, to take the sum of \$90,000, with other provisions not necessary to be recited. Immediately upon the completion of the foregoing agreement, the parties made a supplemental agreement to increase the capital stock of the Florida Mining Company (the corporation to be formed under the terms of the above agreement) to the extent of \$25,000 to be sold for cash, and the amount

to be applied to the purchase of additional property known as Palmetto Phosphate Company's lands near Mulberry, Fla., provided that options on these lands be secured upon satisfactory terms, and provided, further, that the property, after being prospected, shall prove to contain a minimum quantity of 500,000 tons of minable and marketable phosphate. On the instant, immediately after the execution of the supplemental agreement, Mr. Howden stated to Mr. Armstrong and Mr. Tennille that another party (not then naming him) had become interested in these mines, and that he (Howden) thought that he could make a better trade with this other party than he had made with Tennille and Armstrong, and wanted to know whether they would retire from the organization of the company, and, if so, on what terms. They told him that they would take the matter under consideration. The parties thereupon separated and returned to their respective homes from Jacksonville, Mr. Howden being authorized to obtain an option on the Palmetto property specified in the supplemental agreement. Tennille and Armstrong, after their return to Savannah, took the matter of their withdrawal under consideration, and prepared a memorandum of the terms of an agreement on the basis of which they were prepared to withdraw. Mr. Howden obtained the desired option on the Palmetto property and went to Savannah where he met the other parties. They discussed the memorandum which Tennille and Armstrong had prepared, showing the terms on which they would withdraw. This conference and discussion lasted many hours and broke up about 12 or 1 o'clock at night without anything being absolutely decided, closing with a remark by Mr. Tennille to Mr. Howden that he and Armstrong would consider a proposition from them (Howden and Caldwell) on the basis of 45 per cent. to Tennille and Armstrong, and 55 per cent. to Howden and Caldwell, of the interest in the contract which he might be able to make with Pierce, provided that contract was satisfactory to Tennille and Armstrong. And the matter was left in that shape at that time. This conference of parties took place on Wednesday, March 27th. On March 30th (Saturday), Caldwell wrote to Tennille and Armstrong:

"I beg to hand you herewith form of proposed agreement acceptable to Mr. H. L. Pierce for your consideration. Please let me hear from you in regard thereto as early as convenient and before noon on Monday."

On April 1st (Monday), Caldwell wrote again:

"In pursuance of the agreement between you and Mr. Armstrong and Mr. Howden and myself on last Wednesday that you would consider a proposition of division of profits on a basis of 45 per cent. to you and 55 per cent. to us, to the extent of 1,200,000 tons which might be derived from a contract which Mr. Howden might be able to make with Mr. H. L. Pierce, provided the terms of the contract between Mr. Pierce and Mr. Howden were satisfactory to you, I have submitted the form of contract which Mr. Howden finds he can make with Mr. Pierce. I now ask that you advise me whether the terms of the contract submitted are satisfactory to you, so that I may submit the proposition as to division of profits between us, outlined above."

To which Tennille replied the same day:

"I have just received your favor of this date relating to transactions between yourself and Mr. Howden, on the one part, and Mr. George F. Armstrong and myself on the other. We have examined the form of proposed

contract submitted by you to be executed by Mr. Pierce and Mr. Howden, and we now beg to say, in response to your letter, that we are prepared to accept the proposition of division of profits under this proposed contract on the basis of 45 per cent. to ourselves and 55 per cent. to yourself and to Mr. Howden; provided, however, that the contract between Mr. Howden and Mr. Pierce is redrafted so as to incorporate certain features and provisions which are essential, not only to ourselves, but, we think, also for the protection of Mr. Howden, as the principal. * * * We should be glad to take the matter up any time this afternoon between 4 and 6 o'clock."

To which Mr. Caldwell answered:

"Replying to your communication of this date in which you state that you are prepared to accept the proposition of division of profits under the proposed contract between Howden and Pierce on the basis of 45 per cent. to you and Mr. Armstrong and 55 per cent. to Howden and myself, as contained in my letter to you of this date, provided that the form of contract between Howden and Pierce is redrafted to incorporate certain provisions which you desire, I beg to say that until the changes in the contract are made known, it is impossible to say whether they would be acceptable to Howden and Pierce and myself. If you will kindly note on the contract the provisions you wish inserted or changed, and will return it to me, I will immediately take up the question with Howden and Pierce."

On April 3, 1907, Tennille wrote Caldwell.

"We return herewith draft of proposed contract between Mr. Howden and Mr. Pierce, which is acceptable to us and which we think should be satisfactory to Mr. Howden. It is important that the agreement be executed at once, or that we should be advised immediately whether or not it will be executed, so that, in the event negotiations with Mr. Pierce should fail, we may be in a position to comply with the provisions of our agreement with Mr. Howden and yourself, and be ready to finance our proposed company by the 21st instant."

On April 13th, Caldwell wrote Tennille:

"Complying with your request, I submitted the form of contract, as drawn by your attorney, to Mr. Howden, and asked him to submit that form to Mr. Pierce for his acceptance. I am now advised by Mr. Howden that the form of contract submitted by you is not acceptable to Mr. Pierce, and that Mr. Pierce would not agree to a contract on those lines, but that Mr. Pierce was ready to accept and make a contract with Mr. Howden on the lines of the contract herewith. Will you not kindly compare the two forms of contract and advise me at your earliest convenience whether or not you would accept the contract acceptable to Mr. Howden and Mr. Pierce as basis for a proposal from Mr. Howden and me to divide our profits on such a contract with you and Mr. Armstrong on the terms agreed upon?"

To which Mr. Tennille replied on the same day:

"I have your letter of this date, inclosing form of contract which you say is acceptable to Mr. Howden and to Mr. Pierce. Mr. Armstrong and I have examined this draft of agreement and now advise that it is acceptable to us, upon the condition that this agreement shall be executed prior to the 21st instant, the day when our agreement with Mr. Howden and yourself expires, and upon the further condition that Mr. Howden shall, on or before that day, assign to Mr. Armstrong and to myself jointly forty-five per cent. (45%) of his right, title and interest under this agreement to be entered into between himself and Mr. Pierce."

On April 15th, Tennille wrote again to Caldwell:

"Referring to your telephone conversation with me this morning, requesting that Mr. Armstrong and myself now submit a form of agreement with Mr. F. J. Howden, to secure our interest under the proposed agreement be-

tween himself and Mr. H. L. Pierce. We beg to say that, having approved the form of agreement with Mr. Pierce, submitted by you on behalf of Mr. Howden, and having accepted the proposal of Mr. Howden and yourself, to take 45 per cent. of the right, title and interest under this contract, based on a total output for both properties of twelve hundred thousand tons of phosphate, we will be ready and willing to execute a formal contract covering our interest in this agreement, as soon as we are advised that Mr. Howden and Mr. Pierce have executed the contract which you submitted to us for approval on the 13th inst. The time is short, and we do not think the execution of this principal agreement should be further delayed for the purpose of preparing the formal contract securing our proportionate interest under it. As it is necessary for us to arrange to carry out at once the terms of the agreement of March 14, 1907, with Mr. Howden and yourself, in the event the agreement with Mr. Pierce is not closed and executed, we must request that you promptly confirm our acceptance of the proposal submitted on behalf of Mr. Howden and yourself, and advise us immediately whether or not the proposed agreement with Mr. Pierce has been or will be executed."

To which Mr. Caldwell replied the next day, April 16th:

"Your favor of the 15th inst. is received. I have communicated with Mr. Howden and informed him that the form of the proposed contract between Mr. Howden and Mr. Pierce, submitted to you in my letter of the 13th inst., was acceptable to you and Mr. Armstrong. I understand from your letters of the 13th and 15th inst. that your idea of the contract to be executed between myself and Mr. Howden and yourself and Mr. Armstrong is to be in the form of an assignment of an interest in the Howden-Pierce contract. Neither Mr. Howden nor myself understood that the contract between myself and Mr. Howden with you and Mr. Armstrong was to be in the form of an assignment of the Howden-Pierce contract. Our understanding was that our contract with you and Mr. Armstrong was to be an agreement between us by which you and Mr. Armstrong would receive 45 per cent. of the profits coming to us under section 8 of the Howden-Pierce contract, on the basis of the first twelve hundred thousand tons of phosphate sold and paid for. However, I have communicated to Mr. Howden your ideas in this connection, and will, at the earliest possible time, let you know his views on the subject."

Immediately on the same day, Tennille and Armstrong joined in the following letter to Caldwell, which they had delivered by a special messenger, saying:

"Your letter of this date received. We note you say: 'I understand from your letters of 13th and 15th inst. that your idea of the contract to be executed between myself and Mr. Howden, and yourself and Mr. Armstrong, is to be in the form of an assignment of an interest in the Howden-Pierce contract.' This is correct. In all our negotiations with respect to this matter, we have contended that our interest should be secured by an assignment of a proportionate part of the contract with Mr. Pierce, and you will remember that in our earliest negotiations the offer was of a certain percentage of the Pierce contract.' This is the proposal we accepted. Again, at the meeting in my office, with yourself, Mr. Armstrong, and our attorney, item 6 of the pencil memorandum of changes required by us in the first draft of the Pierce contract, which read as follows, was submitted to you: '6. Howden shall have right to assign contract for the benefit of his associates and assigns.' At that time you stated that you could see no objection to our proposed changes. Under these circumstances, we do not see how you could have had any other understanding than that we expected to receive an assignment of a proportionate interest in this Pierce contract."

And on the same day, Tennille and Armstrong joined in a telegram to Howden in these words:

"We approved on Saturday your proposed agreement with Pierce submitted by Caldwell, and accepted your proposal for division of interests under it.

Notified Caldwell important to have immediate advice of execution of Pierce agreement, but understand he still holds papers here. This is unnecessary delay. Unless we are advised by you before noon 18th instant that proposed agreement with Pierce is executed, will be necessary for us to carry out terms of our original agreement, dated March 14th, which we are prepared to do. Please answer."

On the same day Howden answered by telegram:

"Proposed agreement with Pierce will be formally executed eighteenth. Will write particulars when complete."

On the next day, April 17th, Caldwell wrote to Tennille:

"I have been requested by Mr. Howden to advise you that he will execute the contract with Mr. Pierce today. This is probably in connection with your wire to him of yesterday, copy of which I have, and in answer to my wire of the same date. All recent correspondence exchanged between us has been forwarded to Mr. Howden for his consideration."

On the next day, April 18th, Howden wired Tennille:

"Pierce contract with some minor changes sanctioned by me will be executed in Bartow to-morrow. Your obligations may be considered canceled."

On the same day, Tennille replied by wire to Howden:

"Must have absolute notice execution of Pierce contract to-morrow, and will not consent to any essential changes in draft which we have approved."

The next day, April 19th, Howden wired Tennille:

"Cann and Barrow agreement duly executed between Pierce and self, with no alteration that in any way affect your interest. Advise Caldwell."

After completing his contract with Pierce, the complainants demanded of Howden that he assign to them their 45 per cent. interest therein, which he refused to do, and this suit was brought by the complainants, Tennille and Armstrong, both citizens of Georgia, to obtain from the court a decree that the defendant Howden specifically perform his agreement with them, and that he be compelled to execute and deliver immediately a sufficient assignment or transfer to them, jointly conveying to them 45 per cent. of all his right, title, and interest in and to the agreement with H. L. Pierce, dated April 19, 1907 (exclusive of the salary to be paid to Howden), to the extent of the estimated output of 1,200,000 tons of phosphate rock to be mined and sold from the lands covered by the agreement.

It is not necessary to recite the pleadings of either party. They are appropriate to the respective contentions. The complainants contended that Howden acquiesced in and accepted the terms and conditions upon which they abrogated their agreement of March 14th; that by virtue of that abrogation they canceled their valuable contract rights in the phosphate lands and in the options of agreements to purchase the same, and the rights and profits to accrue to them under the marketing of the phosphate thereon, and that Howden, acting with full knowledge and information as to the terms of the arrangement upon which they approved the proposed agreement between himself and Pierce, proceeded to the execution of that agreement with Pierce on April 19, 1907; that Howden, attempting to evade his solemn promise and agreements, has offered to them an entirely different interest in

the contract with Pierce from that which was agreed between complainants and Howden and which is materially against complainants' interests; that his refusal to perform his agreement will cause them great and irreparable damage, which is not susceptible of accurate calculation, and which cannot be fully and adequately compensated by a judgment for damages, which complainants allege will far exceed the sum of \$50,000; and they further allege that Howden is unable to respond in such damages to complainants for the breach of his contract; that by reason of their abrogation of the original agreement of March 14, 1907, and by reason of the subsequent execution by Howden of the agreement with Pierce, complainants cannot now be restored to their original rights and privileges in said options and property, and cannot now take over said properties and operate the same for their mutual benefit and profit, which they were and are financially able to do and ready to do, had not said Howden made the representations he did. The suit proceeded to the hearing, and the Circuit Court decreed that the bill of complaint be dismissed without costs and without prejudice to any suit, either at law or in equity, which complainants may bring to recover 45 per cent. of the profits arising from the operation of the Florida Mining Company accruing to F. J. Howden and Brown Caldwell as holders of an interest in said Florida Mining Company. In connection with this decree, we recite the following opinion of the trial judge:

"This cause having been heard upon the bill, answer, and testimony, and the arguments of solicitors for the respective parties, and being duly considered by the court, the court finds that the only contract or agreement made between the complainants in regard to division of interests in the proposed mining corporation was that proposed by Caldwell in his letter of April 1st, and accepted by Tennille in his letter of the same date, and that was an agreement for sharing the profits of Howden and Caldwell, 45 per cent. to the complainants and 55 per cent. to the defendants; that the subsequent proposition in Tennille's letter of the 13th of April, for an assignment of 45 per cent. of the right, title and interest of Howden was never accepted so as to become a contract which could demand specific performance; that the defendant is willing and ready at any time to carry out the contract or agreement it did enter into; that the executing the contract with Pierce by Howden upon the urging and insistence by Tennille, when the proposition for an assignment of Howden's right, title and interest had not been accomplished, was not an acceptance of such proposition as perfected such an agreement as would justify a decree for a specified performance. The court further finds that Howden had conveyed to Caldwell, for consideration, an interest in the option which he had, before any negotiations with the complainants, and that Caldwell is a necessary party to any determination of the rights of the parties; that he had been recognized as principal in all the correspondence and negotiations, and was only treated as a broker in the bill of complaint in order to give jurisdiction to this court."

The complainants appealed, and assigned that the court erred in dismissing their bill of complaint and in entering a final decree in favor of the defendant, Howden, and in not rendering a decree in favor of complainants for the specific performance of the contract by the defendant, F. J. Howden, as prayed for in the bill of complaint. After a careful study of the record of this case, we conclude that the Circuit Court did err in the matter and to the extent suggested by the appellants' assignment.

Besides, the written memorandums of agreement and the letters and telegrams which passed between the contracting parties, the substance of which we have recited, Tennille and Armstrong and Howden and Caldwell were fully examined as witnesses, and we gather from their testimony, in connection with the written evidence, that the deal between Howden and Hertz had been pending for some time, probably two months, before it ripened into the written option which bore date the 20th of February, 1907. The 140 acres described in that option had been worked for phosphates under primitive and inadequate methods, and the work had been abandoned; but more scientific methods were beginning to be used, with which Howden, in his employment as general manager of the Prairie Pebble Company, had become acquainted, and in which he had faith, and he had satisfied himself that this abandoned field of 140 acres contained at least 700,000 tons of minable and merchantable phosphate. It appears that at that time the market demand for phosphates of good quality was good, and that such products were reputed to be worth \$5.50 per ton f. o. b. at the mines. He, therefore, closed with Hertz on the terms specified in the writing of February 20th, and which appear to have been entirely satisfactory to Hertz, and which appeared to Hull, the president of the Prairie Pebble Company, to be too liberal, for when Howden approached him on the subject of his taking this property, he intimated that he could get the land cheaper if he ever should need it. The life of Howden's option, beginning February 20th, was, at that time, limited to close by or before the end of March 31st. Howden's office of general manager of the Prairie Pebble Company kept him at his work. He was not financially able to furnish or secure the cash payment required to enable him to reap the benefit of his option, and in looking around for some one to help him find parties who could finance his venture, he came to an agreement with Caldwell, who undertook to find the parties able and willing to finance the scheme on terms which Howden was willing to accept. Caldwell immediately became active. He himself was a citizen of Georgia, residing at Savannah, engaged in the naval stores business, actively operating turpentine plants in Florida, but at the same time somewhat of a promoter, having had relations with Tennessee parties and with heavy capitalists in Chicago. For these, however, the deal that he was now attempting was not attractive, possibly because, as Hull suggested with reference to himself, it was not large enough to engage their attention. Howden's option was running short, and Caldwell applied himself to discovering what he could do in Savannah. He had some acquaintance with F. G. Basinger, who, as their attorney, had had relations with Tennille and Armstrong, and had some knowledge of their financial ability and business capacity to meet Caldwell's and Howden's present needs if the proposition could be made attractive to them. Thereupon the negotiations began, which, in a few days, resulted in a written memorandum of agreement drawn up by Basinger and signed by Caldwell, Armstrong, and Tennille in the presence of Basinger, and forwarded to Howden at his home in Florida for his signature. By the time this reached Howden, he had begun to have conferences on the subject with Pierce, and, instead of signing the agreement sent him and returning it to the Savannah par-

ties, he arranged to have them meet him in Jacksonville, where they met on the 14th of March, his option then having only 14 days to run. At this meeting the first thing that was done was the completing of the agreement, which had already been signed by the other parties, by the signature of Howden. Then his option with Hertz was safe, for Tennille and Armstrong were fully responsible parties, their engagement could be relied on, as the contingency specified in their agreement was one which Howden knew the survey and prospect, then going on, would amply meet. When this was done, he told the parties that the Palmetto 1,100 acres, nearer the railroad, which had been operated under primitive methods and the operation abandoned, could, he thought, be obtained at a reasonable price, and was very desirable because it was between the 140 acres and the railroad. Thereupon, immediately the parties entered into the supplemental agreement which authorized the acquisition of this additional land if it could be obtained on reasonable terms, and if the survey and prospect showed that it contained at least 500,000 tons of minable and merchantable phosphate. When that was done, and immediately upon its execution, Howden mentioned having found parties or a party in Florida with whom he thought he could make a better trade if Tennille and Armstrong would agree to withdraw on reasonable terms. He did not name the party, and Tennille and Armstrong replied that they would consider the matter, which, upon their return to Savannah, they promptly and carefully did, and prepared the memorandum of the terms on which they would be willing to withdraw. Pending these negotiations at Savannah, Howden satisfied himself as to the phosphate bearing quality of the Palmetto 1,100 acres of land, and obtained the desired option to purchase it, and went himself to Savannah, where all the parties met on the 27th of March, and had a protracted and earnest discussion of the terms on which Tennille and Armstrong were willing to let Howden and Caldwell deal with the other party who, by this time, had been named as H. L. Pierce. Howden had taken the option for the Palmetto property in his own name, and in this conference on the 27th of March, he suggested that the interest of Tennille and Armstrong did not extend to that property, but they were able to satisfy him that he was mistaken about that. The discussion then revolved around the written set of propositions which Tennille and Armstrong had prepared. One of these propositions was for a cash settlement, which Howden and Caldwell declined; the other was for the formation of a mining company to operate the property and divide the benefits. The concluding paragraph of the last proposition was:

"It is further understood that the benefits accruing from the alternative proposition to be divided 50 per cent. to Caldwell and Howden and 50 per cent. to Tennille and Armstrong."

Tennille testifies touching this matter:

"There was a great deal of discussion and a great deal of trading back and forth. I remember at one time during the session Mr. Howden turned to me and said, 'Well, will you make a contract with me?' and I said, 'Mr. Howden, I do not think that we could make a contract with you without proper security, as we do not know anything about your financial responsibility.' At any rate, we broke up about 12 or 1 o'clock that night without anything being absolutely

decided, and the last remark that I made to Howden, when he left the office, was that we would consider a proposition from them on the basis of 45 per cent. to us and 55 per cent. to him of the interest in the contract which he might be able to make with Pierce, provided that contract was satisfactory to us; and that matter was left in that shape at that time."

On Saturday, March 30th, three days after the conference just mentioned, Caldwell transmitted to Tennille and Armstrong, for their consideration, a copy of the agreement which Howden could make with Pierce, with the request that they let him hear from them in regard thereto as early as convenient and before noon on Monday. This copy was an instrument containing the whole contract in two sections, and made no express provision that Howden should have the right to assign any part of the contract for the benefit of his associates and assigns; and the complainants required, before they would approve it, that this form of the proposed contract should be redrafted, and a little later submitted a redraft prepared by their attorney, embracing the substance of the memorandum copy which had been furnished them, with some additional provisions, especially this:

"The party of the first part shall have the right to transfer, assign and set over all or any part of his rights, title or interest in or under this present agreement, or in or under the proposed agreement between himself and said company, upon the organization thereof, except as to the provisions of said last-named agreement relating to the personal services of the party of the first part as its general manager."

This redraft by complainants' counsel was not acceptable to Mr. Howden and Mr. Pierce, and on the 13th of April, Caldwell submitted another draft of the agreement to the complainants, which they examined and advised him that it was acceptable to them upon the condition that it should be executed prior to the 21st day of April, the day when their agreement with Mr. Howden and Mr. Caldwell expired, and upon the further condition that Mr. Howden should, on or before that day, assign to Armstrong and Tennille, jointly, 45 per cent. of his right, title, and interest under the agreement to be entered into between himself and Mr. Pierce. It is not necessary to recite again the subsequent correspondence by letter and wire. It seems to us that the evidence shows that the complainants manifested to Howden and Caldwell at every point in the negotiations on this subject that they would not surrender the rights they had in the property itself under their agreement of March 14th, except on the terms of retaining 45 per cent. interest in all the rights, title, or interest of Howden in or under the Howden-Pierce agreement, or in or under the proposed agreement between himself and the company for which the Howden-Pierce agreement provided, upon the organization thereof, except as to the provisions of said last-named agreement relating to the personal services of Howden as its general manager. That Howden and Caldwell did not wish to consent to this is very manifest from the correspondence. It is equally manifest that Tennille and Armstrong insisted upon it. It seems to us that there is no ground in the testimony to doubt that Howden and Caldwell must have understood this clearly, and that, when so understanding it, they determined to go ahead and enter into the Howden-Pierce agreement, and Howden telegraphed to Tennille and Armstrong, "Pierce contract, with some changes sanctioned by me, will

be executed in Bartow tomorrow; your obligations may be considered canceled," they cannot be heard to say that they did not accept the terms named in Tennille's letter of April 13th to Caldwell.

Cannot a righteous and effective decree of a court of chancery, which commands the conscience, compel the specific performance of this contract, which they are estopped to deny that they made? The counsel for the complainants urges with convincing force these considerations presented by the proof bearing upon the question we have just propounded. The contract is fair and founded upon a large and valuable consideration, the abrogation of an existing contract, upon which complainants place a cash value of \$50,000, and for which they refused an offer of the defendant to pay them \$5,000 a year for a term of 10 years. It is a contract in which damages could not be calculated, and in which they would clearly be inadequate. It is capable of being enforced by a decree of the court. It does not call for personal or continuous services. It will work no hardship whatever upon defendant. It will not deprive him of anything to which he is entitled, nor impose the slightest liability upon him. A decree would require simply the assignment to be made by defendant to complainants of that which he admits they are the beneficial owners, and the title to which now rests in his name. The complainants have fully performed on their side, so that no question of mutuality is involved. The defendant has sufficient title, and is able to perform. The necessary parties and the subject-matter are properly before the court. There is no difference or dispute as to the amount of complainants' percentage or interest. The question is solely as to the manner in which they shall receive their part. The defendant contends that the obligation is simply to pay complainants annually 45 per cent. of such profits as he may receive under the Howden-Pierce contract from year to year. The complainants contend that the contract was for a division of the interests or profits in the Howden-Pierce contract, and the assignment by defendant to them of their 45 per cent. The agreement made was not one for the payment by defendant, or by defendant and Caldwell jointly, to complainants of 45 per cent. of the profits to be received by defendant, either annually or otherwise; and the negotiations between the parties, based upon a division of profits or interest, were not for annual payments by Howden to complainants. The correspondence refers in each instance to the expected division. There was not a single suggestion of annual payments to complainants in the negotiations or correspondence making up the contract. The preliminary negotiations between the parties were confined to an effort to determine the exact amount of interest in the new venture which the complainants would accept in consideration for canceling their rights under the old contract. These negotiations were not at that stage directed to the form or manner in which that interest should be expressed. Complainants finally agreed to consider a proposal of 45 per cent., provided the terms of the new contract were made satisfactory to them. When the first draft of the Howden-Pierce contract was submitted to complainants by defendant, through Caldwell, as the basis for a proposal, they found that it did not contain a provision expressly permitting the defendant to assign any part of it. Complainants thereupon presented to Caldwell

a written memorandum of changes in the form of this contract, one of the proposed amendments reading:

"Howden shall have right to assign contract for the benefit of his associates and assigns."

They required that this provision should be incorporated in the contract. Defendant and Caldwell acquiesced in this demand. If complainants were not to have any assignment of any part of that contract, would they have been anxious that Howden be given the right in express terms, to dispose of it to others? If their contract was merely to receive certain payments from him annually, would complainants have insisted upon a provision expressly giving the means to defendant by which he might, if he chose, defeat their right to receive from him these annual payments? The evidence of Caldwell illustrates the insistence which complainants made with reference to this provision for assignment, and their reasons for it. The provision for an assignment, as drawn by complainants' counsel, was accepted by defendant, and incorporated verbatim in the Howden-Pierce contract as he finally executed it on April 19th. Their insistence upon this provision in the early stages of the negotiations was of itself clear and plain notice to the defendant and Caldwell that complainants expected and demanded that their interest should come to them by an assignment from Howden. When the defendant acceded to this demand and inserted in the Howden-Pierce contract, word for word, the formal provision for assignment as prepared by complainants, his action was a complete acquiescence in, and acceptance of, their claim to an assignment; and, having secured complainants' approval in this manner, he is estopped to deny their right to it. The complainants' interest under the Howden-Pierce contract is almost equal to that of defendant and Caldwell; that is, 45 per cent. as against 55 per cent. Why should that interest be represented solely by the promise of defendant to pay them their proportion when he receives it? Why should their interest be transmitted through defendant and be subject to the hazards which such transmission might entail? Neither Pierce nor the Mining Company can complain of the assignment since the Howden-Pierce contract expressly provided for the defendant's right to assign it in whole or in part. Nor will Caldwell be affected by such a decree, because he has already received a direct assignment from defendant covering his interest. The performance of the contract, therefore, not only imposes no hardship upon the defendant, but would not in any respect operate to injure or affect the rights of other parties to the Howden-Pierce contract, or those having an interest therein. No valid argument or reason can be advanced, upon the facts set forth in this record, to show that in equity and good conscience complainants are not entitled to have an assignment as they claim of their proportionate interest in the Howden-Pierce contract. On the contrary, every consideration of fair dealing demands that complainants' interest be vested in the Howden-Pierce contract direct, in accordance with the understanding and agreement which they made. The business of the mining company, which assumed the Howden-Pierce contract, is under the sole charge of the defendant, Howden. The mining company is in-

incorporated under the laws of Maine; its principal office is in the state of Massachusetts, where its president and chief owner resides, but its only business and property is located in Florida. Defendant receives a large salary as its general manager. Its operations in Florida, and therefore its earnings, are under the management and control of the defendant. All expectation of profit under the Howden-Pierce contract is dependent upon the operations of the mining company under the defendant's charge. It would be unjust and unfair in the extreme to require that complainants' large interest in the result of the operations of this mining company reach them only through the medium of the defendant and in such measure as he may determine. If defendant's intentions in regard to complainants and their interest in this contract are straightforward and honest, he cannot have any valid objections to assigning their interest to them, and if his intentions in this respect are not honest, then there is all the more reason why complainants should be protected by an assignment.

Assuming the facts of this case to be such as the foregoing opinion shows we have concluded from the proof that they are, the principles and practice of courts of equity, applicable thereto, are so far elementary and are so well settled as to dispense with the citation of authority in support of the conclusions of law embraced in our decree. It follows that the decree appealed from must be and is hereby reversed. And this court will here and now pass its decree that the defendant, Howden, specifically perform his agreement with the complainants, and execute and deliver to them immediately a sufficient assignment or transfer to them, jointly conveying to them 45 per cent. of all his rights, title, and interest in and to the agreement between himself and H. L. Pierce, dated April 19, 1907 (exclusive of the salary to be paid to the defendant, Howden), to the extent of the estimated output of 1,200,000 tons of phosphate rock to be mined and sold from the lands covered by that agreement.

And it is so ordered.

ATCHISON, T. & S. F. RY. CO. v. HAMBLE.

(Circuit Court of Appeals, Ninth Circuit March 9, 1910.)

No. 1,730.

1. RAILROADS (§ 261*)—ACCIDENTS TO TRAINS—INJURIES—PERSONS LIABLE—TRAFFIC AGREEMENT.

That defendant operated trains over the S. Company's tracks under a joint track agreement by which the latter retained full control of the movement of all trains over the track, and defendant's employes were required to take an examination for fitness before going on the same before an officer of the S. Company, which reserved the right to bar any of defendant's employes from working on or over the track, did not relieve defendant from liability for the negligence of its servants in operating trains on such joint track, resulting in a collision and injuries to a servant of the S. Company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 824-830; Dec. Dig. § 261.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. RAILROADS (§ 261*)—ACCIDENTS TO TRAINS—INJURIES—PERSONS LIABLE—NEGLIGENCE.

Where defendant was required to move its train from station to station on the track of the S. Company, under orders of the latter's train dispatcher, defendant would not be liable for injuries resulting from the negligence of the dispatcher; but, if a collision occurred, not attributable to the dispatcher's orders, but to the negligence of defendant's employes, defendant's liability would attach.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 824-830; Dec. Dig. § 261.*]

3. RAILROADS (§ 273*)—ACCIDENTS TO TRAINS—INJURIES—NEGLIGENCE—PROXIMATE CAUSE—QUESTIONS FOR JURY.

Where defendant operated a train in charge of its own conductor over the tracks of the S. Company, under a contract for joint use, and a collision occurred due to the negligence of the S. Company's engineer in running the train at high speed past a block signal set against him, and defendant's conductor also testified that he could have seen the block signal so set if he had been paying attention, and also fuses on the track to protect the preceding train, and could have stopped his train by opening the conductor's safety valve in the caboose, but he failed to do so, and a collision occurred resulting in injury to the conductor of the preceding train, in the employ of the S. Company, whether defendant's employes were negligent, and whether such negligence was the proximate cause of the collision, were for the jury.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 273.*]

4. TRIAL (§ 257*)—INSTRUCTIONS—REQUESTS—TIME.

Under Rev. St. § 918 (U. S. Comp. St. 1901, p. 685), authorizing the Circuit Court to make such rules regulating its practice as may be necessary or convenient for the advancement of justice, and the prevention of delays in proceedings, it was proper for the court to refuse to consider requests to charge not presented before argument, according to a rule requiring them to be presented at the close of the evidence and before argument.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 642-645; Dec. Dig. § 257.*]

In Error to the Circuit Court of the United States for the Southern Division of the Southern District of California.

Action by Mark B. Hamble against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This was an action brought by the defendant in error, hereafter designated as the "plaintiff," to recover damages from the plaintiff in error, hereafter designated as "defendant," for personal injuries resulting from the defendant's alleged negligence.

That part of the Southern Pacific line of railway in Southern California between Mojave and Bakersfield, a distance of about 69 miles, although a single track, is occupied jointly by the Southern Pacific Company and the defendant, the Atchison, Topeka & Santa Fé Company; the latter having a license to run its trains over this section of the Southern Pacific track. Intermediate between Mojave and Bakersfield are the stations of Tehachapi and Bealville. The track from Tehachapi near the summit of the Tehachapi Mountains to Bealville is downgrade; the average descent being about 120 feet to the mile. The line of road between these two points passes over a number of curves and through a series of 14 tunnels. To guard against collisions, the road is divided into sections of varying lengths, called "blocks," and these blocks are equipped with an effective system of automatic block signals. These signals are described by the attorney for the defendant as follows: "At the initial end, or entrance, of each block, and at the right side—

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the engineer's side—is a block signal consisting of a post having near its top an arm, or semaphore, pivoted near one of its ends on the post, so that it can be swung freely through an arc of 90 degrees in a plane at right angles with the block. The long end of the arm is painted red on the side visible to a train approaching the block to enter. The short end of the arm is provided with a red, a green, and sometimes a yellow round disc of glass, arranged in the arc of a circle, so that, as the arm is moved to given angles with the post, these colored glasses will severally stand opposite a light fixed near the head of the post, and will show a red, green, or yellow light to the train approaching the block entrance. Adjacent to the post is an electromagnetic mechanism which swings the semaphore to the desired angle, and is in an electric current formed by the rails in the block and the wheels of a locomotive or car in contact with both rails. When there is no train on the block, the semaphore is at an angle of 45 degrees with the post, and the green light shows. When the forward wheels of the pony truck of a locomotive pass onto the ends of the rails at the block entrance, the semaphore swings up and stands at right angles with the post, its long arm extending away from the track, that is to the right as the train is going and the red glass in the short arm confronts the lamp. The semaphore remains in this position until the last two wheels of the last car in the train pass off of the end of the rails at the block terminus, when it drops again to an angle of about 45 degrees and shows the green light. By day the red arm at right angles, by night the red light, is a signal to enter the block, because it is clear."

The section of road with which we are immediately concerned in this case is a single block having a length of about a mile and a half extending above Bealville. The track in this block passes through four tunnels and over about the same number of curves. The lower tunnel is numbered 3, and is located above Bealville. The next above is numbered 4, the next above that is numbered 5, and the upper tunnel is numbered 6. At the upper end of this block at a point 1,400 feet above the upper end of tunnel No. 6 stands the upper block signal for this block, which gives information to a train coming down the mountain of the condition of the track throughout the entire block below. The lower block signal is below tunnel No. 3 in Bealville. There is also a cautionary signal about 200 or 250 feet above tunnel No. 4. This cautionary signal gives information to a train coming through the block as to the condition of the track approaching the station at Bealville, about 1,500 feet below the lower end of tunnel No. 4.

The movement of trains over this section is under the direction of the division superintendent of the Southern Pacific Company at Bakersfield, who gives his orders through the train dispatcher at that place. Practically the orders of the division superintendent are in fact issued by the train dispatcher.

The plaintiff on February 2, 1903, was employed as a conductor on an extra freight train No. 2,602, belonging to the Southern Pacific Company, consisting of 35 empty freight cars with an engine in front and a caboose, or way car, at the rear. This train left Tehachapi about 2 o'clock on the morning of February 2, 1903, and arrived at a point near the switch at Bealville about 6:05 a. m. The train was stopped and held at this point because the track was blocked by another train in front of Bealville. The train had passed through tunnel No. 5 and partly through tunnel No. 4. The rear end of the train, including the caboose, stood in the westerly end of tunnel No. 4. This tunnel is 257 feet long. The train stood about 90 feet in the westerly end of the tunnel, leaving about 167 feet of the easterly end of the tunnel clear. The distance between tunnels 5 and 4 is about 2,564 feet. The track between these two points is plainly visible from the westerly end of tunnel No. 5, except at a point from 100 to 150 feet from the westerly end of tunnel No. 5, where the track passes through a cut or curve for a distance of about 200 or 300 feet. The evidence that the block signal system was in full operation on that morning is uncontradicted. When plaintiff's train came to a standstill in and below tunnel No. 4, the rear brakeman on that train went back up the track between tunnel No. 4 and tunnel No. 5 and struck a lighted fusee on a tie and placed two torpedoes on the rail to protect the train from collision from an overtaking train. This brakeman testified that when he saw the fusee was burning out he went back to the caboose and got another fusee and two ad-

ditional torpedoes. Returning up the track, he placed the second fusee and the two additional torpedoes at intervals along the track. He then heard a whistle which he thought came from the engine of his train calling him in. Upon going back he found his train still standing in the tunnel. Returning up the track he saw a headlight coming out of tunnel No. 5. This headlight was the headlight of the following train, consisting of three engines and caboose, which had left Tehachapi shortly after plaintiff's train. This train, when seen by the brakeman, had passed the block signal above tunnel No. 6 showing red, and warning this train that there was another train in the block. It passed down the track between tunnels Nos. 5 and 4, exploding the torpedoes and passing over the burning fusee set by the brakeman. It passed the cautionary signal above tunnel No. 4 showing yellow, warning the train to come to a stop, and proceeding onward entered tunnel No. 4, where it smashed into the rear of plaintiff's train, driving that train with 10 brakes set a car length ahead, smashing a caboose, and driving an oil car up into the roof of the tunnel. The plaintiff was in the caboose at the time of the collision and was carried forward in the wreckage and rendered unconscious. When he regained consciousness, he found himself on the top of a door on a level with the mouth of the tunnel and in the midst of wreckage. He crawled out on an oil car and from there to the ground. His left leg was so badly crushed that it became necessary to amputate it below the knee. From that and other injuries received at the time he was in the hospital for a greater part of two years.

At the summit that morning two engines and a caboose belonging to the defendant were coupled together as a train. The engines were numbered 781 and 784; No. 781 being in the lead. The train dispatcher issued an order that these two engines and caboose should go down the road as a train to Kern Junction near Bakersfield as extra No. 781. Under the rules of practice of the road relating to the movement of trains, the leading engine holds the orders of the train dispatcher, and the train, when an extra, takes its number from the number of the engine. After this train had been made up in the order stated, with a conductor in the employ of the defendant in charge, the train dispatcher issued a supplemental order, which was delivered to the conductor and to the engineer in charge of engine No. 781, to couple to engine No. 2245, belonging to the Southern Pacific Company, and to take it to Kern Junction. To avoid the delay in switching, this last engine was placed at the head of the train. The number of the train was not, however, changed, but retained its number as extra No. 781. This train as thus made up had an engineer in the lead in the employ of the Southern Pacific Company, two engineers in the second and third engines, respectively, and a conductor and brakeman in the caboose in the employ of the defendant. Precisely when this train left the station at Tehachapi near the summit is not clear; but, as there is no controversy on that point, it is sufficient to say that it followed plaintiff's train down the mountain, and it will be assumed that it left Tehachapi after a proper interval. It was this following train that overtook and smashed into plaintiff's train in tunnel No. 4 near Bealville, where plaintiff received his injuries.

Thereafter plaintiff brought this action, alleging that by reason of the negligence of the defendant, its servants, agents, and employés, the engineers of said two locomotive engines and conductor in charge of said train and said caboose, said train was caused to come into violent collision with the caboose at the rear end of the train of which plaintiff had charge and in which he was stationed, whereby he was injured.

The defendant in its answer alleged that in the year 1899 the Southern Pacific Company had granted to the defendant a license or privilege authorizing the defendant to run and operate engines, cars, and trains over said line of railway between Mojave and Bakersfield upon condition that the operation and movement of all such engines, cars, and trains to be operated over said line of railway by the defendant should be subject to the immediate direction, government, and superintendence of said Southern Pacific Company through its agents, and that since the year 1899 defendant had been engaged in running and operating certain of its cars, engines, and trains over said line of railway in pursuance of said license, privilege, and arrangement, and not otherwise. Defendant admitted that the train referred to in the complaint as

having collided with the train in charge of the plaintiff consisted of three steam engines coupled together and drawing a caboose, or way car, and admitted that the whole of said train excepting the forward locomotive was owned by the defendant; alleged that the forward locomotive was owned and in the possession of the Southern Pacific Company, and was at the time of the collision controlled, operated, and directed solely by the last-named company and its agents and servants; and that the train while running over said line of railway upon said occasion was under the sole direction, control, and government of the Southern Pacific Company and its agents; and denied that the collision or injuries suffered on that occasion were in any manner caused by any negligence on the part of the defendant or any or either of its servants, agents, employes, engineers, or conductors; charged that the plaintiff was guilty of carelessness, negligence, and a failure to exercise ordinary care in respect to properly guarding and protecting the train in his charge against the danger of collision with other cars, engines, and trains being operated over said line of railway at that time, and that such negligence, carelessness, and a failure to exercise ordinary care on the part of the plaintiff was the proximate cause of such collision and each and all of the injuries sustained by the plaintiff on such occasion.

Upon a trial of the case before a jury, at the conclusion of the evidence for the plaintiff the defendant moved for a nonsuit on the grounds: First, that the train of engines and caboose and everybody on it from the time the train left the summit until the collision was under the control and direction of the Southern Pacific Company and not of the defendant; and, second, on the ground that no negligence had been shown on the part of the defendant. The court granted the motion on the first ground and entered a judgment in favor of the defendant. The case was brought to this court by the plaintiff upon a writ of error, and the judgment reversed and remanded for a new trial. *Hamble v. Atchison, T. & S. F. Ry. Co.*, 164 Fed. 410, 92 C. C. A. 147, 22 L. R. A. (N. S.) 323. In the opinion of this court it was held that the defendant running a train over the track of the Southern Pacific Company under a contract that they would obey the orders of the train dispatcher of the Southern Pacific Company did not relieve the defendant from liability for injuries to the plaintiff caused by the negligence of its employes operating the train and which was in no way attributable to an order of the train dispatcher. The court further held that the liability of the defendant was not affected by the fact that one of the engines attached to the train belonged to the Southern Pacific Company; that, notwithstanding the presence of this engine, the train remained in the control of the conductor, an employe of the defendant, and it was by reason of his negligence the collision occurred. Upon the second trial the evidence on the part of the plaintiff was substantially the same as at the first trial.

On the part of the defendant, in addition to other evidence, a stipulation was introduced in evidence that certain witnesses, if present, would testify that:

Under the agreement by which this track was jointly used by the Southern Pacific and defendant, the Southern Pacific Company had sole control of the movement of trains on the said track; that the employes of the defendant were required to take an examination for fitness before going upon the same by an officer of the Southern Pacific Company, and that the Southern Pacific Company reserved in said agreement the right at any time to bar either temporarily or permanently any employe of the defendant from working at all upon or over said track.

It was agreed that the word "movement," as used in the first part of this stipulation, meant "movement of trains under the orders of the train dispatcher."

The court instructed the jury, among other things, that the conductor and other employes of the defendant on the train which collided with the Southern Pacific train of which plaintiff was conductor were defendant's servants, and that their negligence, if they were negligent, was the negligence of the defendant. In connection with this instruction, the court read that part of the opinion of this court in the former case upon that question. To this and to other portions of the instructions given by the court exceptions were taken by

the defendant. It also excepted to the refusal of the court to give certain requested instructions and to the admission and rejection of certain testimony. The jury returned a verdict for the plaintiff. The case is here upon a writ of error sued out by the defendant.

E. W. Camp, A. H. Van Cott, and U. T. Clotfelter, for plaintiff in error.

Glen Behymer, Mattison B. Jones, and William Freeman, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

MORROW, Circuit Judge (after stating the facts as above). We find nothing in the testimony on the second trial of this case calling for any change or modification of the opinion of this court upon the former writ of error. Nor do we find that the evidence calls for the application of any other or different rule of liability than there announced. *Hamble v. Atchison, T. & S. F. Ry. Co.*, 164 Fed. 410, 92 C. C. A. 147, 22 L. R. A. (N. S.) 323. The fact that the Southern Pacific Company under the joint-track agreement retained full control of the movement of trains over the joint track, that the employes of the defendant were required to take an examination for fitness before going upon the same by an officer of the Southern Pacific Company, and that the Southern Pacific Company reserved in said agreement the right at any time to bar either temporarily or permanently any employe of the defendant from working upon or over said track, did not relieve the defendant from liability for the negligence of its servants in running trains over this track. The defendant was required to move its train from station to station on this track under the orders of the Southern Pacific train dispatcher, and if by reason of such orders a collision should occur between the defendant's train and another, attributable to the negligence of the train dispatcher, the defendant would not be liable for the damages resulting therefrom. But if a collision occurs which cannot be attributed to the orders of the train dispatcher, but to the negligence of the defendant's employes, the defendant cannot escape liability. We can add nothing to what has been said upon this subject in the former opinion of this court, and as there is no evidence tending in any degree to show that the collision was caused by any order or omission of the train dispatcher, or was the result of any order or omission growing out of the general control over the track exercised by the Southern Pacific Company, there was, in this aspect of the case, no question for the jury. It was a judicial question and so properly determined by the court.

The material question to be determined is whether there was competent evidence before the jury tending to show that the defendant's servants were negligent in running the train of engines and caboose through the block in which the collision occurred.

It is contended on the part of the defendant that, if the cause of the collision was the running of this train at a high rate of speed and in disregard of all signals of danger, then it was the fault of the en-

gineer in the employ of the Southern Pacific Company in charge of the Southern Pacific engine in the lead whose negligence caused the collision; that neither of the engineers in charge of defendant's engines nor the conductor in the employ of the defendant in charge of the train had any duty to perform with respect to the speed of the train or the signals of danger displayed by the brakeman of plaintiff's train in front, or by the semaphore of the block signals showing danger because of the presence of that train in the block. The defendant, in support of this contention, introduced in evidence rule 45 of the block signal system of rules of the Southern Pacific Company, providing that:

"The signal must be observed by the engineman when the train enters and by the trainmen when the rear of the train passes out of the block."

The rule refers to the signal displayed by the semaphore under the system of block signals. Under this rule it is the duty of the engineer to notice the signal upon entering a block for the purpose of ascertaining if the block is clear. If it is clear, he can proceed; but, if it is not, it is his duty to bring his train to a stop and hold it until the block is cleared. Upon passing into a block, the forward wheels of the pony truck of the engine passing over the tracks turns the semaphore signal at the entrance of the block to danger, where it remains until the last two wheels of the last car in the train passing over the end of the rails at the other end of the block turn the signals back, showing that the block is clear. This signal showing danger is a warning to a train in the rear to keep off the block until it shows clear. In other words, it protects the rear end of the train from collision from an overtaking train, and it is the duty of the trainmen in the rear to see that the semaphore signal which has been turned to danger by the engine of that train stands at danger when the rear of the train passes that point. But if the engine has passed into a block and has turned the signal showing that the train is in that block, it ceases to furnish information of the condition of the block in front of the train, and the trainmen cannot know its condition, unless, like the engineer, they had seen the signal before the train entered the block. This, in case of a very long train, would probably be impracticable for the conductor in the rear of the train; but it is by no means impracticable for a conductor having charge of a short train. These semaphores are large and conspicuous, and their position can be seen at a considerable distance. In this case the evidence tends to show that the semaphore stood at danger before the train, consisting of three engines and a caboose, entered the block, showing that there was a train already in the block. This train of engines and caboose was a short train, and there is no apparent reason why the engineers on the second and third engines or the conductor seated in the cupola of the caboose could not have seen the position of the semaphore upon entering the block, as well as the engineer on the first engine, and been warned that there was a train in that block. But aside from any duty these employes of defendant may have had in that respect, the important fact to be noticed is that, while the Southern Pacific engineer was in the lead and in charge of the air brakes, defendant's conductor was in

charge of the train. He knew that there was a train ahead of him. The track was crowded with trains. The grade was steep, and the tunnels and curves numerous, requiring such special care and attention on the part of engineers, trainmen, and conductor as was commensurate with the increased danger of such a track. The plaintiff testified that he had observed that there were many duties for trainmen not in the rule book. "One of them," he says, "is a rule that all trainmen of all grades shall be generally watchful as to the safety of trains." This is obviously a necessary rule applicable at all times and places, and particularly on such a track as we have in this case.

Rule 75 of the Book of Rules and Regulations required that "conductors and brakemen of all trains when meeting or passing or leaving or approaching a station must be on the lookout for signals and be prepared to do anything required for safety and dispatch." The evidence shows that this train was approaching and within a half a mile of the station at Bealville when it passed the cautionary signal about 200 or 250 feet east of tunnel No. 4. The conductor in charge of the train testified that this signal was visible from the mouth of tunnel No. 5. If it was yellow it meant to stop. If it was green it meant to go ahead. "The caution is to put the train under complete control. The light, when I saw it, was yellow."

There was evidence that this train was going about 30 miles an hour when it passed this point. The extent and character of the wreckage caused by the collision was itself, under the circumstances, evidence that the train was descending at a dangerous rate of speed, and this of itself was evidence of negligence on the part of the conductor in charge of the train. The conductor says:

"I could have stopped it by opening the conductor's valve in the caboose. That is the method provided so the conductor can stop it. That would have set the brakes and stopped the train."

Why did he not do it? This is his explanation:

"From the time I came within range of vision of this block signal until the time of the collision, I was sitting in the cupola of the caboose with my brakeman. He was on the other side of the cupola. I didn't see that signal until just as it passed by the cupola of the caboose. * * * Just as we came out of tunnel No. 5, I reached out the side window and caught the snow off the front one. There was some snow. It had been storming. It was snowing at this time slightly. I pulled this snow in the window and threw it at my brakeman over on the other side. If there had been any fuses or caution signals on that track burning as I emerged from tunnel No. 5, and if I had been observing, I think I could have seen them. I didn't see the fuse until just as we went by it. After I threw this snow at my brakeman, I turned and looked out of the window, and I see this fuse."

In this state of the evidence, the question whether the defendant's employes were negligent in running this train into collision with the train on which plaintiff was riding, and whether this negligence was a proximate cause of the collision, were clearly questions to be submitted to the jury under proper instructions.

It is next contended that the court erred in refusing to receive and consider certain special instructions on behalf of the defendant; such refusal being based upon the ground that the requested instructions

had not been handed to the court within the time provided in a rule of the court providing that:

"Any special charges or instructions asked for by either party must be presented to the court in writing directly after the close of the evidence and before any argument is made to the jury, or they will not be considered."

The requested instructions were not presented at the close of the evidence, but after the close of the argument and the court was about to instruct the jury. The Circuit Court has power to make such rules regulating its "practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings." Rev. St. § 918 (U. S. Comp. St. 1901, p. 685). The rule requiring instructions to be presented to the court at the close of the evidence and before argument is of that character. It is a general rule and has been found useful in practice. Its enforcement was in the discretion of the court. We do not think the court abused its discretion in enforcing it in this case. The court correctly instructed the jury upon all the matters contained in the special instructions which the jury was properly required to consider. To these instructions no exceptions were taken. The defendant was, therefore, in no way prejudiced by the refusal of the court to give the special instructions in the language requested.

The remaining assignments of error are based in one form or another upon the questions we have already discussed. We do not think they call for further discussion either in relation to the admission or rejection of testimony, or in the instructions to the jury.

The judgment of the court below is affirmed.

MILLS v. SMITH

(Circuit Court of Appeals, Ninth Circuit. February 7, 1910.)

No. 1,763.

1. STATUTES (§ 159*)—REPEAL BY IMPLICATION—GENERAL RULES OF CONSTRUCTION.

Where two acts of different dates cover the same subject-matter, the later will operate as a repeal of the earlier only where that intention is plainly manifest and unmistakable, and it is the duty of a court to adopt any reasonable construction which will give effect to both.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 229; Dec. Dig. § 159.*]

Repeal of statutes by implication, see note to First Nat. Bank of Butte v. Weidenbeck, 38 C. C. A. 136.]

2. CHATTEL MORTGAGES (§ 3*)—REQUISITES AND VALIDITY—WASHINGTON STATUTE.

The provisions of Ballinger's Ann. Codes & St. Wash. § 4558 (Pierce's Code, § 6531), requiring chattel mortgages to be acknowledged and be accompanied by an affidavit of good faith by the mortgagor, were not repealed by Act March 13, 1899 (Laws Wash. 1899, c. 98), which substitutes the filing and indexing of such mortgages for their recording required by such section, but contains no provision changing the requirements as to their execution.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 3.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. STATUTES (§ 142*) — AMENDMENT — CONSTITUTIONAL PROVISIONS — IMPLIED AMENDMENT.

Const. Wash. art. 2, § 37, which provides that "no act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length," applies only to direct amendment by changing the language of a statute, and an act on the same subject-matter may have an amendatory effect by implication on a prior statute without being an amendatory statute within such provision.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 210; Dec. Dig. § 142.*]

Petition for Revision and Appeal from the District Court of the United States for the Northern Division of the Western District of Washington.

In the matter of the Wolverine Lumber Company, bankrupt. Appeal and petition for revision by Edward Mills, trustee, to review an order sustaining the validity of a mortgage by the bankrupt to Everett Smith. Order reversed.

The trustee in bankruptcy of the Wolverine Lumber Company, a bankrupt, brings before this court, both by petition for revision and appeal, the order of the district judge modifying an order made by the referee in bankruptcy respecting the claim of the respondent and appellee. On or about June 24, 1907, the corporation by its president and secretary signed a mortgage covering all the property of the corporation to secure a pre-existing indebtedness. The mortgage was in form a combination real and chattel mortgage. A certificate of acknowledgment was affixed to the mortgage, but both the referee and the district judge found that the president of the corporation never appeared before a notary public to acknowledge the same. About a month after the date of the mortgage, an affidavit of good faith, as required by section 4558, Ballinger's Codes of Washington (Pierce's Code, § 6531), was prepared and mailed by the mortgagee to the president of the corporation, who affixed his signature thereto and returned it by mail to the mortgagee, and a jurat was affixed thereafter thereto by a notary public. The affidavit was then attached to the mortgage. These facts were also found by the referee and by the district judge. In the referee's opinion it is said: "It is conceded in the briefs for the claimant that, if the mortgage was accepted and placed upon record without the affidavit of good faith, it is void as against creditors, and for the greater reason it must be held that, if such mortgage was not acknowledged by the officers of the corporation, it is without force." The conclusion reached by the referee was that the mortgage was void and without force as against the creditors represented by the trustee, and he therefore allowed the claim as an unsecured claim. Upon a petition for review the district judge modified the order of the referee, holding the instrument void as a mortgage of real estate, but valid as a chattel mortgage, upon the ground that section 4558 of the Code had been repealed by the act of the Legislature approved March 13, 1899 (Laws Wash. 1899, c. 98). Section 4558 provides as follows: "A mortgage of personal property is void as against creditors of the mortgagor, or subsequent purchasers and incumbrances of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor, that it is made in good faith, and without any design to hinder, delay or defraud creditors, and it is acknowledged and recorded in the same manner as is required by law in conveyance of real property." The act approved March 13, 1899, is entitled "Chattel mortgages may be filed," "An act relating to chattel mortgages and the filing thereof, and repealing of laws in conflict therewith," but there is in the act itself no repealing clause whatever.

The portions of the act pertinent to the question here involved are the following:

"Section 1. Mortgages may be made upon all kinds of personal property, and upon the rolling stock of a railroad company and upon all kinds of machinery, and upon boats and vessels, and upon portable mills, and such like

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

property and upon growing crops and upon crops before the seed thereof shall have been sown or planted: Provided, that the mortgaging of crops before the seed thereof shall have been sown or planted, for more than one year in advance, is hereby forbidden, and all securities or mortgages hereafter executed on such unsown or unplanted crops are declared void and of no effect, unless such crops are to be sown and planted within one year from the time of the execution of the mortgage.

"Sec. 2. Every such instrument within ten days from the time of the execution thereof shall be filed in the office of the county auditor of the county in which the mortgaged property is situated, and such auditor shall file all such instruments when presented for the purpose, upon the payment of the proper fees therefor, indorse thereon the time of reception, the number thereof, and shall enter in a suitable book to be provided by him at the expense of his county, with an alphabetical index thereto, used exclusively for that purpose, ruled into separate columns with appropriate heads: 'The time of filing,' 'Name of mortgagor,' 'Name of mortgagee,' 'Date of instrument,' 'Amount secured,' 'When due,' and 'Date of release.' An index to said book shall be kept in the manner required for indexing deeds to real estate, and the county auditor shall receive for the services required by this act the sum of fifteen cents for every instrument, and the moneys so collected shall be accounted for as other fees of his office. Such instrument shall remain on file for the inspection of the public.

"Sec. 3. Every mortgage filed and indexed in pursuance of this act shall be held and considered to be full and sufficient notice to all the world, of the existence and conditions thereof, but shall cease to be notice, as against creditors of the mortgagors and subsequent purchasers and mortgagees in good faith, after the expiration of the time such mortgage becomes due, unless before the expiration of two years after the time such mortgage becomes due, the mortgagee, his agent or attorney, shall make and file as aforesaid an affidavit setting forth the amount due upon the mortgage, which affidavit shall be annexed to the instrument to which it relates and the auditor shall indorse on said affidavit the time it was filed."

Section 5 prescribes the form of a chattel mortgage for \$100 or less. It was the opinion of the district judge that the act of 1899 was a revision of the chattel mortgage law previously in force, and that it must be regarded as a complete substitute therefor, "the effect of it being to repeal the statutory requirements as to the acknowledgment and affidavit of good faith."

J. Y. Kennedy and L. A. Merrick, for appellant.

Jay C. Allen, Smith & Cole, and Shorett & Shorett, for appellee.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). Upon a careful consideration of the question, we are unable to agree that the purpose and effect of the act of 1899 was to repeal the statutory requirement that a chattel mortgage be acknowledged and accompanied by an affidavit of good faith. Where two acts of different dates cover the same subject-matter, the later will operate as a repeal of the earlier only where that intention is plainly manifest and unmistakable, and it is the duty of a court to adopt any reasonable construction which will give effect to both acts. In *Wood v. United States*, 16 Pet. 363, 10 L. Ed. 987, Mr. Justice Story said of repeal by implication:

"It is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it, for they may be merely affirmative or cumulative or auxiliary, but there must be a positive repugnance between the provisions of the new law and those of the old; and even then the old law is repealed by implication only pro tanto to the extent of the repugnance."

Section 4558 of the Code is not mentioned in the act of 1899. That section provides for the affidavit of good faith, the acknowledgment and the recordation of chattel mortgages. The act of 1899 provides for the filing of chattel mortgages within 10 days from the execution thereof, and the indexing of the same, and declares that such filing and indexing shall be considered sufficient notice to the world. It does not deal at all with the subject of the execution or authentication of chattel mortgages. Its purpose was to dispense with the necessity of recording chattel mortgages and to substitute a different registration therefor, leaving it optional with the mortgagee to record mortgages of \$300 and more in accordance with the prior act in addition to filing them in accordance with the new. As we construe it, it does not dispense with the existing requisites of the execution, to wit, the affidavit of good faith and the acknowledgment. It is not to be supposed that the Legislature would repeal the statute requiring that a chattel mortgage shall be accompanied by an affidavit of good faith, a statute based upon a sound principle of public policy, and in existence for many years, without clearly expressing that intention. Here there is not only an absence of such intention expressed or implied, but there is in the later act evidence that the Legislature had in mind the continued existence of the former act. It is shown by the language of section 6 of the act of 1899, which provides:

"A mortgage given to secure the sum of \$300, or more, exclusive of interest, costs and attorney's fees or counsel fees, may be recorded and indexed with like force and effect as if this act had not been passed, but such mortgage, or a copy thereof must also be filed and indexed as required by this act."

Also by an act passed and approved on the same day (Laws Wash. 1899, c. 72), entitled, "An act relating to the filing and recording of mixed chattel and real estate mortgages in the state of Washington, and curative provisions relative thereto," the first section of which provides that mortgages on real and personal property when acknowledged in the manner provided by law may be recorded as a real estate mortgage, and that the original thereof or a certified copy may be filed, and upon such filing shall constitute notice. The second section is partly curative, but refers also to mortgages to be recorded in the future. It provides as follows:

"In case any mortgage covering mixed real estate and personal property has heretofore been or may hereafter be recorded in the record of mortgages of real estate, or in the record of chattel mortgages, and in case the affidavit required by law to be attached to chattel mortgages was not or shall not be recorded as a part of said chattel mortgage but has been or shall be afterwards recorded upon a separate page of said record and a reference made at the place of the original record of said real estate or chattel mortgage to the said affidavit stating the volume and page on which the same may be found, said record shall constitute notice from and after the date of the filing of said affidavit, the same as if the affidavit and mortgage had been recorded together at the same time and at the same place."

That the Supreme Court of Washington has entertained the view that the requirement of the earlier law as to the affidavit of good faith and acknowledgment of chattel mortgages was not repealed by the later act is indicated by its language in two decisions. In *Hicks v. National Surety Co.*, 50 Wash. 16, 96 Pac. 515, 126 Am. St. Rep. 883,

a case in which was involved the validity of a bill of sale intended as a mortgage, executed on January 25, 1907, the court said:

"A bill of sale given as security must be acknowledged and accompanied by the affidavit of good faith required by Ballinger's Ann. Codes & St. § 4558, or the same will be void as against creditors," etc.

It is true that in the opinion no discussion was had of the effect of the act of 1899 on the prior act, but it is not to be presumed that the later act was overlooked. In the case of *Averill Machinery Co. v. Allbritton*, 51 Wash. 30, 97 Pac. 1082, the court expressly referred to the later act. The mortgage involved was made on September 21, 1903. The court said:

"The mortgage was duly executed as a chattel mortgage, with necessary acknowledgment and accompanying affidavit that it was made in good faith, without intent to defraud creditors. It was filed in the auditor's office of Lewis county on the same day and was duly indexed by the auditor as provided by law. * * * The latest statute governing the recording of chattel mortgages, as far as we are advised, is to be found in chapter 98 of the Laws of 1899."

It is to be inferred from this language that the court understood section 4558 to be still in force as to its requirement that there be an acknowledgment and affidavit.

In holding that the act of 1899 was intended to be a repeal of the prior law relating to chattel mortgages, and a substitute therefor, the court below was influenced by the constitutional provision of the state of Washington (article II, § 37), which provides:

"No act shall ever be revised or amended by mere reference to its title, but the act revised, or the section amended shall be set forth at full length."

Giving effect to this provision, the conclusion was reached that the later statute abrogates the older statute, whether the Legislature intended to do so or not. But it has generally been held in states in which the same provision has been adopted, and we know of no decision to the contrary, that statutes which amend or repeal by implication prior statutes, in whole or in part, are not within the constitutional prohibition; that the prohibition means only that a prior statute shall not be amended by adding to or striking out certain words or by omitting certain language and inserting certain other words in lieu thereof. *Fleischner v. Chadwick*, 5 Or. 152; *Grant County v. Sels*, 2 Or. 243; *People v. Mahaney*, 13 Mich. 481; *Lehman v. McBride*, 15 Ohio St. 573; *Maguire v. Draper*, 47 Mo. 29; *Spencer v. State*, 5 Ind. 41; *Branham v. Lange*, 16 Ind. 497; *Evernham v. Hulit*, 45 N. J. Law, 53; *Davis v. State*, 7 Md. 151, 61 Am. Dec. 331; *State v. Cain*, 8 W. Va. 720; *People ex rel. v. Wright*, 70 Ill. 388; *Anderson v. Commonwealth*, 18 Grat. (Va.) 295; *State ex rel. v. Rogers*, 107 Ala. 444, 19 South. 909, 32 L. R. A. 520; *Hellman v. Shoulters*, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057; *Little Rock v. Quindley*, 61 Ark. 622, 33 S. W. 1053; *Clark v. Finley*, 93 Tex. 171, 54 S. W. 343; *State ex rel. v. Hocker*, 36 Fla. 358, 18 South. 767. In *Re Dietrich*, 32 Wash. 471, 73 Pac. 506, the court said:

"That a statute may in its effect modify or be in conflict with a former one because it deals with the same subject-matter does not necessarily make it an

amending statute within the meaning of the constitutional provision invoked here. That provision was evidently intended to prevent the evil of seeking to amend a former law in such manner that the entire law upon the subject treated by the amendment cannot be known without reference to the former law. It was therefore expressly provided that, in the case of such an amendment, the former law as amended shall be fully set out, in order that the full force and significance of the amendment may be at once seen and understood without reference to the former act. But, when an act is independent and complete in itself, though it has the effect to modify a former law, this constitutional provision or a similar one is held in many states not to apply, and such statutes are held not to be within the mischief intended to be remedied."

And the court quoted at length from the opinion of Judge Cooley in *People v. Mahaney*, in which it was held that a law which does not assume in terms to revise, alter, or amend any prior act or section of an act, but has an amendatory effect by implication, does not conflict with the constitutional prohibition.

As the case as it was presented in this court involved questions of fact in addition to the questions of law which have been discussed, it was properly brought here by appeal. The order of the district judge is reversed, and the cause is remanded, with instructions to affirm the order of the referee.

NOTE.—The following opinions were delivered by Hanford, District Judge, in the court below:

HANFORD, District Judge. The mortgage which is the subject of controversy between the trustee and Everett Smith purports to incumber real estate and create a lien upon personal property. As against creditors of the bankrupt corporation represented by the trustee, the court confirms the decision of the referee and adopts his memorandum decision to the extent of holding that as an incumbrance of real estate the mortgage is void, because it was not acknowledged by the president of the bankrupt corporation in compliance with the requirements of the statutes of this state relating to real estate mortgages.

Section 37 of article 2 of the Constitution of the state of Washington provides that: "No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length." In view of the constitutional provision above quoted, the court holds that the chattel mortgage law of this state enacted in the year 1899 (*Laws Wash.* 1899, p. 157, c. 98; *Pierce's Code* [Ed. of 1905] § 6549 et seq.), being a revision of the chattel mortgage law previously in force, must be regarded as a complete substitute therefor; the effect of it being to repeal the statutory requirements as to the acknowledgment and affidavit of good faith. In *re Buelow* (D. C.) 98 Fed. 86; *Copland v. Pirie*, 26 Wash. 481, 67 Pac. 227, 90 Am. St. Rep. 769; 23 Am. & Eng. Enc. of Law (2d Ed.) 282, 283.

I have carefully weighed a suggestion made to me to the effect that, inasmuch as the act of 1899 purports to change the statutory law of the state, and does not expressly repeal certain provisions of the previously existing statute, nor declare an intention to supersede it entirely by the enactment of a substitute, it is not clearly apparent that the revised law has been "set forth at full length" as the Constitution requires; therefore, it is repugnant to the Constitution and void. In that view, all existing chattel mortgages in this state, which, in reliance upon the act of 1899, have been filed and indexed, but not recorded in the manner required for the recording of conveyances of real estate, are invalid to the extent declared by section 6531 of *Pierce's Code* (*Balinger's Ann. Codes & St.* § 4558). Without a firm and mature opinion requiring it to do so, a court should not assume the grave responsibility of declaring a statute to be void, and should be especially cautious when its decision will be a surprise to the business community and have a tendency to unsettle property rights and encourage dishonest litigation. I am convinced that the act

of 1899 and the previously existing chattel mortgage statute cannot, consistently with the Constitution, be blended and construed as one law, nor can both be upheld as separate acts not in conflict with each other. On the other hand, I find no serious obstacle barring a reasonable conclusion that the act of 1899 is what its title would signify if there were no other statute relating to chattel mortgages; that is to say, it is the statute, and the only statute, relating to that subject. The title of the act does indicate a purpose to repeal only conflicting laws; but the act contains no repealing clause whatever, so that part of the title is surplusage.

There being no special formalities, made essential to the validity of a chattel mortgage by any statute, I hold that a written instrument, signed by the president and secretary and authenticated by the seal of a corporation, which contains the names of the contracting parties, a description of the property mortgaged, and an accurate statement of the terms and conditions agreed to, requires only to be filed in the office of the county auditor and indexed as prescribed by the statute to make it valid and binding upon the mortgagor and his creditors. Although it was given to secure an antecedent debt, there was at the time of its execution no contemplated suspension of business on the part of the mortgagor, and, in fact, the credit of the corporation was strengthened for the time being, and it was enabled to continue in operation as a going concern with beneficial results to those who were then creditors other than the mortgagee. It has been assigned in writing to Everett Smith, and he has a lawful right to sue in his own name for the collection of the debt secured thereby.

The court directs that an order be entered, modifying the order made by the referee in accordance with this memorandum.

On Petition for Rehearing.

One of the grounds for a rehearing alleged in the trustee's petition is that: "The testimony shows that there were persons who became creditors of the bankrupt subsequently to the 24th day of June, 1907, and prior to the 27th day of July, 1907." If this were a true statement, it would be necessary for the court to make a ruling upon the question as to the validity of a chattel mortgage for an antecedent debt given by an insolvent corporation. It is assumed by the court that the mortgage became effective, against subsequent creditors, on the day on which it was filed for record in the office of the county auditor, and there are no others to be considered. The evidence contradicts the petition for a rehearing, and the court finds that the mortgage, when given, was not prejudicial to creditors who were creditors at the time of the initiation of the proceedings in this case.

Attorneys for the trustee, in combating the decision of the court, have cited the case of *Hicks v. National Surety Co.*, 50 Wash. 16, 96 Pac. 515, 126 Am. St. Rep. 883. The opinion of the court in that case contains the following dicta: "A bill of sale given as security must be acknowledged and accompanied by the affidavit of good faith required by Ballinger's Ann Codes & St. § 4558 (Pierce's Code, § 6531), or the same will be void as against creditors of the vendor or subsequent purchasers and incumbrancers of the property for value and in good faith." I do not find in the report of the case any reference to the statute enacted in the year 1899, and it is quite obvious that the lawyers who presented that case to the Supreme Court neglected to call attention to the later statute, and that the court did not intentionally or consciously express any opinion as to its validity or effect. I cannot decide this case contrary to my own opinion of the law, on a theory that this court is fettered by a decision of the state court in which the vital question was not considered.

Another statute enacted by the Legislature of 1899, which was approved the same date as the new chattel mortgage law under consideration, provides that any mixed mortgage upon real estate and personal property may be recorded as a real estate mortgage when acknowledged in the manner provided by law, and that the original instrument, or a certified copy thereof, may be filed, and that such record and filing shall constitute notice of the lien provided for by said mortgage. The second section of the act, when considered in connection with the title of the act, appears to have been designed as a curative statute, applicable to past and future transactions, and to make an effective notice by

separately recording affidavits required by law to be attached to chattel mortgages. Pierce's Code (1905 Ed.) §§ 6545, 6546. The first section makes a plain distinction with respect to real estate and personal property covered by a mixed mortgage, and appears to require an acknowledgment and recording of the instrument to constitute notice of a lien upon real estate, and that the filing of the instrument, or certified copy thereof, shall be sufficient to give notice of the lien upon personal property, and the acknowledgment of the instrument is merely a prerequisite to the recording of the instrument as a real estate mortgage. Neither the acknowledgment, recording, nor filing are declared to be essential to the validity of the contract, but are requisite to constitute constructive notice of the existence of the lien. The second section is permissive, and not mandatory, as it prescribes no penalty or deprivation of rights for failure to attach an affidavit or have it recorded.

The most that can be claimed for this statute is that it indicates that the Legislature did not intend to abrogate the previously existing chattel mortgage law. I hold, however, that a specific intent to repeal the prior law is not essential to the accomplishment of that result. If the new law is not void, the constitutional provision prohibiting successive statutes covering the same subject abrogates the older statute, whether the Legislature intended to do so or not.

It is said that there is no evidence before the court that the mortgage was filed and indexed in the manner required by the statute. Without any record or filing, acknowledgment, or affidavit, the mortgage is a valid contract as between the parties, and, until bona fide creditors show affirmatively that the requirements of the law have not been complied with, the court will not presume that their rights are superior to the rights of the mortgagee. The evidence in the case does show that the mortgage was filed in the office of the county auditor of the county in which the property was situated, and there is a legal presumption that the county auditor performed his duty in the matter of indexing.

I find no ground for reversing the decision heretofore announced.

KERR et al. v. SCHWANER.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1910.)

No. 1,747.

1. SHIPPING (§ 181*)—DEMURRAGE—CONSTRUCTION OF CHARTER PARTY.

A provision of a charter party for the carriage of a "full and complete cargo of wheat in sacks," to be loaded by the charterers within lay days fixed, that lay days should not be counted during any time the bringing of the cargo to the port of loading by rail should be delayed by railway accidents, "or any other hindrance * * * beyond the charterer's control," did not entitle the charterers to hold the vessel until the arrival of sufficient wheat of a particular kind was received, when they had sufficient of other kinds to load her within the time stipulated; but any delay on such account was at their risk as to the time to procure and load such cargo.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 589-592; Dec. Dig. § 181.*]

Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 342.]

2. SHIPPING (§ 181*)—DEMURRAGE—CONSTRUCTION OF CHARTER PARTY.

Under a charter of a vessel to carry a cargo of wheat to be loaded by the charterers within a time specified, which contained a provision that lay days for loading should not be counted during any time the bringing of the cargo to the port of loading was delayed by railroad accidents, or any other hindrance beyond the charterer's control, where the charterers

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

loaded only with a particular grade of wheat which they had with other grades stored on lines of a railroad company, they were not entitled to the benefit of such provision, on the ground that the company did not furnish sufficient cars to bring in that particular wheat within the time fixed by the charter, when their notice to the company was only to furnish cars generally, and it did furnish sufficient to bring in double the quantity required, but in part of different grades, which the charterers loaded on other vessels.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 589-592; Dec. Dig. § 181.*]

3. SHIPPING (§ 181*)—DEMURRAGE—CONSTRUCTION OF CHARTER PARTY—"RAINY DAYS."

A provision of a charter party for the carriage of a cargo of wheat to be loaded at Portland, Or., that "rainy days" should not be counted as lay days for loading, is presumed to have been made with reference to the established rule of that port and excludes only days on which, on account of rain and with reference to the facilities of the port in the way of covered docks, etc., for the protection of vessels while loading, cargo could not be safely and conveniently loaded.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 589-592; Dec. Dig. § 181.*]

For other definitions, see Words and Phrases, vol. 7, p. 5916.]

4. SHIPPING (§ 181*)—DEMURRAGE—CONSTRUCTION OF CHARTER PARTY—"HOLIDAYS."

A provision of a charter party that "holidays" should not be counted as lay days for loading must be construed in accordance with the presumed intention of the parties to exclude only such days as were holidays in the usual and ordinary sense, which were customarily observed by a cessation of work, and did not entitle the charterers to exclude a series of holidays subsequently appointed by the Governor on account of a financial panic for the sole purpose of deferring the maturity of financial obligations, and which were not observed, nor intended to be observed, by a cessation of labor or traffic.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 589-592; Dec. Dig. § 181.*]

For other definitions, see Words and Phrases, vol. 4, p. 3321.]

Appeal from the District Court of the United States for the District of Oregon.

Suit in admiralty, by J. H. Schwaner, as master of the steamship Tiberius, against Peter Kerr, Thomas Kerr, and Andrew Kerr, partners as Kerr, Gifford & Co. Decree for libellant, and respondents appeal. Affirmed.

For opinion below, see 170 Fed. 92.

The case comes here upon an appeal from the decree of the District Court in favor of the libellant for the sum of \$1,531.74, with interest and costs in a cause of demurrage by reason of the delay of the respondents in loading the German steamship Tiberius of Hamburg.

Teal, Minor & Winfree, for appellants.

Veazie & Veazie, for appellee.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

MORROW, Circuit Judge. The charter party in this case is dated October 3, 1907, and provides for a full and complete cargo (not ex-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ceeding what she can reasonably stow or carry) of wheat in sacks to be loaded at Portland, Or. The charter party contains the following provisions:

"8. Fourteen working lay days (Sundays, holidays, and rainy days * * * not to be counted as lay or working days), to commence twenty-four hours after the inward cargo and or ballast shall have been finally discharged, and the captain has given charterers written notice, accompanied by surveyor's certificate that his vessel is ready to receive cargo, are to be allowed charterers for loading at places as hereinbefore provided, but should the loading be completed in less time charterers have the privilege of detaining the vessel until the expiry of said lay days."

"14. It is agreed that for each and every day's detention or demurrage at the port of loading, by default of said parties, of the second part, or their agents, fourpence per net register ton, or its equivalent, per day shall be paid day by day, by said parties of the second part, or their agent, to said party of the first part or his agent.

"15. Lay or working days shall not count at ports of loading, during any time when the supply or loading of stiffening, or the supply or bringing by rail, craft, or otherwise, to port of loading or alongside the vessel, or the loading of the cargo, or intended cargo, or any part thereof, is delayed by * * * holidays (ecclesiastical or civil), railway accidents or impediments, or any other hindrance, of whatsoever nature beyond the charterer's control."

The Tiberius arrived at Portland on the 7th day of November, 1907, and at 9 a. m. on Monday the 11th of November, 1907, libellant, as master of the Tiberius, gave the respondents notice, accompanied by the certificate of the competent surveyor selected by the respondents, that the vessel was ready to take in cargo under the terms of the charter party. Lay or working days for loading commenced to run 24 hours after the service of the notice, or on Tuesday morning, November 12th. Excluding Sundays, the 14 lay or working days expired on Wednesday, November 27th, unless extended by some provision of the charter party. The vessel was not loaded until the afternoon of December 6th, or nine days after the expiration of the period of 14 days just stated. The respondents refusing to pay demurrage on this delay, the libellant brought this suit to recover from respondents demurrage for nine days at the rate of £45 1s., sterling, equal to \$218.82, United States gold coin, amounting to the sum of \$1,969.38. The respondents resisted libellant's claim on the grounds that the respondents had ample cargo with which to load said steamship within the time specified, but that, without the negligence, fault, or connivance of the respondents, the railroad company failed and refused to furnish cars for the transportation of said cargo to the port of loading, although requested and importuned by respondents to furnish cars for the transportation of the cargo to said vessel; that the delay in transporting the cargo to the port of lading and the delay in loading said steamship were entirely beyond the control of respondents. The respondents claimed, further, that the 13th, 15th, 19th, 20th, 22d, 23d, 25th, 26th, and 27th days of November and the 4th and 6th of December, 1907, were "rainy days" within the meaning and intent of that term as contained in the charter party; and that each and all of the days intervening between the giving of said notice to respondents by the master of said steamship and the completion of the lading of said steamship were legal holidays duly proclaimed, published, and declared by the Governor

of the state of Oregon as legal holidays save and except the 5th, 6th, and 7th days of December, 1907.

It was stipulated between the parties that Thursday, the 28th day of November, was what is generally termed "Thansgiving Day," and was a legal holiday within the contemplation of the charter party in controversy and excluded from the count of lay or working days.

The court below found as a fact that from November 11th to November 27th, inclusive, more than sufficient wheat arrived at Portland for the loading of the *Tiberius* by the respondents; that there was no hindrance arising from dilatoriness on the part of the railway lines in delivering cargo sufficient to load the *Tiberius*; that two other ships, namely, the *British Monarch* and the *Borderer*, each of about the same tonnage as the *Tiberius*, were loaded ahead of the *Tiberius*, notwithstanding they arrived later. The court found that November 23, 1907, was a rainy day, and excluded that day from the count of lay or working days, as it did also Thanksgiving Day, or Thursday, November 28th, under the stipulation; but rejected the claim of respondents that the other specified days were rainy days, finding as a fact that such other days were not rainy days. The court also rejected the claim that the intervening days (other than Sundays and Thanksgiving) between Monday, November 11th, and Thursday, December 5th, were legal holidays. The court found that, excluding November 23d as a rainy day and November 28th as Thanksgiving, the ship had been detained seven days beyond the stipulated lay days, and thereupon entered a decree in favor of the libellant for the sum of \$1,531.74, with interest. *Schwane v. Kerr* (D. C.) 170 Fed. 92. The findings and decree of the court in rejecting respondents' defenses are assigned as errors.

There is no question but that sufficient wheat arrived at Portland for the loading of the *Tiberius* by the respondents during the actual lay or working days between November 11th and November 28th. The *Tiberius*, when finally loaded, carried 5,966 tons of wheat. The *British Monarch* arrived in Portland after the *Tiberius* and late in the day of November 7th, under charter to the respondents, and was loaded by them commencing November 11th and finishing November 14th. The *Borderer* arrived in Portland on November 11th, also under charter to the respondents, and her loading was finished by them on November 28th. A. Mann, shipping clerk for the respondents, was called as a witness by them, and testified that he was familiar with the movements of grain and the dates of charters and the loading and leaving of vessels loaded by respondents; that the respondents loaded 11,209 tons of wheat in the month of November, 1907; and that the vessels loaded were the *British Monarch* and the *Borderer*. The excuse given for the delay in loading the *Tiberius* is that the respondents determined on October 10, 1907, that they would load the *Tiberius* with a quality of wheat described as "No. 1 Blue Stem." The charter party was executed October 3, 1907. The cargo to be shipped on the vessel is there described as "a full and complete cargo (not exceeding what she can reasonably stow or carry) of wheat in sacks." The owner of the *Tiberius* did not agree that his vessel should be held for a cargo of "No. 1 Blue Stem Wheat," and it does not appear that he or his agents even knew that the vessel was being so held. His agreement was that

the vessel should carry a full and complete cargo of wheat in sacks. It was immaterial to him what quality or grade of wheat should be loaded on the vessel; but it was material to him when it should be loaded, and, when the respondents held the vessel for a special grade of wheat to be thereafter received, they did so at their own risk as to the time to procure and load such a cargo of wheat. But it appears from the evidence that no specific cargo of wheat was bought by the respondents for the Tiberius. Wheat of various qualities was purchased by them in the interior without regard to cargo shipments from Portland, and, when they called upon the railroad company to carry their wheat from such interior points to Portland, they did not specify any particular grade or quality of wheat to be carried. The request was that the railroad company should furnish cars for the transportation of wheat generally, and this they did, enabling respondents to load 11,209 tons of wheat on the British Monarch and the Borderer during the month of November. The cargo of the British Monarch consisted of No. 1 White Walla Walla, No. 1 Red Walla Walla, and No. 1 Blue Stem, about one-third of each. The several grades of wheat in the cargo of the Borderer is not stated, but is described simply as a superior grade of wheat. The failure of the railroad company to furnish as many cars in the aggregate for the transportation of all kinds of wheat in the month of November as they had furnished in the month of October, or afterwards in the month of December, does not excuse the respondents on the ground that the railroad company hindered and impeded them in loading this particular vessel with a cargo of wheat of a particular grade or quality. If the respondents had the ample cargo of wheat of particular quality with which to load the Tiberius within the time specified, as they say they did, they should have notified the railroad company to carry and deliver the particular quality of wheat that was to constitute that cargo from such places, and at such times as would enable them to load the vessel within the time limited in the charter party. Had they given such a notice, and the railroad company had then failed to transport such wheat to the place of loading, a different question could have been presented. But the respondents failed and neglected to give such a notice, and this neglect is sufficient, in our opinion, to deprive the respondents of any extension of the period for lay or working days on account of a delay or hindrance in the movement of cars claimed to have been beyond their control.

It is assigned as error that the court failed to find that November 19th, 20th, 22d, and 25th were rainy days. In paragraph 8 of the charter party it is provided that:

"Sundays, holidays and rainy days * * * not to be counted as lay or working days."

In paragraph 15 it is provided that:

"Lay or working days shall not count at ports of loading, during the time when * * * the loading of the cargo, or intended cargo, or any part thereof, is delayed by * * * rain."

It appears from the evidence that some rain fell on the days named, but not sufficient to have delayed or interrupted the loading of the vessel had the loading been in progress; but as the vessel was not being

loaded, and the loading was not in any respect delayed on that account, we may dismiss the excuse that the loading was delayed by rain and by reason thereof respondents entitled to have such days excluded from the count as lay or working days under paragraph 15 of the charter party. Were such days excluded from the count of lay or working days under paragraph 8? A provision of this identical character was contained in the charter party in *Balfour v. Wilkins*, 5 Sawy. 429, Fed. Cas. No. 807, and the question as to the meaning of the term "rainy days" as contained in the charter party was there fully considered, discussed, and determined with specific reference to lay days in the work of loading vessels at the port of Portland. The court there said:

"The burden of proof is upon the charterer to show that there were such days (rainy days). The parties are presumed to have had in mind the known condition of things at this port when the contract was made, and contracted with reference to it; for instance, that there were covered wharves here from which cargo could be, and commonly was, safely and conveniently loaded in all ordinary rainy weather. The phrase 'rainy day,' then, as used in this contract, and as both parties to it must have understood it, means a day on which cargo could not be safely and conveniently loaded at this port."

This decision was rendered in 1879, and the interpretation thus placed upon the term "rainy days" as used in a charter party for the port of Portland has never since been questioned. It will therefore be presumed that the term was used in this charter party as it had been defined by the court and had become recognized in referring to climatic conditions in the port. It appears from the evidence in this case that the dock where the *Tiberius* was loaded was a covered dock, and when it rains it is the custom for the stevedores to put up awnings running from the dock above the chutes to the vessel and over the hatchway, down which the grain is lowered to the hold so as to protect the cargo from the rain as the cargo is being loaded. The only exposure then is when the rain is accompanied by high wind that blows the rain under the awning. In such a case a wind-brake is erected to prevent the rain from being driven under the awnings. The testimony is to the effect that no attention whatever is paid to an ordinary rainy day in the loading of grain vessels in the harbor at Portland. This evidence is confirmed by the action of the respondents themselves in loading the *Borderer* and *Tiberius*. From a report of the Weather Bureau Station at Portland it appears that the rainfall, the greatest velocity, and average velocity of the wind in 24 hours, were as follows:

November 19th, rainfall, $70/100$ of an inch; greatest velocity of wind, 20 miles per hour; average hourly velocity of wind, 10.5 miles.

November 20th, rainfall, $41/100$ of an inch; greatest velocity of wind, 32 miles per hour; average hourly velocity of wind, 10 miles.

November 22d, rainfall, $50/100$ of an inch; greatest velocity of wind, 27 miles per hour; average hourly velocity of wind, 12 miles.

November 25th, rainfall, $48/100$ of an inch; greatest velocity of wind, 26 miles per hour; average hourly velocity of wind, 13.9 miles.

As the loading of the *Tiberius* did not commence until November 27th, neither the fall of rain nor the velocity of the wind prevented the loading of the vessel on those days. But if the loading of the vessel

had been in actual progress, could the loading have been safely and conveniently continued during those days? They did in fact load the Borderer on those days, and it appears that the Tiberius was being loaded on December 4th and December 6th. From a report of the Weather Bureau, it appears that the rainfall, greatest velocity of wind, and average hourly velocity on these days were as follows:

December 4th, rainfall, $\frac{27}{100}$ of an inch; greatest velocity of wind, 40 miles per hour; average hourly velocity of wind, 12.1 miles.

December 6th, rainfall, $\frac{52}{100}$ of an inch; greatest velocity of wind, 13 miles per hour; average hourly velocity of wind, 3.4 miles.

We are of opinion that, as the respondents were able to load the Borderer on the days named and the Tiberius on December 4th and 6th under the conditions of rain and wind prevailing during those days, they could have safely and conveniently loaded the Tiberius on the days claimed as rainy days in November, and that the court was right in holding that the November days named were not "rainy days" as that term is used in the charter party.

It is next contended by the respondents that all the days intervening between November 11 and December 5, 1907, were legal holidays and excluded from the count as lay or working days under the charter party. The word "holidays," like the term "rainy days," is used in paragraphs 8 and 15 of the charter party and in the same relation to other provisions of this section. As the loading of the vessel was not in any respect delayed by reason of these holidays, respondents' claim to have such holidays excluded from the count as lay or working days under paragraph 15 need not be further considered. Were they excluded under the provisions of paragraph 8? On the 28th day of October, 1907, the Governor of Oregon issued a proclamation in which it was recited that the banks of Oregon and of the West had large balances due them from banks in New York, Chicago, Boston, Philadelphia, St. Louis, St. Paul, Minneapolis, Omaha, and other Eastern cities, and because of the strained financial situation throughout the East the banks in said cities had refused to make shipments of coin or currency in payment of said balances to the banks of Oregon and other Western banks, and, as a result of the action of said Eastern banks, it was impossible for the banks of Oregon to continue in the exercise of their functions without great injury to the industries of the state. It was stated that, for the common good of the people of the whole state, it was necessary that a holiday be proclaimed in order that an opportunity might be afforded to the financial institutions of the state to procure from Eastern banks the balances then due them as stated in the proclamation. The Governor thereupon proclaimed the 29th, 30th, and 31st days of October and the 1st and 2d days of November, 1907, legal holidays, to the end that time and opportunity might be given to the banking institutions of the state to arrange for shipment of money then due them from banks of the Eastern states therein named, without which every industry of the state must suffer and the growth and development thereof be greatly retarded. And thereafter, beginning at midnight on the 2d day of November, 1907, the Governor duly issued a proclamation in substantially the same form as that of the proclamation of October 28th, declaring each and every subsequent day a legal

holiday up to the time of the departure of the *Tiberius* from the port of Portland, save and except that no such proclamation was issued with reference to the 5th, 6th, and 7th days of December, 1907.

When the charter party in this case was executed, did the parties to the contract have in view these holidays appointed by the Governor for the sole purpose of enabling the banks of the state of Oregon to bridge over a financial stress, and was it the purpose of the parties to the contract to exclude such days from the lay or working days designated for the loading of the vessel?

In *Nash v. Towne*, 5 Wall. 689, 699, 18 L. Ed. 527, the Supreme Court of the United States, speaking of the language of a contract relating to the sale and delivery of certain barrels of flour, said:

"Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described."

In *Merriam v. United States*, 107 U. S. 437, 441, 2 Sup. Ct. 536, 27 L. Ed. 531, this rule was applied to a contract for the sale and delivery of a quantity of oats, and in *O'Brien v. Miller*, 168 U. S. 287, 297, 18 Sup. Ct. 140, 144, 42 L. Ed. 469, the rule was applied in admiralty in the construction of a bottomry bond. It was there said:

"The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them."

It was further stated that:

"In the exercise of their jurisdiction with respect to such bonds, courts of admiralty are not governed by the strict rules of the common law, but act upon enlarged principles of equity"—citing the opinion of Mr. Justice Story in *The Virgin*, 8 Pet. 538, 550, 8 L. Ed. 1036.

The rule that a contract will not be held to include a condition within the words of the contract, but not contemplated by either of the parties when the contract was made, was held in *United States v. Stage Co.*, 199 U. S. 414, 423, 26 Sup. Ct. 69, 50 L. Ed. 251.

In the present case, the parties to the contract could not have had in view the series of holidays appointed by the Governor of the state for the sole purpose of deferring the maturity of financial obligations and liabilities, nor could they have had in contemplation an interpretation of the contract that would properly have included such days as holidays. These days were not holidays in the usual and ordinary sense. They were not set apart for rest, recreation, fasting, thanksgiving, or for public rejoicing, or public mourning; nor were they so observed. The evidence shows that there was no cessation of labor or traffic on account of these days. The loading of the vessels went on as usual. As before stated, the respondents received and loaded 11,209 tons of wheat during the month of November, loading and dispatching the *British Monarch* and the *Borderer*; each having a tonnage about the same as the *Tiberius*. It appears from the evidence that stevedores at

Portland are accustomed to be paid "time and a half" for overtime and holidays; but during the days appointed by the Governor as holidays they neither asked nor received such extra pay. They worked as usual and upon the usual terms. These days were lay or working days at the port of Portland, and so treated by the parties to the contract. We are therefore of opinion that they were properly so held by the court below.

The decree of the District Court is affirmed.

BAILEY v. SANDERS.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1910.)

No. 1,684.

1. PUBLIC LANDS (§ 109*)—CANCELLATION OF ENTRY—POWER OF COURTS TO REVIEW.

To give a Circuit Court jurisdiction to review the action of the Land Department in canceling an entry of public land, it must first appear from the bill that the complainant has at least an equitable claim to the land.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 307; Dec. Dig. § 109.*]

2. PUBLIC LANDS (§ 109*)—CANCELLATION OF ENTRY—SUIT TO SET ASIDE DECISION.

Where a homestead settler on ceded lands of the Nez Perce Indian reservation required to pay a stated price per acre by Act Aug. 15, 1894, c. 290, 28 Stat. 326, and entitled to commute under Rev. St. § 2301, as extended by Act Jan. 26, 1901, c. 180, 31 Stat. 740 (U. S. Comp. St. 1901, p. 1620), commuted but paid only the minimum price of \$1.25 per acre, which was less than the price required by the plain provision of the statute, and neither he nor a grantee, whose deed was not recorded and who had not taken possession, although notified of the suspension of his entry, tendered further payment until several months after his entry had been canceled and a new entry accepted on a relinquishment filed by him, a bill by the grantee to recover the land from the new entryman *held* to show no equity which gave a court jurisdiction to review the action of the Land Department.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 307; Dec. Dig. § 109.*]

Appeal from the Circuit Court of the United States for the Northern Division of the District of Idaho.

Suit in equity by Douglas W. Bailey against Arthur Sanders. Decree for defendant, and complainant appeals. Affirmed.

This action was brought on the 26th day of January, 1907, in the Circuit Court of the United States for the Northern District of Idaho, by Douglas W. Bailey, appellant, a citizen of the state of Oregon, against Arthur Sanders, appellee, a citizen of the state of Idaho, to quiet and confirm the complainant in his alleged right to certain public land of the United States within the limits of the ceded portion of the Nez Perce Indian reservation in Idaho county, state of Idaho. The subdivisions described comprise 160 acres of public land.

The bill prayed that the complainant be decreed to be entitled to the possession thereof; that the defendant be enjoined to desist from claiming any title to or interest in said real property, and from committing any waste thereon,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and from interfering with complainant's possession of said premises; that the defendant be required to make and render a full and complete account to complainant for the value of the rents, issues, and profits of said premises since April 13, 1902; and that a judgment be rendered in favor of complainant and against defendant for the amount found due.

The bill of complaint alleged that on the 1st day of May, 1899, the land in controversy was unoccupied and unimproved vacant public land of the United States, situated within the ceded portion of the Nez Perce reservation in Idaho county, state of Idaho, and as such was subject to settlement and entry under the homestead laws of the United States; that on May 1, 1899, one William W. Hatelly made application at the United States Land Office, at Lewiston, Idaho, to enter said land as a homestead; that he thereupon made before the register and receiver of said Land Office the usual and customary application required under the provision of section 2290 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1389), and paid the fees and commissions therein prescribed, and received his certificate therefor; that Hatelly thereupon entered upon the possession of said land and constructed a dwelling house thereon, and began to reside, and continued to reside, thereon with his family and to improve and cultivate said land until about the 24th day of April, 1901; that on the 24th day of January, 1901, desiring to avail himself of the benefits, privileges, and rights under the provision of section 2301 of the Revised Statutes of the United States, as amended by Act Cong. March 3, 1891, c. 561, § 6, 26 Stat. 1098 (U. S. Comp. St. 1901, p. 1406), and Act May 17, 1900, c. 479, 31 Stat. 179 (U. S. Comp. St. 1901, p. 1618), he filed in the Land Office of the United States in Lewiston, Idaho, his notice of intention and desire to make final proof of his residence upon and improvement and cultivation of said tract of land and pay the minimum price therefor as prescribed in said act of March 3, 1891, and said act of May 17, 1900; that on the 9th day of March, 1901, said Hatelly appeared before the United States commissioner and submitted his proof of such residence upon and improvement and cultivation of said tract of land, and paid to the register and receiver of said Land Office "the sum asked" for said land under the said laws of the United States, to wit, the sum of \$200 (\$1.25 per acre for 160 acres), and in pursuance thereof said register and receiver on the 29th day of March, 1901, issued to said Hatelly their final certificate thereof and receipt therefor; that on the 2d day of April, 1901, said Hatelly and his wife made, executed, and delivered to one R. C. Beach their warranty deed, whereby, in consideration of the sum of \$800 to them paid by said Beach, they, the said Hatelly and wife, granted, bargained, sold, and conveyed unto the said Beach the said land; that in April, 1901, the Commissioner of the General Land Office suspended said entry of Hatelly for the reason that under the act of Congress of January 26, 1901, providing for commuting homestead entries within the limits of ceded Indian reservations, said Hatelly was required to pay for his land the sum of \$3.75 per acre, or the additional sum of \$406; that said Beach, as the grantee of Hatelly, caused an appeal to be taken from said order, and upon said appeal the Secretary of the Interior affirmed said order of the commissioner, and thereafter on October 31, 1902, said Beach, as the grantee of Hatelly, made a tender of said sum of money to the register and receiver of the Land Office at Lewiston, Idaho, and said register and receiver refused to accept the same; that prior thereto, and on January 30, 1902, Hatelly made a relinquishment of said land to the United States, whereby he sought and attempted to restore said land to the public domain of the United States, and thereupon the defendant, Arthur Sanders, sought to enter the land as a homestead and presented his application and affidavit therefor with the relinquishment to the said land on the 31st day of January, 1902. It appears that on June 10, 1903, Beach conveyed his interest in the land to the complainant herein, who had appeared as attorney for Beach in the proceedings before the Land Office.

The bill of complaint recites the proceedings in the General Land Office in the matter of the application of Arthur Sanders to enter the land formerly embraced in the Hatelly homestead entry, wherein R. C. Beach was the transferee. It appears from the complaint, and such recitals and the exhibits attached to the bill of complaint and made a part thereof, that Hatelly moved from said land in April, 1901, and took up his residence in Moscow, Idaho; that on No-

venember 7, 1901, he was officially notified by the Land Department to make an additional payment of \$406 in payment for the land, which he refused to do; that the defendant, Sanders, moved upon the land on the 18th day of April, 1902; that Beach was a dry goods merchant residing and doing business in Lewiston, Idaho, about 70 miles distant from the land in controversy; that Beach learned soon after the issuance of the final certificate by the register and receiver on March 9, 1901, that the price of the land was \$3.75 per acre, but he failed to bring his claim to the attention of the officers of the Land Department until after Hately had filed his relinquishment in the Land Office on the 30th day of January, 1902.

There was a hearing before the register and receiver of the Land Office at Lewiston ordered by the Commissioner of the General Land Office "in order that all the facts in the case might be brought out." The hearing resulted in a recommendation by the register and receiver to the Commissioner of the General Land Office that Hately's homestead entry and cash certificate be canceled, and that Arthur Sanders be allowed to file a homestead entry to the land. This recommendation was approved, and the Commissioner of the General Land Office ordered "that the homestead entry and the commuted cash entry will be canceled on his relinquishment, and Sanders will be allowed to enter the land." Beach appealed from this order to the Secretary of the Interior. In the opinion of the Secretary of the Interior passing upon this appeal, the evidence before the Land Office is reviewed, and the Secretary of the Interior found that:

"Beach has never paid Hately any consideration, has never assumed control of the land, and has expressly disclaimed any interest therein, both to the local officers and to the original entryman who executed the alleged conveyance to him.

"On the other hand, it appears from the evidence: (1) That in January, 1901, two months before the commutation proof was offered, Bailey induced Hately to enter into a verbal agreement, of which a memorandum was written and explained to him by Bailey, to make commutation proof in the interest of some other person, and make the cash payment with money furnished by Bailey, and thereupon to execute a deed to said land as directed by Bailey and received \$600 as the consideration therefor; (2) that in pursuance of this agreement Bailey had Hately submit his proof on March 9, 1901, which Bailey obtained from the officer taking the same, and a few days later delivered to the local officers, and that, after an interval of two weeks, Bailey obtained the money from Beach, and on March 29, 1901, made the cash payment then required; (3) that on April 2, 1901, Bailey had Hately execute a deed to the said land according to their said agreement, naming Beach as the grantee therein, presumably to secure the latter for \$200 advanced; (4) that, in payment of the consideration agreed upon in January, Bailey gave Hately said sight draft on Beach; (5) that Bailey for one year and nearly three months held and then filed for record the said deed, and four months later made said tender to the local officers, and three months thereafter made said tender to Hately."

The Bailey here referred to is the complainant herein.

It was further found that:

"The evidence compels the conclusion that Beach is and was not the real party in interest, and that the sale of this land by Hately was agreed upon in advance of final proof thereon, and that it was commuted according to that agreement, Hately delivering the deed, and accepting, and presenting for payment, the said sight draft. The entering into such forbidden agreement ended the right of the entryman to make proof and payment and rendered him incompetent to further proceed with his entry. He could not thereafter submit a proof upon which he could convey a valid title and could not take oath of non-alienation required with said additional payments. It ended the contract between Hately and the United States, initiated by his filing and entry, and upon which alone it could be maintained. The land was from that time forward open to settlement and entry by the first legal applicant, although it yet remained to cancel his entry of record whenever the fact of such illegal contract should become known and established.

"It followed that Beach took nothing by said deed, Hately has forfeited his claim, and that Sanders has the right to make entry for the land."

To this bill of complaint a demurrer was interposed upon the grounds, among others: (1) That it appears by the plaintiff's own showing by the said bill that he is not entitled to the relief prayed for by said bill against the defendant; (2) that it appears from said bill of complaint that the court has no jurisdiction to hear or determine the action. The court sustained the demurrer and afterwards dismissed the bill of complaint.

Douglas W. Bailey, for appellant.

James H. Forney and Frank L. Moore, for appellee.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

MORROW, Circuit Judge (after stating the facts as above). The first question to be determined is whether the bill of complaint shows such equity in the complainant as to entitle him to a review of the action of the Land Department with respect to the land in controversy. To give the Circuit Court jurisdiction to review the action of the Land Department upon allegations of the character contained in this bill, it must first appear from the bill of complaint that the complainant has at least an equitable claim to the land in question. What are the facts alleged with respect to this claim? They are that one Hatley, on the 24th day of January, 1901, desiring to avail himself of the benefits, privileges, and rights under the provisions of section 2301 of the Revised Statutes of the United States, as amended by act of Congress of March 3, 1891, and the act of May 17, 1900, filed in the Land Office of the United States at Lewiston, Idaho, his notice of intention and desire to make final proof of his residence upon and improvement and cultivation of said tract of land and pay the minimum price therefor as prescribed in said act of March 3, 1891, and said act of March 17, 1900; that on the 9th day of March, 1901, said Hatley appeared before the United States commissioner and submitted his proof of residence upon and improvement and cultivation of said tract of land and paid to the register and receiver of said Land Office "the sum asked for said land," to wit, the sum of \$200, or \$1.25 per acre for 160 acres contained in the tract.

Section 2301 of the Revised Statutes as amended provides as follows:

"Nothing in this chapter shall be so construed as to prevent any person who shall hereafter avail himself of the benefits of section twenty-two hundred and eighty-nine from paying the minimum price for the quantity of land so entered at any time after the expiration of fourteen calendar months from the date of such entry, and obtaining a patent therefor, upon making proof of settlement and of residence and cultivation for such period of fourteen months, and the provision of this section shall apply to lands on the ceded portion of the Sioux reservation by act approved March second, eighteen hundred and eighty-nine in South Dakota and in the state of Nebraska, but shall not relieve said settlers from any payments now required by law."

But with respect to lands embraced within the limits of the ceded portion of the Nez Perce Indian reservation section 16 of the act of Congress of August 15, 1894 (28 Stat. 326, 332, c. 290), provided that the lands ceded and conveyed to the United States should be open to settlement by the proclamation of the President, and should be subject to disposal only under the homestead, town-site, stone and

timber, and mining laws of the United States, except the sixteenth and thirty-sixth sections, which were reserved for common school purposes. It was further provided that each settler on said land should, before making final proof and receiving a certificate of entry, pay to the United States for the land so taken by him in addition to the fees provided by law the sum of \$3.75 per acre for agricultural lands, one-half of which should be paid within three years from the date of the original entry. By proclamation of the President of the United States these lands were opened to settlement at noon on the 18th day of November, 1895 (29 Stat. 873, 875).

The act of January 26, 1901 (31 Stat. 740, c. 180 [U. S. Comp. St. 1901, p. 1620]), provided:

"That the provisions of section twenty-three hundred and one of the Revised Statutes of the United States, as amended, allowing homestead settlers to commute their homestead entries be, and the same hereby are, extended to all homestead settlers affected by or entitled to the benefits of the provisions of the act entitled 'An act providing for free homesteads on the public lands for actual and bona fide settlers, and reserving the public lands for that purpose,' approved the seventeenth day of May, Anno Domini nineteen hundred: Provided, however, that in commuting such entries the entryman shall pay the price provided in the law under which original entry was made."

The original entry in this case was made under the act of August 15, 1894, which fixed the price of agricultural land within the ceded portion of the Nez Perce Indian reservation at \$3.75 per acre.

Hately, in an affidavit dated January 30, 1902, attached to the complaint and made a part thereof, says:

"That at the time that he made said entry and at the time offering proof for commutation of the same he was informed and believed that the land was minimum land and could be commuted at the rate of \$1.25 per acre; but since that time he has been informed that said land is within the Nez Perce Indian reservation, and cannot be commuted at the rate of \$1.25 per acre, but must be commuted at the rate of \$3.75 per acre."

It seems extraordinary that a settler could go upon public land in the vicinity of an Indian reservation and make a homestead entry within the recently ceded portion of such reservation without knowing that the land had been a portion of the reservation. Such a statement at least excites suspicion. But when was Hately informed that the land could only be commuted at the rate of \$3.75 per acre? It is stated in the bill that on April 2, 1901, Hately conveyed the land by deed to Beach in consideration of the sum of \$800, and we are informed by the affidavit of the complainant herein, also attached to the complaint and made a part thereof, that for this deed Hately was paid by the complainant, as attorney for Beach, the sum of \$200 in cash and given a sight draft on Beach for the sum of \$600; that this draft was not paid by Beach because he had been advised that the homestead entry could not be approved. There is an unsworn statement by Hately in the proceedings before the Land Office in which he says:

"That some weeks after said Bailey gave me said sight draft on Beach, I sent the same to Lewiston through the bank, and as I am informed the same was presented to Beach and payment thereof was declined, and said Beach advised me that he had held up the payment of said draft on account of an

order of the Commissioner of the General Land Office requiring an additional payment.

"That as I am also informed, prior to the presentation of said draft the Commissioner of the General Land Office made an order suspending said entry and requiring that \$3.75 per acre be paid for commutation of said entry, instead of \$1.25 per acre, and that said Beach had received that information before the draft was presented and did not pay the draft on that account."

This statement is fully corroborated by the acts and statements of the parties as they appear in the record. It further appears that on November 7, 1901, the officers of the Land Department officially notified Hatelly that he was required to make an additional payment of \$406, or the full price of \$3.75 per acre in payment of the land. Did the parties in interest, either Hatelly, Beach, or the complainant, promptly pay or tender the amount required to make full payment for the land as required by law? It was not until October 31, 1902, that Beach, the grantee of Hatelly, by the complainant as his attorney, tendered to the register and receiver the sum of \$406 in full payment for the land. In Hatelly's affidavit dated January 30, 1902, he says:

"Affiant does not intend to pay the balance of \$400 and commissions necessary, but intends to relinquish said entry, as he is not able to pay the balance due under the same."

The tender was made a year and a half after Hatelly had sold or attempted to sell the land to Beach; nearly a year after Hatelly had been officially notified to make the additional payment of \$406; nine months after Hatelly had notified the Land Office that he would not pay the balance, but would relinquish the entry; and six months after the land had been settled upon and entered as a homestead by Sanders and his homestead rights had attached. If the parties seeking to obtain this land under Hatelly's commuted homestead entry were acting in good faith, why did they not after being advised promptly tender the full amount required by law to purchase the land? The law was perfectly clear that the price of the land was \$3.75 per acre, and an appeal to the Secretary of the Interior upon such a question did not justify the parties in delaying a year and a half in making the tender after having knowledge of the law and a year after having received official notice from the Land Department. Furthermore, this tender has not been made good in this action. There is no offer in this case to pay to the United States the full amount required to obtain the land as a commuted homestead entry. The allegations of the bill do not show good faith in the proceedings before the Land Department on the part of the complainant and those from whom he has derived his title; on the contrary, the inference to be drawn from the facts stated is that there was an effort on the part of Hatelly and the complainant, acting as the attorney for Beach, to obtain this land for a sum less than and under conditions other than those provided by law.

The complainant failing to show in his bill that he has an equitable claim to the land in controversy, the bill was properly dismissed.

The decree of the court below dismissing the bill is therefore affirmed.

BOWER v. STEIN.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1910.)

No. 1,733.

1. MORTGAGES (§ 408*)—FORECLOSURE—DEFAULT—WAIVER.

Where a mortgagee's assignee was entitled to foreclose at any default, the fact that he did not elect to foreclose on the first default did not prevent a foreclosure after the third default.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 408.*]

Foreclosure in federal courts, see note to *Seattle, L. S. & E. Ry. Co. v. Union Trust Co.*, 24 C. C. A. 523.]

2. MORTGAGES (§ 414*)—FORECLOSURE—DEFAULT—NOTICE.

A mortgagee's assignee, being authorized to foreclose on the mortgagor's default, was under no obligation to notify the mortgagor of his intention to do so before beginning suit.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 414.*]

3. PROCESS (§ 96*)—SERVICE BY PUBLICATION—AFFIDAVIT.

An affidavit for service by publication, alleging that defendants were nonresidents, and not to be found within the state, that on due inquiry and diligent search their address was ascertained to be No. 215, West 125th street, New York, was sufficient to sustain an order for the publication of summons.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 108-120; Dec. Dig. § 96.*]

4. MORTGAGES (§ 496*)—FORECLOSURE—DECREE—VACATION—FRAUD.

Where process in mortgage foreclosure was served by publication, allegations of a bill to set aside the decree that the affidavit for publication falsely stated complainant's post-office address, but failing to charge what her true address was, and not alleging that the address given was not that of her husband, and an allegation that the mortgagee's assignee made no search or inquiry for the complainant's post-office address, though he could easily have ascertained the same, but failing to allege that he knew such address, was insufficient to show fraud.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 496.*]

5. MORTGAGES (§ 496*)—FORECLOSURE—DECREE—VACATION—MISTAKE.

That a mistake was made as to the residence of a defendant in a suit to foreclose a mortgage, who was served by publication, is not ground for vacating the decree.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 496.*]

6. MORTGAGES (§ 440*)—FORECLOSURE—PROCESS—SERVICE BY PUBLICATION.

In proceedings to foreclose a mortgage, it is not necessary that a non-resident defendant shall have had actual notice; it being sufficient that the statute relating to service by publication was complied with.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1304, 1305; Dec. Dig. 440.*]

7. MORTGAGES (§ 496*)—FORECLOSURE—DECREE—VACATION—BILL.

In a suit to set aside a foreclosure decree for fraud, plaintiff's allegation that the mortgagee's assignee might have ascertained plaintiff's residence and given her actual notice is not sufficient to show fraud when it also shows that the mortgagee's assignee's affidavit for service by publication distinctly stated the contrary, and on its face exhibited diligence in making search and inquiry, and the bill further affirmatively discloses absence of motive for withholding from the mortgagors knowledge of the pendency of the suit.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 496.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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8. MORTGAGES (§ 440*)—FORECLOSURE—PROCESS—FRAUD.

That a mortgagee's assignee who sued to foreclose was a member of an art association to which the mortgagor belonged, and was in correspondence with members of the association, from whom he could have easily ascertained the mortgagor's address, and given her actual notice of his intent to foreclose, did not show fraud in his failure to do so, and in his obtaining service by publication.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 440.*]

9. JUDGMENT (§ 407*)—VACATION—REMEDY AT LAW.

Where complainant had notice of a mortgage foreclosure suit in time to have moved the state court to set it aside under a state statute providing that a defendant against whom a judgment is taken on service by publication may on good cause shown, and on proper terms, be allowed to defend within a year after judgment, she was bound to apply for relief thereunder as a condition to her right to sue in equity in a federal court to set aside the decree.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 768-774; Dec. Dig. § 407.*]

10. EQUITY (§ 219*)—LACHES—DEMURRER.

Where a bill without the aid of inference discloses laches and no valid excuse for the delay, it is demurrable.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 498; Dec. Dig. § 219.*]

11. MORTGAGES (§ 496*)—FORECLOSURE—DECREE—VACATION—LACHES.

Where complainant knew of a foreclosure decree against her, based on service by publication, immediately after October, 1898, and on July 1, 1902, had actual notice of the sale, but took no steps to redeem or have the decree set aside until June, 1907, her right to do so was barred by laches.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 496.*]

12. EQUITY (§§ 77, 78*)—LACHES—EXCUSE.

It was no excuse for complainant's laches in failing to promptly sue to set aside a foreclosure decree that she was without means or a resident of a distant state.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 235, 238; Dec. Dig. §§ 77, 78.*]

13. EQUITY (§ 87*)—LACHES—FOLLOWING STATUTE OF LIMITATIONS.

Delay which will bar relief in equity is not necessarily measured by the statute of limitations, but may be for a much shorter period, depending on the peculiar circumstances in each case, involving a consideration of whether one of the parties or an important witness has died since the trial, and important testimony lost, whether the property involved is largely increased in value, or whether it has been sold to a third person.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242-244; Dec. Dig. § 87.*]

Appeal from the Circuit Court of the United States for the District of Oregon.

Bill by Lucy Scott Bower against Hartian Stein. From a decree dismissing the bill, complainant appeals. Affirmed.

For opinion below, see 165 Fed. 232.

The appellant, as complainant in the court below, filed a bill, in which she alleged that on March 20, 1896, she was the owner in fee simple of two certain lots in the city of Portland, state of Oregon, and that on said date she joined her husband in a mortgage thereof to one Sherman to secure her husband's note of \$1,500, which note was payable three years from date, with interest at 8 per cent. per annum, payable semiannually; that on June 11, 1896, the said mortgage was transferred to Cleveland Rockwell; that at the time of

executing said note and mortgage the plaintiff and her husband were residents of the city of Portland, but thereafter, on June 28, 1896, they removed therefrom to Chicago, and thence they removed to New York, where they have since resided; that on April 30, 1898, said Cleveland Rockwell commenced a suit for the foreclosure of the mortgage; that in the mortgage it was provided that, in case of default in the payment of the interest due semiannually on said note, the whole sum, both principal and interest, should become immediately due, at the option of the holder of the note, and it was further provided that the maker of said note should maintain insurance on the building on said property to the amount of \$1,000, loss payable to the mortgagee, and, in case of his failure so to do, that the mortgagee, his heirs or assigns, might effect such insurance, and the amount of the premiums so paid should be secured by the mortgage; that the first default in payment of interest was of the interest which fell due on March 20, 1897; that the holder of the said note and mortgage failed to exercise his option at that date, and that the complainant never at any time had notice that he had elected to declare the whole amount due or to foreclose the mortgage until long after the decree of foreclosure; that said mortgagee by failure to exercise his option on the first default in the payment of the interest had waived his right to foreclose upon subsequent defaults, and until the principal of said note became due, according to the terms thereof; that the plaintiff in said foreclosure suit undertook to serve the appellant and her husband by publication of summons, and, in order to obtain an order of publication, filed an affidavit that the defendants were nonresidents of the state, and not to be found therein, and that, upon due inquiry and diligent search, their address was ascertained to be No. 215 West 125th street, New York. The bill specified the particulars in which it was charged that the affidavit was insufficient. It alleged, among other defects, that it was false and fraudulent in stating the address of the complainant to be at No. 215 West 125th street, New York, when that was not and never had been her address; that on June 20, 1898, based on said affidavit, an order was made for the publication of summons, and on June 24, 1898, a copy of said summons and complaint was deposited in the post office at Portland, Or., addressed to the complainant at No. 215 West 125th street, New York, but that the same was not received by her, and she had no notice of the pendency of said suit to foreclose; that on September 9, 1898, a final decree of foreclosure was entered in said suit upon default taken against the complainant, and judgment was rendered on said note and mortgage for \$1,825.77, together with \$150 attorney's fees and \$25 costs; that on October 18, 1898, said property was sold to Cleveland Rockwell, trustee, for the sum of \$2,039.35, which sale was confirmed on October 31, 1898; that the property at that time was worth \$10,000, and is now worth \$20,000; that on May 24, 1902, said Cleveland Rockwell conveyed said property to the appellee herein by a quitclaim deed for the consideration of \$2,050; that in June, 1907, the appellant tendered the appellee by a written tender said principal sum and all unpaid interest, taxes, insurance, and other sums chargeable against said property under said note and mortgage, and demanded the right to redeem said property, which tender and demand were refused. The appellant alleged that "her delay in bringing the suit was unintentional, and was occasioned by her living in a distant state, and being engaged actively in her work there as an artist, and by her lack of means to obtain counsel; and to pay costs of suit, and by the further fact that she was ignorant of said sale of said real property for a long time after the same was made, her first 'actual' notice thereof being subsequent to June, 1902." The appellee interposed a demurrer to the bill for want of equity, and on the ground of laches. The demurrer was sustained on both grounds, and the bill was dismissed.

A. H. Tanner, for appellant.

Wm. A. Munly, for appellee.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). The appellant seeks to invalidate a judicial decree rendered in another forum, and to go behind that decree to the extent of obtaining leave to redeem the property which was sold thereunder. The first ground of relief stated in the bill is that the complainant did not know until long after the foreclosure suit that the holder of the mortgage had exercised his option to declare the whole sum unpaid on the note and mortgage due and payable, and that she was led to believe that he had elected to waive the option, for the reason that he failed to exercise it upon the first default in the payment of the interest. But the bill does not show that the appellant had any information that he had failed to foreclose on the first default, and it exhibits no facts which would constitute a ground for her reliance on such a waiver. It is true that the option was not exercised until after the third default, but the holder of the mortgage had the right to foreclose at any default, and he would seem to have exercised forbearance in waiting until after the third default in the payment of the interest, and the total default to insure the property, before he instituted the suit. The facts set forth in the bill indicate a total disregard on the part of the mortgagors of their obligation on the note and mortgage. The appellant was bound to take notice of the terms of the mortgage. The mortgagee was under no obligation to notify her before bringing suit. He properly exercised his election by instituting the suit.

In addition to the allegation that the appellant herein had no notice or knowledge of the pendency of the suit, there is in the bill an attempt to allege fraud in the procurement of the decree. The affidavit upon which the order of publication was obtained is set forth. It fully complies with all the requirements of the statutes, and was sufficient to justify the court in making the order of publication. *Cohen v. Portland Lodge No. 142*, B. P. O. E., 152 Fed. 357, 81 C. C. A. 483; *McDonald v. Cooper* (C. C.) 32 Fed. 751; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Pike v. Kennedy*, 15 Or. 422, 15 Pac. 637; *Bank of Colfax v. Richardson*, 34 Or. 519, 54 Pac. 359, 75 Am. St. Rep. 664. It sets forth with unusual detail the efforts made by the plaintiff in the suit to ascertain the residence of the defendants therein, and upon its face it shows due diligence in that regard. The bill charges that the affidavit was fraudulent in falsely stating that the post-office address of the appellant was at that time No. 215 West 125th street, New York. It does not state what her true address was, nor does it allege that the address so given was not that of her husband, an attorney at law then residing in New York. It alleges that the plaintiff in the suit made no search or inquiry as to her post-office address, but it does not allege that he knew her address, although it states that he could easily have ascertained the same. Such allegations are insufficient to show the fraud which must be the basis of equitable relief in a case such as this. There is an entire absence of any allegation of motive upon the part of the plaintiff in the foreclosure suit to procure foreclosure without notice to the defendants therein. On the other hand, it is evident from the bill that he had nothing to gain thereby. All that he obtained by it was the money he had invested, the interest thereon, and the expenses of foreclosure. He parted with the

property for a consideration which left a loss instead of a profit to him. The fact that a mistake is made as to the residence of the defendant who is served by publication in a foreclosure suit is no ground for setting aside the decree. *Connely et al. v. Rue et al.*, 148 Ill. 207, 35 N. E. 824. It is not necessary that the nonresident defendant shall have had actual notice. It is sufficient if the statute as to service by publication be complied with. The mere allegation that the plaintiff in such a suit might have ascertained the residence of the defendants is not sufficient to invoke the aid of equity on the ground of fraud, when the bill also shows that the plaintiff's affidavit distinctly states the contrary, and upon its face exhibits diligence in making search and inquiry, and the bill further affirmatively discloses absence of motive for withholding from the defendants therein knowledge of the pendency of the suit. The allegations of fraud in such a case must be explicit, pointed, positive, and relevant, and must present distinct charges of acts or omissions from which the court can see that they were instrumental in procuring a decree that otherwise would not have been rendered. *United States v. Atherton*, 102 U. S. 372, 26 L. Ed. 213; *Travelers' Protective Ass'n v. Gilbert*, 111 Fed. 269, 49 C. C. A. 309, 55 L. R. A. 538; *Brick v. Burr*, 47 N. J. Eq. 189, 19 Atl. 842; *Warner Glove Co. v. Jennings*, 58 Conn. 74, 19 Atl. 239; *Lyme v. Allen*, 51 N. H. 242; *Smith et al. v. Nelson et al.*, 62 N. Y. 286. To allege that the affiant was a member of an art association to which the appellant belonged, and that the latter was in correspondence with members of the association, from whom he might have easily ascertained her address, is not to present a tangible fact which, if proven, would sustain the charge of fraud. Doubtless there may have been many people in Oregon from whom the address of the appellant might have been ascertained, but that fact would not be sufficient to impeach the bona fides of the affidavit, nor is any fact charged in the bill from which the court may deduce the conclusion that there was fraud in the affidavit, or in obtaining the decree.

Another ground on which it should be held that there is no equity in the bill is the appellant failed to avail herself of the remedy afforded her by the statute of Oregon, which provides that the defendant against whom a judgment is taken on service by publication may upon good cause shown, and upon such terms as may be proper, be allowed to defend within one year after judgment. Under that statute, it has been held that an allegation that the plaintiff in the action did not try to find the defendant's address may be considered upon a motion to open the decree. *Smith v. Smith*, 3 Or. 363. According to the allegations of the bill, the appellant had notice of the foreclosure suit in ample time to have availed herself of the remedy so afforded by the state statute. A party who thus neglects to avail himself of the remedies afforded in the state court is precluded from resorting to a federal court to obtain relief against the decree. *Nougue v. Clapp*, 101 U. S. 551, 25 L. Ed. 1026; *Graham v. Boston, H. & E. R. Co.* (C. C.) 14 Fed. 753, affirmed in 118 U. S. 162, 6 Sup. Ct. 1009, 30 L. Ed. 196.

But it is unnecessary to dwell upon the want of equity in the bill, for the demurrer was also clearly sustainable on the ground of laches.

Where the bill distinctly and without the aid of inference discloses laches, and no valid excuse for delay is pleaded, a demurrer will be sustained on that ground. The suit to foreclose the mortgage was begun on April 30, 1898. The decree was rendered on September 9, 1898, and the sale was made on the 18th day of the following October. The present suit was begun on June 6, 1907. The bill alleges that the appellant had no knowledge of the foreclosure suit "until after said decree was rendered," and that she had no "actual" notice of the sale of said property on foreclosure until "subsequent to June, 1902." Construing these allegations as they must be construed, most strongly against the pleader, we have to infer that the appellant knew of the foreclosure suit immediately after October, 1898, and that on July 1, 1902, she had actual notice of the sale. The date when such actual notice was received is not important, for knowledge of the foreclosure suit imported notice to her that a sale would follow in due course. It is a well-established principal of equity practice that diligence must be exercised in asserting the right to set aside a decree in cases of this nature. Unnecessary delay is deemed a waiver of the right. It is no excuse for such delay that the plaintiff is without means or resides in a distant state. Case of Broderick's Will, 21 Wall. 503, 519, 22 L. Ed. 599; McQuiddy v. Ware, 20 Wall. 14, 22 L. Ed. 311; Hayward v. National Bank, 96 U. S. 611, 618, 24 L. Ed. 855; Washington v. Opie, 145 U. S. 214, 12 Sup. Ct. 822, 36 L. Ed. 680; De Estrada v. San Felipe Land & Water Co. (C. C.) 46 Fed. 280; Naddo v. Bardon, 51 Fed. 493, 2 C. C. A. 335. It is proper to observe also in this connection that according to the bill the property of the complainant was worth at the time of the foreclosure sale \$8,000 over and above the incumbrance thereon.

In cases of this nature the delay that will bar relief is not necessarily measured by the statute of limitations. It may be a delay for a much shorter period, depending upon the particular circumstances in each case. Thus it is proper to consider whether one of the parties thereto or an important witness therein has died since the trial thereof, so that thereby important testimony has been lost to the adverse party (Foster v. Mansfield Coldwater, etc., Railroad, 146 U. S. 88, 100, 13 Sup. Ct. 28, 36 L. Ed. 899), or whether the property has largely increased in value since the sale thereof on the judgment or decree (Connely et al. v. Rue et al., 148 Ill. 207, 35 N. E. 824), or whether it has been sold to a third person, so that the rights of a purchaser intervene (Graham v. Boston, Hartford & Erie R. R. Co., 118 U. S. 161, 179, 6 Sup. Ct. 1009, 30 L. Ed. 196; Harwood v. Railroad Company, 17 Wall. 79, 21 L. Ed. 558; Hayward v. National Bank, 96 U. S. 611, 24 L. Ed. 855). In this case it appears affirmatively from the bill that the complainant had no defense to the suit of foreclosure. It is not denied that the money for which the decree was taken was due and owing to the plaintiff therein. It also appears from the bill that the property in controversy was at the time of the commencement of this suit of the value of \$20,000, whereas, at the time of the foreclosure sale, it is alleged to have been of the value of \$10,000. It is alleged in the bill that the appellee purchased the property from the

purchaser at the sheriff's sale, and paid therefor the sum of \$2,050, and while the appellee cannot claim to stand in the attitude of an innocent purchaser, since he took by quitclaim deed (*Low v. Schaffer*, 24 Or. 239, 33 Pac. 678), he is nevertheless a purchaser upon a record which upon its face was free from defects, and one whose rights would be affected by the relief which is sought, and that fact is to be taken into account in determining the question of laches. *Evers v. Watson*, 156 U. S. 527, 536, 15 Sup. Ct. 430, 39 L. Ed. 520. The appellant herein had notice of the foreclosure suit as early as October, 1898. The records were public, and at all times accessible to her. Everything which she now complains of was discoverable upon examination thereof. She could then have ascertained all of the facts in regard to the sale in ample time to have redeemed therefrom. The possession of the means of knowledge was equivalent to knowledge itself. Having had the opportunity of knowing, she cannot now avail herself of her failure to acquire actual knowledge of the facts. A much shorter period of inaction than here has in similar cases been held ground for the denial of relief. *Evers v. Watson*, 156 U. S. 527, 15 Sup. Ct. 430, 39 L. Ed. 520; *Parker v. Dacres*, 130 U. S. 43, 9 Sup. Ct. 433, 32 L. Ed. 848; *Boone County v. Burlington, etc., Railroad*, 139 U. S. 684, 11 Sup. Ct. 687, 35 L. Ed. 319; *Brown v. County of Buena Vista*, 95 U. S. 157, 24 L. Ed. 422; *Quinn v. Jenks*, 88 Hun, 428, 34 N. Y. Supp. 962; *Connely et al. v. Rue et al.*, 148 Ill. 207, 35 N. E. 824.

The decree is affirmed.

GLINN V. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1910.)

No. 1,571.

1. POST OFFICE (§ 49*)—PROSECUTION FOR USING MAILS TO DEFRAUD—SUFFICIENCY OF EVIDENCE.

A conviction on an indictment for using the mails to defraud, in violation of Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), which charged that defendant falsely represented to the persons intended to be defrauded by letters and circulars sent through the mail that she was conducting a fair, honest, and bona fide matrimonial agency, well knowing that she was not, held sustained by evidence showing that she inserted false advertisements in newspapers, purporting to have been inserted by a man or woman of wealth who desired to marry, and in reply to answers received through the mail sent letters and circulars representing that she conducted a matrimonial bureau, and had many clients of wealth of both sexes, and thereby obtained from persons so addressed a fee of \$5 each for membership in such bureau and to be introduced to such clients of wealth, when in fact, so far as shown, none were ever so introduced, and no marriages resulted, and defendant made no attempt to carry out the promises made.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 86; Dec. Dig. § 49.*]

Nonmailable matter, see note to *Timmons v. United States*, 30 C. C. A. 79.]

2. CRIMINAL LAW (§ 1170*)—APPEAL—REVIEW—HARMLESS ERROR.

The exclusion of certain original letters offered in evidence by the defendant in a criminal case held not prejudicial, where a tabulation of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

contents of such letters made by defendant was received in evidence, the correctness of which was not disputed, and which as fully established the only fact for which the letters were competent as would the letters themselves.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3146, 3147; Dec. Dig. § 1170.*]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

E. L. Glinn was indicted and convicted for a criminal offense, and brings error. Affirmed.

The writ of error is to reverse the judgment of the District Court, sentencing plaintiff in error to a term of one year in the House of Correction of the City of Chicago, and to pay the costs of the prosecution, upon her conviction by a jury of an offense within section 5480, Rev. St. (U. S. Comp. St. 1901, p. 3696).

The indictment charges that plaintiff in error,

“had devised a scheme and artifice to defraud one Harrison Miller, then resident at Clarion, in the State of Iowa, one Abbia N. P. Nix, then resident at St. Louis, in the State of Missouri, one Silas L. Chandler, then resident at Bicknell, in the State of Indiana, and a class of persons then resident within the said United States not capable of being resolved into individuals, and not capable, by reason of their great number, and by reason of a want of information on the part of the said grand jurors, of being named in this indictment, that is to say, such of the persons being desirous of marrying as should make answer to certain advertisements inserted and to be inserted and to be caused to be inserted by her, the said E. L. Glinn, in divers newspapers and public prints throughout the said United States of the kind and character and in substance and to effect following (except that in some instances it would be the advertisement of a woman desiring a husband), to wit:

‘Matrimony—Wealthy manufacturer wishes congenial, home-loving wife; no objection to lady employed; object matrimony. Hill, 2208 Wabash Av., Chicago.’

—which said scheme and artifice was a scheme and artifice which the said E. L. Glinn then had devised to defraud the said persons so intended to be defrauded as aforesaid by inserting and causing to be inserted in divers newspapers and public prints in different parts of the said United States fictitious and pretended advertisements of the kind and character above set forth (except that in some instances it would be the advertisement of a woman desiring a husband); by causing the letters, correspondence and communications answering and replying to said advertisements, and inquiring about the same, to be sent and delivered to her, the said E. L. Glinn, at Chicago aforesaid; by replying to said last-mentioned letters, correspondence and communications; by falsely representing and pretending to the said persons so intended to be defrauded respectively, by and through correspondence and circulars (and causing said persons to believe) that she, the said E. L. Glinn, under the name and style of Glinn's International Corresponding Association, was conducting and carrying on at Chicago aforesaid a fair, honest and bona fide matrimonial agency; that she, the said E. L. Glinn, under the said name and style, had numerous wealthy, lady and gentlemen clients who respectively had requested her to find for them loving life companions (husbands or wives as the case might be); that the said Glinn's International Corresponding Association had a great many wealthy members of all ages, descriptions and nationalities enrolled upon its books; that if the said persons so intended to be defrauded respectively would send and pay to her, the said E. L. Glinn, under the said name and style, a membership fee of five dollars, she, the said E. L. Glinn, under the said name and style, would place them respectively in communication with wealthy mem-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Repr Indexes

bers of said association (men or women as the case might be), and would continue introducing them respectively to wealthy members of said association (men or women as the case might be), without further charge until she, the said E. L. Glinn, under the said name and style, had found for them respectively suitable husbands or wives (as the case might be); by falsely representing and pretending to said persons so intended to be defrauded respectively that she, the said E. L. Glinn, under the said name and style, had lady and gentlemen clients (as the case might be), who respectively were about to take business trips that would take them near the locality of the said persons so intended to be defrauded respectively and that would make it possible to arrange for a personal meeting at an early date between said clients respectively and the said persons so intended to be defrauded respectively; whereas in truth and in fact (as the said grand jurors charge the facts to be), at the time of the devising of the said scheme and artifice, at the several times of the committing of the several offenses hereafter in this indictment set forth, as the said E. L. Glinn at all of said times well knew, she, the said E. L. Glinn, under the name and style of Glinn's International Corresponding Association, or under any other name, was not conducting and carrying on at Chicago aforesaid or elsewhere a fair, honest and bona fide matrimonial agency; and she, the said E. L. Glinn, under the said name and style, or under any other name and style, did not have numerous wealthy lady and gentlemen clients, who respectively had requested her to find for them loving, life companions (husbands or wives as the case might be); and the said Glinn's International Corresponding Association did not have a great many wealthy members of all ages, descriptions and nationalities enrolled upon its books, and did not have any wealthy members of any kind enrolled upon its books, or desiring to secure husbands or wives (as the case might be); and if the said persons so intended to be defrauded respectively would send and pay the said E. L. Glinn, under said name and style, or under any name or style, a membership fee of five dollars, she, the said E. L. Glinn, under the said name and style, or under any other name, would not place them respectively in communication with wealthy members of said association (men or women as the case might be), and would not continue introducing them respectively to wealthy members of said association (men or women as the case might be) without further charge until she, the said E. L. Glinn, under the said name and style, or under any other name, had found for them respectively suitable husbands or wives (as the case might be), and the said E. L. Glinn, under the said name and style, or under any other name, would not, and intended not to, introduce the said persons so intended to be defrauded respectively to, or place them in communication with any wealthy persons of the opposite sex desiring marriage, and she, the said E. L. Glinn, did not intend to, and would not, find and secure wealthy husbands or wives (as the case might be) for the said persons so intended to be defrauded; and neither the said E. L. Glinn, nor the said association had done anything or accomplished anything at all in furnishing men with wealthy wives or women with wealthy husbands; and no wealthy men desiring to secure wives and no wealthy women desiring to secure husbands had registered their names with such association as members of said association or enrolled themselves as members of said association; and she, the said E. L. Glinn, under the said name and style, did not have lady or gentlemen clients (as the case might be) who respectively were about to take business trips, or any kind of trips, that would take them near the locality of the said persons so intended to be defrauded respectively, and that would make it possible to arrange for a personal meeting at an early date between the said clients respectively and the said persons so intended to be defrauded respectively, or between any of them; and she, the said E. L. Glinn, under the said name and style, or under any name, would not secure, and intended not to secure, for the said persons so intended to be defrauded respectively, or for any of them, wealthy husbands or wives (as the case might be). And the grand jurors aforesaid, upon their oaths, aforesaid, do further present that the said E. L. Glinn intended, by the means aforesaid, to induce and procure the said persons so intended to be defrauded respectively to send and pay to her, the said E. L. Glinn, under the said name

and style, the sum of five dollars as a fee as aforesaid, and thereby to get possession of the moneys arising from the collection of said fees and thereupon, that is to say upon getting possession of said moneys, to convert said moneys to the own use of her, the said E. L. Glinn, without rendering to said persons therefor such services as she was falsely to represent and pretend as aforesaid that she would render to them, and without rendering to said persons any thing or service of value therefor; and thereby to defraud those said persons of the same moneys; which said scheme and artifice was a scheme and artifice which the said E. L. Glinn, when devising the same and committing the several offenses hereafter in this indictment mentioned, intended to effect, and which said scheme and artifice then and there was a scheme and artifice to be effected, by inciting, by means of the said advertisements, the said persons so intended to be defrauded as aforesaid to open communication with her, the said E. L. Glinn, by means of the Postoffice establishment of the said United States, and by thereupon (that is to say, when the said persons had opened communication with her, the said E. L. Glinn), opening correspondence and communication with those persons respectively under the name and style of Glinn's International Corresponding Association per E. L. Glinn, Manager, by means of the Postoffice establishment of the said United States."

The further facts are stated in the opinion.

W. Knox Haynes, for plaintiff in error.

Edwin W. Sims, U. S. Atty., S. S. Shirer, and Wm. E. Medaris, for the United States.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, after stating the facts as above, delivered the opinion.

The offense, of which the plaintiff in error was convicted, was the sending through the mails of certain letters, set forth in the indictment, in furtherance of a scheme to defraud, to be effected by opening correspondence with persons, residents of the United States, by means of the Postoffice establishment of the United States. The sending of the letters was not denied. The alleged scheme to defraud was the common one known as a matrimonial bureau or agency, the object of which was to bring persons of either sex, desiring to marry, into communication with persons of like desire of the opposite sex.

The initial step taken by plaintiff in error to organize her bureau was a pair of advertisements as follows:

"Matrimony: Wealthy manufacturer wishes congenial, home-loving wife, no objection to lady employed; object matrimony. Hill, 2208 Wabash Ave., Chicago."

"Wealthy young widow, unincumbered, fine appearance, genial and generous, seeks husband and adviser. Glinn, 171 E. 22nd Street, Chicago."

These advertisements were answered by a number of people of both sexes, to each of whom a letter was sent, containing, in the case of each man inquiring, the photograph of a woman (the same photograph in each case), and stating that the lady in question ("the wealthy young widow") had asked plaintiff in error to send to this particular man her full description and the photograph; adding that the lady was desirous of finding at once a good moral upright husband, who would help her in her business cares; that she was contemplating a business trip that would take her "near your locality," in which event it would be possible to arrange for a personal meeting at an early date; and

asking the person addressed to fill out a description blank enclosed and return same with a membership fee of \$5.00, which would entitle him to the privilege of the association without extra charge. To each woman inquiring, a like letter was sent, enclosing, also, a photograph (the photograph of a man—the same to each); adding that the “wealthy manufacturer” had asked that this be done, and stating that such wealthy manufacturer was contemplating a business trip in her locality in a short time.

With these letters were sent to the men an additional list of so-called lady members, and to the women an additional list of so-called gentlemen members, a sample of which is the following:

“906—Young lady, age 24, complexion medium, height 5 ft., 4 in., weight 115 lbs., widow, Protestant, American, occupation at home. Worth \$10,000, inheritance \$15,000.”

“703—Lady, age 34, complexion medium, height 5 ft. 5¼ in., weight 185 lbs., widow, Catholic Canadian. Worth \$10,000.”

—and corresponding descriptions of men.

In this way, during the time the bureau was in progress, and before the trial, about three hundred men and three hundred women had each been brought to join the bureau and pay in their initiation fee. As far as the evidence discloses, however, none of the interchanges of communications brought about, resulted in marriage.

The scheme, thus carried out, cannot be said to be in any sense, whether we look at it from the view point of some European countries, where matrimonial bureaus are encouraged, or from the view point of our own country, where they are considered as against public policy, to be a bona fide matrimonial bureau. The object of the bureau was not honestly to bring young men and women into communication with each other, that they might have an opportunity of determining whether they suited one another for the purposes of marriage. The sole object was to get the five dollar membership fee; to accomplish which the scheme pictured to the mind of the person addressed that the person of the other sex presented would be a desirable mate; had an attractive personality (for the photograph used was an attractive one); and was in comfortable circumstances—a mental picture that had no basis in the facts.

Error is assigned that there was no proof submitted to the jury sustaining the indictment, and that plaintiff in error's motion, to instruct the jury to find a verdict of not guilty, ought therefore to have been sustained. The indictment avers that plaintiff in error falsely represented to the persons intended to be defrauded that she was “conducting and carrying on, at Chicago aforesaid, a fair, honest and bona fide matrimonial agency,” well knowing that she “was not conducting and carrying on, at Chicago aforesaid, or elsewhere, a fair, honest and bona fide matrimonial agency.” There was no demurrer to the indictment as a whole; nor to this part of it, as insufficient or indefinite; and no motion for a bill of particulars; plaintiff in error going to trial upon this averment and its traverse, as if this were a sufficient particularization of the scheme to defraud alleged. Whether, under these circumstances, a conviction based upon a scheme so generally pre-

sented would stand, we need not decide, for, accepting the issue of the indictment as framed by plaintiff in error, viz; that the only alleged false representations traversed were those relating to the "wealth" of the persons presented, the issue thus submitted was whether plaintiff in error intended, or did not intend, to introduce to persons addressed the "wealthy" persons of the other sex—an issue of fact submitted to the jury, not alone upon the circumstance that a few persons of wealth had gotten upon the books of plaintiff in error, but upon all the other circumstances of the case, including this one, for instance, that a man who testified that he paid his money to be brought into communication with the "wealthy widow," was actually put into communication with one earning her living by domestic service—circumstances amply justifying the verdict of a jury that it was not the intention of plaintiff in error to introduce the persons responding to other persons of wealth. And the verdict of the jury being thus amply supported, must be accepted as a verdict that the averments of the indictment in this respect were proven according to the rules of law.

Error is assigned that certain original letters, written by so-called members to plaintiff in error, were offered and rejected. This is true, but it is also true that plaintiff in error was permitted to put in evidence all the books and records in the case, including (for the records were made up, among other things, from these letters) the contents of the letters rejected; and there is nothing in the record that shows that there was any issue presented to the jury, or any contention made, that the records were not a true tabulation of the letters; from which it follows that plaintiff in error was permitted to put fully before the jury the only fact—the character of her business—for which the letters might have been competent; and as to these evidentiary facts there was no dispute. We do not think that, under these circumstances, the rejection of the letters was prejudicial error.

Other errors are assigned, such as remarks made by the Court during the trial and in the instructions to the jury, but none of them present any substantial error.

The judgment of the District Court is
Affirmed.

GOODING v. REID, MURDOCK & CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1910.)

No. 1,550.

1. NE EXEAT (§ 3*)—CONSTITUTIONAL LAW (§ 83*)—JURISDICTION TO ISSUE WRIT—CONSTITUTIONAL PROVISIONS.

In a suit in equity for an accounting under a contract and for a receiver for the property embraced in the contract, a part of which is in a foreign country, as an appropriate process toward preserving the property and compelling its delivery to the receiver to abide the final decree, the court has power to issue a writ of ne exeat, and such writ is not a violation of a constitutional provision prohibiting imprisonment for debt.

[Ed. Note.—For other cases, see *Ne Exeat*, Cent. Dig. §§ 3-6; Dec. Dig. § 3.* Constitutional Law, Cent. Dig. §§ 150-151; Dec. Dig. § 83.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. INJUNCTION (§ 32*)—RESTRAINING ACTION AT LAW—PROTECTION OF COURT'S JURISDICTION.

A court of equity, which has issued a writ of ne exeat, has power to enjoin the prosecution of an action at law, brought in another court pending the equity suit, to recover damages for false imprisonment under such writ; such equity court having power in the pending suit to redress any wrong sustained by the wrongful issuance of its process, and exclusive jurisdiction to do so.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 69, 72, 73; Dec. Dig. § 32.*]

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by Reid, Murdock & Co. and others against Frederick Charles Gooding. From an order granting an injunction, defendant appeals. Affirmed.

The appeal is from an order of the Circuit Court enjoining appellant, his agents and solicitors, from further prosecuting against appellees a suit at law in the Circuit Court of Cook County (and from instituting and attempting to institute, or prosecute, any suit at law) on account of, or based upon, appellant's alleged false imprisonment under a writ of ne exeat, issued in the suit in equity of appellees against appellant, now pending in the said Circuit Court of the United States for the Northern District of Illinois, in which suit the order appealed from was entered.

The suit in equity is by appellee, a corporation under the laws of Illinois, against appellant, a citizen of Great Britain, and is for an accounting by appellant to appellee, on account of a contract entered into between them respecting the purchase and sale, by appellant, for and on account of himself and appellee, of olives growing in the Kingdom of Spain; for a receiver to take charge of all the olives, accounts and bills receivable, moneys, credits, effects and property of every kind, growing out of said contract, whether in the city of Seville, in the Kingdom of Spain, or elsewhere; for a cancellation and termination of the contract; and for an injunction restraining appellant from suing appellee upon, or setting up or claiming, any right under said contract; as also for a writ of ne exeat republica, forbidding appellant from departing without the jurisdiction of the Court until his compliance with, and performance of, all the orders and decrees therein entered.

Thereupon, after hearing upon a motion therefor, a receiver was appointed, and appellant directed to transfer and deliver the moneys, olives and other property, referred to in the bill, and also directed not to take any steps to prevent the receiver from procuring title to, or obtaining possession of same, said order of possession extending to the olives in the Kingdom of Spain as well as elsewhere. At the same time a writ of ne exeat was issued, restraining appellant from departing out of the jurisdiction of the Court, the said writ being marked for security in the sum of One Hundred and Forty Thousand Dollars; which security was given and accepted.

In due time, motion to quash the writ of ne exeat was made and overruled; and upon the receiver's report to the Court that he had possession of all the property prayed for in the bill, including the olives in the Kingdom of Spain, the appellant was released and discharged upon giving bond in the sum of Ten Thousand Dollars that he would not depart from the jurisdiction of the Court, except upon the condition that he would personally appear before, and surrender himself to its jurisdiction after he had been so ordered to do; whereupon the suit, restrained by the order appealed from, for \$100,000 damages for false imprisonment, was brought in the Circuit Court of Cook County by appellant against appellees. The further facts will be found in the opinion.

Almon W. Bulkley, for appellant.

Isaac H. Mayer, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GROSSCUP, Circuit Judge, after stating the facts as above, delivered the opinion.

The equity suit, in which the writ of *ne exeat* was issued, is still pending. The immediate question before us is whether, pending such suit in equity, an independent action at law for false imprisonment, growing out of the execution of the writ, can and ought to be enjoined; and this question depends largely on whether, as an appropriate process of furthering the jurisdiction and orders of the equity suit, the issuance of a writ of *ne exeat* is *coram non judice*.

The chief arguments made against the writ are, that it amounts to imprisonment for debt, and that there is no imprisonment for debt in Illinois; that it will be issued only when the demand sought to be enforced is certain in its nature, actually payable, and not contingent; and that it will not be issued in an action for an accounting, unless there is an admitted balance due by the defendant to the plaintiff; all of which arguments, except the first, challenge not the jurisdiction of the Court to issue, but the sufficiency of the case made out in such Court to call for the exercise of its jurisdiction, and are therefore immaterial here, because this is not an appeal from the order issuing the writ, nor from the order denying the motion to quash the writ, nor from any order involving appellant's right to an assessment of damages in the equity suit, on account of the issuance of the writ, but an appeal from an order that forbids appellant from going into any Court, other than the Court from which the writ was issued, to determine these questions. And granted that the Court had jurisdiction to issue the writ, and that it had power to protect this jurisdiction so as to make it all inclusive of the questions that might arise thereunder, including the question of damages; these questions are not questions that arise on this appeal.

(1) Did the equity court have power, as an appropriate process toward preserving the property brought by the bill within its jurisdiction, compelling a delivery to the receiver, and to prevent an evasion of its order, to issue the writ? We think it did. The constitutional provision regarding imprisonment for debt does not prohibit the exercise of equitable process for the purposes named. *Dean v. Smith*, 23 Wis. 483, 99 Am. Dec. 198. The writ is one of right (2 Story's Eq. Jurisp. [10th Ed.] § 1469), and as said in the preface to Warner's 1st Am. Ed. of *Beames' Ne Exeat Regno*, is little more than an order to hold to equitable bail, the party generally getting rid of it by giving security to abide the event of the litigation. And in a number of cases in this country, as an appropriate equitable process, the writ has been utilized and sustained. *Patterson v. McLaughlin*, 1 Cranch, C. C. 352, Fed. Cas. No. 10,828; *Union Mutual Life Ins. Co. v. Kellogg*, 24 Fed. Cas. 611, No. 14,373; *In re Rosser*, 101 Fed. 562, 41 C. C. A. 497; *Dean v. Smith*, *supra*.

In *Enos v. Hunter*, 4 Gilman (Ill.) 211, it was said:

"Where the relief sought could be effected by acting directly upon the person of the defendant, the court of chancery has never hesitated to entertain the bill where the defendant is found within its jurisdiction, whether the subject-matter of the controversy be within its control or not. Of this character are those cases where the courts have compelled specific performance

of contracts for the conveyance of, or relating to land which is situated beyond its jurisdiction. And in such cases the court will compel a conveyance to be executed, in such manner and form as may be prescribed by the law of the country where the land is situate. And if need be, in order to effect this, they will prevent the defendant from leaving the jurisdiction of the court, *pendente lite*, by a writ of *ne exeat*."

In *Mitford & Tyler's Pl. and Pr. in Equity*, p. 144, it is said:

"For the purpose of preserving property in dispute pending a suit, or to prevent evasion of justice, the court either makes a special order on the subject, or issues a provisional writ; as * * * the writ of *ne exeat regno* to restrain the defendant from avoiding the plaintiff's demands by quitting the Kingdom."

In a note to Section 865, *Gibson's Suits in Chancery* (1907), it is said:

"It would seem that a *ne exeat* is a writ necessary for the purposes of justice when the defendant, by leaving the state, can defeat the power of the court to grant effectual relief, or evade the relief granted; especially when the relief consists in compelling the defendant (1) to execute to the complainant a deed for land, or other property, situate in another state, or * * * (4) to do some other act which the court could not effectually do by the direct and inherent operation of its own decree. The object of the writ is to enable the court to act upon the person of the defendant in such cases. 1 Barb. Ch. P. 647, 651, 652; 2 Dan. Ch. Pr. 1698, note; 2 Sto. Eq. Jur. §§ 1471, 1472, note."

That the writ was not *coram non iudice*, seems clearly, by these authorities, to be established.

(2) Had the equity court, in pursuance of its power to issue the writ, power to enter the order appealed from, restraining the law court from proceeding with the action at law? The question, as we have already said, is not, Shall a "Federal Court" restrain the "State Court," but shall a Court of equity restrain a Court of law from taking jurisdiction of a complaint, by a party to the equity suit, that one of the processes of the Court of equity, issued against him, was wrongfully issued, and undertaking to redress that wrong? The question has been up in England in *Aston v. Heron*, 2 My. & K. 390, 39 Eng. Reprint, 393, and in *Frowd v. Lawrence*, 1 Jac. & W. 656. In the first of these cases, Lord Brougham, Lord Chancellor presiding, speaking to the question above stated, says:

"The Court excludes all other jurisdiction in everything relating to its process, not only preventing any other Court from judging whether or not its orders were regular, but from examining into the regularity of their execution; and not only preventing such examination, but shutting out redress at any hands but its own, where a wrongful act is admitted to have been done under color of obeying its commands. It assumes to be the only judge of all that regards the issuing and the execution of its own orders. Whether or not it be necessary that the Court should enjoy this jurisdiction, and have the power of enforcing it, exclusive of all interference, even where its orders cannot be said to have been obeyed, but rather have been colorably used as a pretext for wrong-doing, it is now too late to inquire. The question has been settled long ago."

And in the second of these cases, speaking to the same question, Eldon, Lord Chancellor, says:

"In this case an attachment, under which the defendant was taken up, issued regularly, and, upon his application, it was afterwards discharged,

with costs. No application was made to this court, to visit the proceeding upon the parties concerned; but the defendant, after the attachment is discharged, brings an action at law for damages, and a motion is now made to me for an injunction to restrain him, *brevi manu*, from going on with it. I need not point out the importance of the question, because it is one between this court and the right of the subject to ask of a jury, whether he is not entitled to damages for being deprived of his liberty. It was stated that there was a case in *Vernon*, in which it had been expressly laid down that the court would not permit such an action to go on. That was a very strong case. The ground there taken was, that the court would not suffer its process to be examined by any other court; and that a court of law could know nothing of it."

* * * * *

"But this does not mean, that the persons concerned will not be obliged to make the party satisfaction; only that it must not be done by an action at law. It is impossible, from the nature of the thing, that they can try the regularity of an attachment in a court of law. The injunction must be, without prejudice to any application that the defendant may be advised to make for compensation, or the costs at law."

The reference of Lord Brougham, to the question as one settled "long ago," and now "too late" to inquire into, is a reference probably, at least in its origin, to the celebrated contest between Lord Chief Justice Coke and Lord Chancellor Ellesmere, in the time of James I, as to whether a court of equity could restrain a judgment at law in which, as stated in Vol. 1, p. 5, Ames' Selection of Cases in Equity Jurisdiction, foot note, "Lord Ellesmere's triumph was complete."

In this country, in *Mackay v. Blackett*, 9 Paige Ch. (N. Y.) 437, Walworth, Chancellor, speaks as follows:

"It [the court] must restrain of course; otherwise it permits its own orders to be rescinded and its jurisdiction to be questioned—its orders to be rescinded indirectly and not by the superior court of appeal; its jurisdiction to be questioned by courts of inferior or co-ordinate authority."

Also *Reynolds v. Corp.*, 3 Caines (N. Y.) 263 (Chief Justice Kent).

And in *Foster's Federal Practice* (Third Edition) Vol. 1, § 263, treating specifically of the practice in obtaining the writ of *ne exeat*, the author concludes:

"The discharging order usually enjoins the defendant from bringing an action of false imprisonment (citing *Darley v. Nicholson*, 2 Dr. & War. 86); and the prosecution of such an action may be restrained by a subsequent order (same citation)."

This is sufficient authority, it seems to us, to settle the question in favor of the Court of equity's right to enjoin. Upon principle the right ought to exist. It does not deny to the person, against whom the process has been issued, his right to redress; for, contrary to the wrong sued upon in the ordinary action for false imprisonment, the party has redress in the Court that issues the process. There is no need, therefore, that he have the right to bring an action for false imprisonment. On the other hand, the need is imperative that a Court of equity, issuing process in furtherance of its purposes, and within its jurisdiction, shall not be hampered by collateral inquiry, in other Courts, as to the legality of such process, or the sufficiency of the grounds upon which it was issued. For conflicts of that kind, proceeding with varying fortunes in the different Courts, besides weighing

down litigation with additional expense, can result only in making those things uncertain that ought, at every stage of the proceeding, to be capable of being reduced to certainty. Equity Courts, subject to such procedure, would no longer be the masters of their writs.

The decree appealed from is affirmed.

UNITED STATES *ex rel.* CHANIN *v.* WILLIAMS, Immigration Com'r.

(Circuit Court of Appeals, Second Circuit. March 17, 1910).

No. 287.

ALIENS (54*) — IMMIGRANTS EXCLUDED — LIABILITY TO BECOME A PUBLIC CHARGE — ADMISSION UNDER BOND — DISCRETION.

The exercise by the Secretary of Commerce and Labor of the discretionary power conferred in him by Immigration Act Feb. 20, 1907, c. 1134, § 26, 34 Stat. 906 (U. S. Comp. St. Supp. 1909, p. 463), to admit alien immigrants after a finding that they are likely to become a public charge, if otherwise admissible, on the giving of a suitable bond, or his refusal to exercise such power, is not reviewable by the courts.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Action by the United States, on relation of Hannah Chanin, against William Williams, as Commissioner of Immigration. From an order dismissing a writ of habeas corpus, relator appeals. Affirmed.

Kahn & Hegt (Herman Kahn, of counsel), for appellant.

Henry A. Wise, U. S. Atty. (G. H. Dorr and D. D. Walton, Jr., Asst. U. S. Atty., of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The appellants are alien immigrants, who arrived at this port in the steamship Ryndam in November, 1909. The husband and father arrived by the same boat and was admitted to the country without much difficulty, because he traveled second class. The appellants, however, came in the steerage and were taken to Ellis Island. They came over in different parts of the steamship through no fault of their own, but because at the last moment it was discovered that the accommodations which the ship's agents had promised could not be furnished. As there was only one bunk in the second cabin, and the wife could not leave the small children, the husband took it, and the others kept together in the steerage. At Ellis Island the physician certified that appellant Hannah has "chronic Bright's disease which affects ability to earn a living; also has valvular disease of the heart which affects ability to earn a living." A board of special inquiry examined the husband as to his financial condition, and upon such examination and the certificate found that the relators were likely to become public charges. An appeal was taken to review this finding, but without success, and the conclusion that relators are within the ex-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 177 F.—44

cluded class, "persons likely to become a public charge," cannot be here disputed.

Section 26 of the immigration act of February 20, 1907 (34 Stat. 906, c. 1134 [U. S. Comp. St. Supp. 1909, p. 463]), provides:

"That any alien liable to be excluded because likely to become a public charge, or because of physical disability other than tuberculosis or a loathsome or dangerous contagious disease may, if otherwise admissible, nevertheless be admitted in the discretion of the Secretary of Commerce and Labor upon the giving of a suitable and proper bond or undertaking, approved by said Secretary in such amount and containing such conditions as he may prescribe," etc.

In accordance with the provisions of said section the relators applied for relief, offering to submit evidence of the financial condition and earning ability of the husband, father, and brothers of Mrs. Chanin, and adding:

"We respectfully submit that the discretion of your department should properly be exercised in favor of the aliens and for admission under bond, which we are ready to furnish."

A further hearing was thereupon had before the board of special inquiry, which took testimony as to financial conditions and as to the circumstances under which they failed to come all in the same cabin. The acting commissioner at this port advised against admission under bond. His certificates and all the evidence in the case were laid before the Secretary of Commerce and Labor. Relator's counsel had an interview with the commissioner, and was informed by the latter that it was the practice of the department to admit persons under bond only in cases of separation of family. Attention was then called to the fact that, if relators were excluded, the husband being admitted, there would be a separation of family in this case. In reply the commissioner stated that relators were not entitled to consideration, because the husband had come surreptitiously into the country. On December 13, 1909, the acting Secretary of Commerce and Labor denied the application for admission.

The matter of admission under bond of a person once found to be likely to become a public charge is by the statute confided to the Secretary, and we do not see why his refusal to admit is not an adverse exercise of such discretion in any particular case. His reasons for refusal may or may not seem persuasive to a court; but it is to him, not to the court, that Congress has confided the discretion.

The order is affirmed.

PITTSBURGH MFG. CO. v. LUDLOW VALVE MFG. CO.

(Circuit Court of Appeals, Third Circuit. January 4, 1910.)

No. 83 (1,252.)

APPEAL AND ERROR (§ 1207*)—PROCEEDINGS AFTER REVERSAL AND REMAND—CONFORMITY OF DECREE TO MANDATE.

A decree of a Circuit Court, entered after a reversal and remand by the Circuit Court of Appeals, affirmed, as in strict conformity to the opinion and mandate of the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4696; Dec. Dig. § 1207.]

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

Suit in equity by the Ludlow Valve Manufacturing Company against the Pittsburgh Manufacturing Company. Decree for complainant, and defendant appeals. Affirmed.

See, also, 166 Fed. 26, 92 C. C. A. 60.

Robert D. Totten and James I. Kay, for appellant.

Louis Marshall, for appellee.

Before GRAY and LANNING, Circuit Judges, and J. B. McPHERSON, District Judge.

PER CURIAM. This appeal is taken from the decree finally entered in this case March 28, 1908, after the reversal by this court of the decision of the court below. We think the decree appealed from is in strict conformity with the opinion and mandate of this court (166 Fed. 26, 92 C. C. A. 60) heretofore rendered and issued. Indeed, the decree, as rendered, grants to the complainant a minimum of the protection to which this court considered it entitled, and the decree below is therefore affirmed.

GORMLEY & JEFFERY TIRE CO. v. UNITED STATES AGENCY et al.

(Circuit Court of Appeals, Second Circuit. March 21, 1910.)

No. 139.

1. PATENTS (§ 327*)—SUITS FOR INFRINGEMENT—EFFECT OF PRIOR ADJUDICATION IN ANOTHER CIRCUIT.

The importance of securing uniformity in the law as administered in the several circuits in patent causes is so great that a decision of a Circuit Court of Appeals in one circuit should be followed by that of another circuit in every case where the questions presented can fairly be regarded as doubtful.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620-625; Dec. Dig. § 327.*

Effect of prior adjudications in patent infringement suits on Circuit Court of Appeals, see notes to National Cash Register Co. v. American Cash Register Co., 3 C. C. A. 565; Amberg File & Index Co. v. Shea Smith & Co., 27 C. C. A. 247; United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 475.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PATENTS (§ 328*)—INFRINGEMENT—RUBBER TIRES.

The Jeffery patents, No. 454,115 and No. 558,956, for pneumatic wheel tires, *held not infringed*.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by the Gormley & Jeffery Tire Company against the United States Agency and others. Decree for defendants (169 Fed. 831), and complainant appeals. Affirmed.

The decree of the Circuit Court dismissed a bill charging the infringement of letters patent No. 454,115, dated June 16, 1891, and No. 558,956, dated April 28, 1896, issued to Thomas B. Jeffery for improvements in wheel tires.

Livingston Gifford, for appellant.

F. R. Coudert, for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. These patents were before the Circuit Court for the Western District of Pennsylvania and the Circuit Court of Appeals for the Third Circuit in the suit of the present complainant against the Pennsylvania Rubber Company, and the opinions of those courts are reported in 155 Fed. 982 and 161 Fed. 337, 88 C. C. A. 308, respectively. The Circuit Court held that the defendants' tire in that suit did not infringe the patents, and its decision was affirmed by the Circuit Court of Appeals.

It is conceded that the tire which was held not to infringe in the Pennsylvania case was practically the same as that of the defendants in this case, and the records in the two cases are not substantially different. So at the outset we find decisions in the Third Circuit directly against the contentions of the complainant. The decision of the Circuit Court of Appeals for the Third Circuit is entitled to the greatest respect in this court, as is also the decision to the same effect of the Circuit Court. The high standing of those courts would give weight to their opinions upon any subject. But, more than that, the importance of securing uniformity in the law as administered in the several circuits in patent causes is so great that a decision of a court of co-ordinate jurisdiction should be followed by this court in every case where the questions presented can fairly be regarded as doubtful. *Pratt v. Wright* (C. C.) 65 Fed. 99; *Enterprise Mfg. Co. v. Deisler*, (C. C.) 46 Fed. 855.

With respect to the first patent in suit, the most we can say is that, had the question been presented to us in the first instance, it is by no means certain that we would have given the patent so narrow a construction as to exclude infringement. There is much ground for contending that the flanges of defendants' structure are the "hooked edges" of the claims. Still, in the Pennsylvania case Judge Buffington in the Circuit Court considered the claims in connection with the specifications, and held that they covered a specific form of hook connection not embraced in the defendants' device. The Circuit Court of Appeals likewise construed the claims in connection with the specifications

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and affirmed Judge Buffington's decision. It is true that the Circuit Court of Appeals erroneously considered the Golding patent as in the prior art, and referred to it in its opinion as tending to narrow the construction of the claims. But this patent was not referred to in the Circuit Court's decision, and cannot be said to have controlled the decision of the Circuit Court of Appeals. Reading the claims with the specifications seems to have led that court—like the Circuit Court—to a narrow construction independently of the Golding patent. Moreover, the error regarding the Golding patent was called to the attention of the Circuit Court of Appeals upon petition for rehearing. As the rehearing was denied, it may fairly be inferred that the Circuit Court of Appeals did not regard the Golding patent as having materially influenced its decision.

Upon the whole, we think the question of the construction of the first patent a doubtful one, and that we should follow the decisions in the Third Circuit.

Our duty with respect to the second patent seems even clearer than with respect to the first. The Circuit Court of Appeals approved and adopted the opinion of the Circuit Court that the lateral inwardly extending portions of the sheath referred to in the claims were not to be found in the defendants' structure. The whole question turned upon the construction to be given to the claims in controversy when read in the light of the specifications. Precisely the same question upon the same record is presented to us. We regard it as a doubtful question to say the least, and feel that we ought to follow the decision of a court of co-ordinate jurisdiction.

The decree of the Circuit Court is affirmed, with costs.

CONTINENTAL AUTOMOBILE CO. v. A. G. SPALDING & BROS.

(Circuit Court, S. D. New York. March 12, 1910.)

1. PATENTS (§ 165*)—CONSTRUCTION—CLAIMS FOR FUNCTION.

If the claims of a patent are for means sufficiently specified and described in the claims and specifications, they are not invalidated as being for a function by a recital therein of the function to be performed or the result to be secured by such means.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

2. PATENTS (§ 165*)—CONSTRUCTION.

Claims of a patent cannot be broadened by construction or elements imported into them for the purpose of giving them novelty or establishing infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

3. PATENTS (§ 328*)—INFRINGEMENT—CLUTCH MECHANISM FOR AUTOMOBILES.

The Mabley and Franquist patent, No. 883,552, for a combination with other parts of the driving gear of an automobile of a clutch mechanism mounted on a shaft which is removable without disturbing the alinement of the other parts, such removability being the principal object of the in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

vention, in view of the prior art and the proceedings in the Patent Office, must be construed narrowly as an improvement patent only, and confined to the means specified and described. As so construed, *held* not infringing.

In Equity. Suit by the Continental Automobile Company against A. G. Spalding & Bros. On final hearing. Decree for defendant.

Edwards, Sager & Wooster (Clifton V. Edwards and Julian S. Wooster, of counsel), for complainant.

Redding, Greeley & Austin (William A. Redding and Albert M. Austin, of counsel), for defendant.

RAY, District Judge. Claims 1, 2, 4, 5, 6, 7, 8, 11, 12, and 13 of the patent in suit are in issue, and read as follows:

"1. In an automobile, the combination of a driving gear and a shaft comprised in part by a clutch member, a sleeve supporting said clutch member, a hollow shaft on which said sleeve is adapted to slide longitudinally, a spring device contained within the said hollow shaft for moving the clutch member in one direction, the said hollow shaft being connected at each end to other sections of shafting and in alinement therewith, the said hollow shaft and its supported parts being removably secured by such connections in such manner that the said hollow shaft and its supported parts may be uncoupled and removed from the machine without disturbing the alinement of the remaining portions of the shaft.

"2. In an automobile, the combination of two sections of alined shafting with the following instrumentalities intervening between the same, namely, a clutch member, a sleeve upon which said clutch member is carried, a hollow shaft surrounded by said sleeve, a spring device contained within the hollow shaft, means connecting the said sleeve with said spring device whereby the sleeve is forced longitudinally in one direction, said instrumentalities as an organism being removably connected to the said sections of the alined shafting and alined therewith and the said removable connections permitting the said clutch mechanism to be removed from the machine without disturbing the relation or alinement of the sections of shafting. * * *

"4. The combination with two separated shafts, of an intermediate shaft coupled to one of said shafts and having movable devices for clutching the other shaft, said latter shaft having co-operated clutching devices separably secured thereto, whereby to permit removal of said clutch mechanism from between said shafts without disturbing their position, substantially as described.

"5. The combination of two separated shafts, of an intermediate shaft coupled to one of said shafts and having movable devices for clutching the other shaft, said latter shaft having a flywheel carrying co-operating clutching devices separably secured thereto, whereby to permit removal of said clutch mechanism from between said shafts without disturbing their position, substantially as described.

"6. The combination with two separated shafts, of an intermediate shaft separably coupled to one of said shafts and having a movable clutch ring for clutching the other shaft, a detachable clutch ring surrounding and co-operating with said movable clutch ring, said rings being one within the other in operative position, whereby, upon detaching the clutch ring from one shaft, and the intermediate shaft from the other, the clutch mechanism can be removed without disturbing said shafts, substantially as described.

"7. The combination with a driving and a driven shaft, of an intermediate shaft separably coupled to the driven shaft and having a bearing in the driving shaft separable therefrom, and clutch devices carried by said intermediate shaft for clutching said driving shaft, said clutch devices being mounted so as to permit removal without disturbing the driving and driven shafts, substantially as described.

"8. The combination with a driving shaft and a driven shaft, of an intermediate shaft separably coupled to one of said shafts and having a bearing in the end of the other, said driving shaft carrying a clutch member, a movable clutch

member on said intermediate shaft adapted to engage therewith, one of said clutch members and said bearing being detachable from the shaft to permit removal of said intermediate shaft and the clutch independently of said driving and driven shafts, substantially as described. * * *

"11. The combination with a flywheel carrying a separable clutch member, of an intermediate shaft carrying a movable co-operating clutch member, a shaft to which said intermediate member is coupled, said clutch member moving towards the flywheel to release the driving connection, and a spring carried within the intermediate shaft for engaging said clutch members, substantially as described.

"12. The combination with a shaft carrying a clutch member, of an intermediate shaft carrying a movable clutch member mounted on a sleeve, a driving connection permitting longitudinal movement between said sleeve and said shaft, a shaft coupled to said intermediate shaft, and means whereby the intermediate shaft with the clutch members, can be removed from between said shafts without involving disarrangement thereof, substantially as described.

"13. In a flywheel clutch mechanism, a detachable clutch member secured to the flywheel outside the plane thereof, and a co-operating movable clutch member on a second detachable shaft carried within said clutch member and the flywheel, substantially as described."

The main object of the invention was to provide a clutch device especially for automobiles, which could readily be removed. The specifications say:

"This invention relates to clutch mechanism, more particularly to clutches used for the transmission of power from an engine, and embodies a construction by which the clutch parts can be removed without necessitating disarrangement of other parts of the mechanism.

"The invention is more especially designed for use on automobiles or self-propelled vehicles of any character. At the present time it is extremely difficult to renew the parts of the clutch for the reason that the necessities of construction of automobiles are such that the space in which the parts are contained is very limited, and in order to get at the clutch, numerous parts must be removed, causing trouble when the machine is put together again, owing to the difficulty of aligning the various parts. In addition, it is quite inconvenient to take the machine apart whenever an accident happens to the clutch. Clutches made in accordance with this invention can readily be removed and put in place without the necessity of taking out the main shaft of the machine."

The defenses urged are (1) that the claims in issue are invalid for want of patentable invention in view of the prior art; (2) that such claims specify a result or function not patentable and are therefore invalid; and (3) noninfringement.

The elements of claim 1 are: In an automobile the combination of (A) a driving gear and a shaft comprised in part by (1) a clutch member, (2) a sleeve supporting said clutch member, (3) a hollow shaft on which said sleeve is adapted to slide longitudinally, (4) a spring device contained within the said hollow shaft for moving the clutch member in one direction, (a) the said hollow shaft being connected at each end to other sections of shafting and in alinement therewith, (b) the said hollow shaft and its supported parts being removably secured by such connections in such manner that the said hollow shaft and its supported parts may be uncoupled and removed from the machine without disturbing the alinement of the remaining portions of the shaft. I take it from this that the spring device is within the hollow shaft, which hollow shaft is connected at each end, in some way not mentioned in the claim, it may be by couplings and bolts, to other sections

of shafting, not further described in the claim, and in alinement therewith, but so connected and secured to such connections that the hollow shaft and its supported parts may be uncoupled and removed from the machine without disturbing the alinement of the remaining portions of the shaft. This connection and the mode and manner of making it and the means employed are not specifically mentioned or described in the claim. We are told that a sleeve supports the clutch member, and that this forms a part of the shaft or shaft and driving gear, and that the sleeve slides on the hollow shaft longitudinally. If the object or purpose is to claim a device or mechanism which is connected to other devices or mechanism, and in alinement therewith, in such a manner as to be removed by uncoupling same without disturbing the alinement of the other parts, we are left, so far as the claims speak, to our own choice and selection of coupling devices and connections. We are told what is to be done, but are not told in the claim what to use or how to use it. However, by reference to the drawings and specifications, we are fully informed on this subject. We have ordinary couplings, bolts, and nuts for the purpose fully described. We have a flywheel mounted on shaft, a. We have a driven shaft, p, which defendant mentions as a transmission shaft. We have an intermediate shaft, h, resting at one end in a bearing, i, bolted to the flywheel and coupled to the driven shaft, p, at the other end by couplings and bolts. The friction ring is bolted to the flywheel, but is so connected to the movable member, d, of the clutch that, when such ring is unbolted, it will come out with the intermediate shaft, as will everything supported and carried by such shaft. This means that in a few minutes, by removing a few bolts, we may take the clutch from an automobile without disturbing the alinement of the other parts, and, after repair, replace it, provided the shaft, h, resting in the bearing, i, bolted to the flywheel, is first removed, and further provided the construction is such that the intermediate shaft carrying the clutch slips out without moving back the shaft, p, or the shaft, a, so as to disturb the alinement of the other shafts or their relation to the other parts. As much was said on the argument, and as much is said in defendant's brief on this subject, it is well to call attention to the claims in this regard. Claim 1 says, "without disturbing the alinement of the remaining portions of the shaft." Claim 2 says "without disturbing the relation or alinement of the sections of shafting." Claims 4 and 5 say, "to permit removal of said clutch mechanism from between said shafts without disturbing their position." Claims 6 and 7 are substantially the same. Claim 8 says, "to permit removal of said intermediate shaft and the clutch independently of said driving and driven shafts." Claim 12 says, "and means whereby the intermediate shaft with the clutch member can be removed from between said shafts without involving disarrangement thereof."

Assuming that this construction is new, it remains to determine whether it presents patentable invention in view of the prior art. I do not think the claims are for functions. If the claims are for means specified and pointed out, and made complete and specific, as to such means, by reference to the specifications which are to be read with the claims, they are not invalidated by a recital therein of the function to

be performed by the combination, or by one or more of its elements, or by a recital therein of the result accomplished by the construction pointed out. I am not able to agree with the contention of the defendant that "the supposed novel feature of the structure shown and described in this patent is the removability of the clutch without disturbing other parts of the driving and driven mechanism and the replacing of the clutch without disturbing other parts of the mechanism." This undoubtedly was the main object or purpose sought to be accomplished by the construction mentioned, but the invention was in the new construction and arrangement of parts in a combination which would enable this removal and replacement to be accomplished. If done, it saved time and great expense. Is it a new or novel arrangement of old elements, somewhat changed, so as to form a new and useful combination? It is apparent on the face of the patent that all the claims are not limited to use in an automobile. Two of the claims in issue are so limited. The defendant claims that:

"It was old in the art long prior to the date of this supposed invention to construct a clutch mechanism which was removable without disturbing any other part of the driving or driven mechanism, and which might be replaced without disturbing the alinement of the parts."

If this be true and Mabley and Franquist have not made a patentable improvement on that mechanism as it stood, or made such changes and improvements as to adapt the old mechanism to use in a new place to meet a new and novel exigency for which it was not before adapted by the display of more than the ordinary skill of the mechanic skilled in the art, then there is not invention. This involves a more detailed examination of the claims, and a careful scrutiny of the prior art.

Patent Office Proceedings.

In the Patent Office there was substantially a rewriting of all the claims involved here as well as of the specifications. The original claims were six in number, and February 10, 1904, claims 1, 2, and 3 were rejected on Riker, No. 725,629, and German patent to Dimmler, No. 107,109, and claims 4 and 5, on Dimmler alone. Attention was also called to Kruse, No. 434,150. Claim 5 was substantially rejected also. Claims 1, 2, and 3 were broadly for the combination in a self-propelled vehicle—claims 2 and 3 mentioning an automobile—of (1) an engine, and (2) a clutch shaft driven thereby, the said clutch shaft being formed in part by removable portions carrying the clutch elements, which clutch elements and removable portion of the shafting might be removed without disturbing the alinement or adjustment of the rest of the clutch shaft. Claims 4, 5, and 6 brought in the sleeve and the hollow shaft and spring.

March 15, 1904, numerous amendments and substitutions were made. Claim 1 was amended, claim 2 was canceled, claim 3 was made claim 2 and amended, claim 4 was canceled, and two new claims, 3 and 4, substituted or added in place of original 3 and 4, claim 5 was amended, and claim 6 canceled. May 6, 1904, claims 1 and 2 were rejected on same references, and claims 3 and 4 were objected to as not accurately descriptive. As to claims 1 and 2, the examiner said:

"The references contain the same elements as recited in these claims, the claims differing therefrom only in the statement that the sections of the applicant's shafting are so connected as to be removable without disturbing the alignment of the clutch shaft. This statement is too functional and indefinite to warrant the allowance of these claims over the references cited. The applicant should set forth in the claims the nature and arrangement of the connections by which the function is accomplished."

May 6, 1905, claims 1 and 2 were canceled by the applicants, and claim 3 was made claim 1 after substantial amendment, claim 4 was amended and made claim 2, and 5 was made No. 3. August 28, 1905, these claims were objected to, whereupon, June 8, 1906, the applicants canceled 1 and 2 and inserted new claims in place thereof. July 18, 1906, the Patent Office suggested amendments to claims 1 and 2, and July 20th they were amended. August 24, 1906, the case having been transferred to division 17, other amendments were suggested, and September 25, 1906, numerous amendments were made. October 29, 1906, the examiner proposed other amendments, and said that, when made, "the case will probably be allowed." January 26, 1907, the applicants changed their attorneys, and thereupon new specifications and a new set of claims, 16 in number, were substituted. Claims 1, 2, and 3 were, however, with amendments, the same as 1 and 2 and 3 before this substitution was made.

In making the substitution and asking the allowance of the claims as then presented, the applicants said:

"The advantages of a removable clutch for automobiles are sufficiently apparent from the specification of this application, and it must be apparent that the improvement does not rely so much in a clutch mechanism per se, as in the mounting of the clutch mechanism which will permit the objects of the invention to be attained. Viewed in this light, none of the references cited disclose the same inventive idea, and in none of them are the same results attained. Considering now the patent of Riker, 725,629, it is not seen how his clutch mechanism can be removed without dismantling the entire machine, and there is nothing in the specification of this patent which indicates that Riker was attempting to secure a removable clutch mechanism. A further point of distinction resides in the construction itself, which is not at all like applicants' and it could not be made to secure applicants' results without an entire reorganization. It is thought that the examiner has not heretofore given sufficient weight to the applicants' detachable clutch member carried by the flywheel in combination with the separable coupling between the intermediate shaft and the driving shaft, this arrangement permitting withdrawal of the clutch laterally from between the two shafts. This arrangement is broadly new, so far as any of the references show. The patent of Kruse, No. 434,150, does not aid in the solution of this problem because it is a clutch for an overhead shaft in a mill, and there is no reason for making such a clutch detachable, and, even if there were such reason, the result could not be effected by the Kruse construction. The German patent of Dimmler, No. 107,109, is equally foreign to the invention of these applicants, and it is not intended that this clutch be removable independently of the shafts, A and B, and in mechanical construction there is no resemblance to applicants' invention."

Certain objections were made, but claim 6 was amended, as was claim 14, and claim 13 was canceled. An interference followed, and thereafter the claims as amended and renumbered were allowed. It seems clear to me that the invention resides in so mounting the clutch mechanism upon the intermediate removable shaft that it is carried by such shaft and removed with it, and also in so connecting, by suitable

bolts and bolts and couplings, such removable section of shaft to the other parts that the entire machine is operative when together for use, but allows the removal of the intermediate shaft and the mechanism carried by it by disconnecting it and without disturbing the alinement and relation of the other parts of the entire operative mechanism when in position for work. In order that this removal might be made, it was thought desirable to modify and change the construction of the prior art, including the connections. This done the easy removal of the parts desired followed.

Changes from Prior Art.

If no such changes and modifications in the prior art were required, or if required and those made were of such a character as to be within the province of the ordinary mechanic skilled in the art, he having the prior art before him, there is no invention. The defendant says that but a small and an immaterial part of the prior art was cited when this patent was in the Patent Office. This will be considered as we progress.

In this art the clutch is, or should be, always arranged between the engine and the transmission gear. The clutch shown and described in this patent is of the type known as the "cone clutch," and of the reverse acting variety. In the cone clutch one member is known as the "male" clutch member and the other as the "female" clutch member. The female clutch member is always directly connected with the engine by being mounted on either the engine shaft or on the engine flywheel. The male member is always mounted on the driven shaft, and must have an independent movement of some kind so as to permit it to be engaged with and disengaged from the female member alternately. Usually a spring is employed which normally holds the male and female members in engagement. They are disengaged usually by a lever or some similar mechanism. The result is that with the engine constantly in motion, and the flywheel and attached female member in constant motion, the male member may be engaged and disengaged at will by the lever (if one is used), and power from the engine transmitted to or cut off from the driving gear of the machine. It follows that, with the engine in constant operation and the flywheel and female member in constant revolution carried by the engine shaft, the machine may be at a "standstill," and then set in motion by moving the male member into connection with the female member by a simple turn of the lever.

In figure 1 of the patent in suit the flywheel, a, is carried by the engine shaft, a', and the female member, called a friction ring, b, is bolted to the flywheel by bolts, c. A bearing, i, is bolted to the flywheel by bolts, j, and its function is to carry one end of the intermediate shaft, h. It is, of course, in alinement with engine shaft, a', and in effect is a prolongation thereof. The removable shaft, h, revolves in these bearings. These bearings may be removed by unbolting, j. In the construction described in the patent, this end of the driven shaft, h, is free when such bearings are unbolted. By unbolting the bearings, i, and the friction ring, or female member, b, the intermediate shaft and

all that is carried by it, including the female member, *b*, are entirely disengaged from the flywheel and the engine shaft, according to the claims and specifications of the patent in suit. The other end of this intermediate shaft, *h*, is connected to the said transmission shaft, *p*, by means of bolts passing through couplings, *r*, on both shafts. Nothing is said in the claims or specifications as to the construction of these adjoining ends of shaft, *h*, and shaft, *p*. If they are not interlocked in any way, it is evident that by unbolting the bearings, *i*, the friction ring, *b*, and the couplings, *r*, and removing such couplings, the intermediate shaft and the entire clutch mechanism would be easily removed without disturbing the other parts or their relation or alinement. If, on the other hand, the intermediate shaft, *h*, is joined to the shaft, *p*, which defendant calls "transmission shaft" in the manner indicated in figure 1, then the intermediate shaft, *h*, and the clutch mechanism carried thereby, cannot be removed until shaft, *p*, is moved to the right, so as to disengage it from shaft, *h*. This would disturb it, but would not necessarily affect the relation of the parts or the alinement.

In giving the movements or operations for removing the clutch, the defendant, after mentioning the unbolting and removal of the couplings and the disconnecting of the operating lever, *u*, adds that "either the engine shaft, *a*', or the transmission shaft, *p*, must be shifted lengthwise." On this subject Mr. Freeman, expert for defendant, says:

"I observe in one of the above quotations from the specification and in many of the claims in suit it is stated that the clutch mechanism may be removed 'without disturbing' the parts to which the clutch is detachably connected. This is not true of the construction shown in the patent. The clutch mechanism in this construction cannot be removed without disturbing one of the shafts, to the extent, at least, of moving it endwise or away from the other shaft so as to increase the space between the two shafts."

In this connection we may again call attention to the claim and statement of the patentees or inventors when they were urging the allowance of the claims as against the prior art, viz.:

"The advantages of a removable clutch for automobiles are sufficiently apparent from the specification of this application, and it must be apparent that the improvement does not rely so much in a clutch member per se, as in the mounting of the clutch mechanism which will permit the objects of the invention to be attained. Viewed in this light, none of the references cited disclose the same inventive idea, and in none of them are the same results attained."

The prior art plainly shows complete clutch mechanism carried by the driven shaft not having an intermediate part or shaft which is removable with such driven shaft. It also shows such clutch mechanism where all of it except the female member is carried by the driven shaft and is removable with it. We also have in the prior art clutch mechanism mounted on an intermediate shaft carrying all but the female member, which is carried by the driving or engine shaft, but is detachable therefrom, and may be easily removed after the clutch mechanism and intermediate shaft are removed. This, however, shows a clutch mechanism of the direct, not reverse, acting cone clutch type. In the direct acting cone clutch the male member moves towards the flywheel, which carries the female member, and engages the tapering or cone

shaped face of the male member with the tapering or cone shaped face of the female member. In this type, if we would remove the driven shaft and the male member carried thereby, there is no obstacle to such removal because of the slope of the engaging faces of the two members. If the female member is not an integral part of the flywheel (sometimes we have that construction), and is in such case detachable, of course, it may be removed after the driven shaft and male member are removed. In the reverse acting cone clutch type, the male member is within the female member, so to speak, and moves away from the flywheel to engage the sloping faces of the female member, and the result is that the driven shaft carrying the male member and such male member of the clutch cannot be removed until the female member is released from the flywheel, so that both members can come away together. As the patent in suit shows and describes the reverse acting cone clutch only, we have the necessity for liberating the female member from the flywheel before the male member of the clutch can be removed with the driven shaft to which it is connected and by which it is carried.

It is evident that, by making the female member detachable in the reverse acting type of cone clutch, the entire clutch mechanism would be removed with the driven shaft; and that by making such female member detachable in the direct acting type of cone clutch it would be easily removable after the driven shaft and male member are removed. All this would be easily accomplished without disturbing the alinement of the engine or driving shaft or the flywheel carried thereby. All this was done in the prior art, and was fully and plainly shown and described in the prior art, as applicable to both types of cone clutch. It only remained, if that did remain, to provide a detachable section of the driven shaft carrying the clutch mechanism (aside from the female member), or an intermediate shaft carrying such mechanism, which could be removed without disturbing the alinement of the other part of the driven shaft, or transmission shaft, p. On this subject the defendant contends, first, that the prior art plainly shows such detachable intermediate shaft, and that it was old in the art; and, second, that it involved no invention to make that part of the driven shaft carrying the clutch mechanism detachable. The defendant says it was old in the art to provide a continuous shaft in two sections, the one in perfect alinement with the other, connecting the sections by means of bolts and couplings such as are shown and described in the patent in suit; also, that we have no new or improved coupling; also, that it was old to provide bearings on a driving shaft by means of which a driven shaft might be connected thereto and actuated thereby, the motion of the one communicated to the other, or by means of which the one shaft might be kept in alinement with the other without the motion of the driving shaft being communicated to the driven shaft through such bearings. In fact, the defendant claims that in the patent in suit we have no new combination, no new construction, no new mode of operation, no new result; that the only changes from the prior art are in mere matters of detail and mechanical construction within the skill of the ordinary mechanic, and showing no patentable invention.

Prior Art.

The idea or conception of a detachable and removable clutch mechanism from a self-impelled vehicle or any other place for that matter, without disturbing the other parts, was clearly old in the art when the application for the patent in suit was filed. It is equally clear that the idea or conception of a driven shaft divided into two sections, one carrying the clutch mechanism so as to be easily removable, had been made effective and means provided for carrying the conception into effect. In view of the prior art and the action of the Patent Office, the claims of the patent in suit, if valid, must be construed narrowly and confined to the means specified and described. Improved means for doing a specified thing or accomplishing a new result or an old result in a better way may be patentable. The claims of this patent are divisible into two classes, or groups. Claims 4, 5, 6, 7, 8, 12, and 13 belong to the one, and claims 1, 2, and 11 to the other, and these are more limited in their scope. The claims will be further referred to after more specifically referring to the prior art. On page 254 of *La France Automobile*, dated April 19, 1902, "Clutch of Chenard and Walcker," figure 278 (page 275 of D. R.), shows a clutch with the female member loosely and detachably mounted on the flywheel by means of lugs, an intermediate and removable shaft carrying the remainder of the clutch mechanism, the male member of which is mounted on a sleeve which slides on the said intermediate shaft, and a spring coiled about the intermediate shaft which holds the male and female members of the clutch in engagement, but which is compressed when the male member is moved out of engagement with the female member. Means for moving the clutch members into and out of engagement are shown. It is also shown that the end of the said intermediate shaft which is connected with the remainder of the driven shaft—that is, the transmission shaft—is connected thereto by couplings and bolts. True, the bolts are not shown, but the complainant's contention that these couplings cannot be removed is not tenable. If not removable, why there at all? Again, the Chenard and Walcker carriages and clutches are described in volume 7, p. 232, of *La France Automobile* of 1902, and we have the detachable and detached clutch mechanism and intermediate shaft shown in figure 254 (page 269 of D. R.), and of it the article says:

"We shall see, however, in Fig. 254 that the cleats of the flywheel serve only for driving. The end of the axis of the motor is a pivot which serves to center the axis of the clutch. Two coupling nuts (b^1 , b^1) play the same rôle between the coupling and the speed change."

Turning to figure 254 and comparing it with figure 278, we see at once that the whole clutch mechanism with the intermediate shaft is removable, and was so constructed that it might be removed. It would hardly be expected that a writer in a scientific journal, after showing an old and well-known coupling, would deem it necessary to describe the mode and manner of unbolting and detaching it. In the *Automobile Journal* of August 8, 1903, showing the Mercedes models, the clutch and clutch mechanism and connections are shown, and it is said:

"The driven portion (the drum) of the clutch is connected with the first motion shaft of the change-speed gear through the short shaft, K, which has

flanged couplings at each end. This short length of shafting is inserted in order that the clutch can be removed without disturbing the gear box."

In the Horseless Age of March, 1902, we have an article describing the Clement car (see Defts. R., p. 266), and an illustration and description of a clutch mechanism (direct acting cone clutch), which, aside from the female member, is mounted on and carried by an intermediate and removable driven shaft, which shaft is connected to the so-called transmission shaft (it being a part of the driven shaft) by couplings and bolts holding them. The article referred to expressly states that the purpose of this coupling is to permit the easy removal of the intermediate shaft, "clutch shaft," carrying the clutch mechanism for removal and repair of the clutch mechanism. In the construction there described, the driving or engine shaft carries flanges to which is bolted the female member thus forming the flywheel, and it may be said the flywheel forms or is used as the female member. We may call it a friction ring, if we please, but it is removable without disturbing the alinement of any of the parts after the removal of the clutch mechanism. Aside from this described female member, the clutch mechanism is carried by the intermediate driven shaft (called in the article "clutch shaft"), and is removable with it. It is disengaged entirely from the driving shaft by moving it to the right, and this is accomplished by removing, after uncoupling, a steel block inserted between the transmission shaft and the intermediate shaft. This movement is necessary for the reason that the driving shaft terminates in a guide stud with a sleeve which enters a counterbore in the end of the intermediate driven shaft, or "clutch shaft." The male member or "friction clutch cone" is mounted on this intermediate driven shaft on which it slides freely, being united with a sleeve, and is engaged normally with the female member by a spring on the shaft and disengaged by compressing the spring. Mere inspection of this drawing (figure 6 in the article referred to, page 367) shows that the entire clutch mechanism is easily removable without in any way moving or disturbing the alinement of the shafts or any of the connected parts. That part of the flywheel forming the female member is shown to be removable as easily and as surely as is the friction ring or female member of the patent in suit and by the same means, the removal of bolts. This the prior art showed, and it is not material what the actual construction was.

In this clutch we have connected with the clutch mechanism a forked lever, fully described, for controlling it, and by means thereof the two members may be disengaged before removal of the intermediate shaft, if, indeed, such disengagement is necessary. In this construction the spring is carried on the intermediate shaft, not in it, but I do not see that there is any substantial difference in the mode of operation, function, or result. Its function is to engage and disengage the two clutch members. The connection of the driving or engine shaft with the end of the intermediate shaft is different in this construction from that of the patent in suit, but the same result is attained in the one case as in the other. The main purpose of connecting the two shafts at all at their respective contiguous ends is to

keep them in alinement. Motion is communicated from the engine to the driven shaft through the driven shaft and the clutch members.

In the *Automobile Journal* of October 25, 1902, p. 674, we find a description of "The Milnes Voiturette" as follows:

"The flywheel, C, forms the shell for the main clutch in the usual way. The male portion of the clutch is secured to a sleeve, B, which is mounted about the forward end of the first-motion shaft. The first-motion shaft itself does not move longitudinally, and its extreme forward end forms a steadying spigot. This shaft is made in two pieces, the one portion carrying the sliding wheels inside the gear case, G, and the other carrying the clutch sleeve. These two parts are connected together by a flange coupling. The coupling has a distance piece between the two flanges, so that the main clutch can be taken out without disturbing the gear box. The clutch sleeve, B, is provided with a ball thrust, against which the lever operating it presses. The lever lies horizontally, is pivoted at its left-hand extremity, and is connected with a spring and with the foot pedal, P, at its other end. The fulcrum piece and the spring are separately adjustable, and the entire clutch mechanism is readily accessible."

I do not think patentable invention was involved or disclosed in substituting the reverse acting cone clutch for the direct acting cone clutch of the prior art. Any skilled mechanic could have done it. But there were other changes in the details of the construction of the clutch mechanism of the patent in suit. We have a hollow intermediate shaft, and the spring is carried therein. We have a sliding sleeve against which the spring bears. We have a pin in the sliding sleeve which passes through slot, o, in the hollow shaft into sleeve, f, which is mounted on the hollow shaft. The expansion of the spring, on or against the pin, m, moves the sleeve, f, and the said hollow intermediate shaft, h, in opposite directions. Assume that there are new and novel features in such a mechanism which are patentable and covered by the patent in suit, does the defendant use them?

Claim 1 calls for a hollow shaft and a spring device contained therein and means, the pin, connecting the spring device and a sleeve supporting the clutch member. Claims 4 and 5 call for "movable devices for clutching the other shaft (driving shaft), such other shaft having co-operating clutching devices separably secured thereto" whereby, etc. Claim 5 mentions a flywheel, but claim 4 does not. These claims are so broad in terms that they actually cover the prior art, and, so construed, are obviously void. Claim 11 calls for a spring carried within the intermediate shaft. As already stated, I am of the opinion that no claim in issue of the patent in suit can be construed broadly enough, in view of the prior art and action of the Patent Office, to cover other than the construction shown and described, and that they do not cover broadly a removable clutch mechanism carried by an intermediate driven shaft whether the clutch be a direct acting cone clutch, a reverse acting cone clutch, or a multiple disk clutch; one member of the clutch being carried by the driving shaft and separable therefrom so as to be removable, etc. So broadly construed, in view of the prior art and limitations, they would be void. I do not so construe them.

Defendant's Clutch.

The defendant has an engine or driving shaft and a driven shaft in two parts, one part called "transmission shaft," and the other part

"intermediate shaft," which latter carries one member of the clutch proper. The intermediate and transmission shafts are joined and kept in alinement by a square coupling. The defendant uses neither the direct nor the reverse acting cone clutch, but a multiple disk clutch well known as the "Weston" clutch in use for some 60 or 70 years, improved, of course, and which exists in more than one form. In place of a single male member engaging with a single female member to create the necessary friction and move the driven shaft and mechanism connected thereto and thereby propel the vehicle, we have a plurality of driving disks, all being friction disks. The driving or engine shaft has a hub which carries a plurality of disks, and, being secured to the hub mentioned, they rotate with the driving shaft. Interposed between the said disks, driving disks because driven by the engine shaft, we have a plurality of driven disks which are attached to the intermediate driving shaft before mentioned by means of a key or spline provided on such shaft. These are driven disks because caused to rotate when brought in contact with the driving disks. There is a collar which slides on such intermediate driven shaft, and which collar is provided with flanges which receive an operating lever to slide the collar back and forth on the intermediate shaft. A spring is interposed between this sliding collar and a removable flange bolted to the hub of the driving shaft. This spring normally holds the disks in contact with each other.

In the patent in suit "f" is a cylindrical sleeve, and carries the movable or male member of the clutch, d, to which it is bolted. In defendant's clutch mechanism we have the collar or clamping ring, or clamping ring spider, which is also marked "f" in sheets 1 and 2 of defendant's exhibit, drawings of defendant's construction, but it does not carry any or either of the friction rings. Its function is to force the disk members together. The intermediate shaft of defendant's clutch mechanism is hollow, but this is of no importance, as the hollow portion performs no function in the mechanism or combination. The spring is not contained or carried therein. This shaft is made hollow to save weight so far as I can discover from the testimony. It has been more than once mentioned that in the complainant's patent a cylindrical sleeve carries the male cone clutch member to which it is bolted by bolt, g. In defendant's clutch mechanism I fail to find any such sleeve or any equivalent for it. In defendant's mechanism, so far as I can discover, and so far as the evidence gives reliable information, the friction disks which take the place of the male and female members so far as to perform their functions are supported directly by the hub on the driving shaft, and by the intermediate shaft directly. I do not see that a cylindrical sleeve movable on the shaft and carrying one member of the clutch can be considered as the well-known mechanical equivalent of the collar or clamping ring, or that the latter is the equivalent of the former. The construction and operation of the two clutch mechanisms in this and other respects are different in principle and mode of operation. In the complainant's clutch mechanism the one member (male) is located and carried within the other, while in the defendant's the clutch members are located and carried side by side.

No Infringement.

I think it perfectly clear that the defendant does not infringe claim 1 of the patent in suit, as it has no "sleeve supporting said clutch member," and, while defendant's clutch mechanism has a hollow intermediate shaft (the cavity performing no function), the spring of defendant's structure is not "contained within the said hollow shaft." Springs for moving or engaging clutch members were numerous and old in the prior art. Clearly there was nothing new or novel in bolting one thing to another so as to be easily removable, or in attaching one end of the intermediate shaft, hollow or solid, to the transmission shaft by means of the couplings and bolts or couplings and wedges, it is immaterial which, as all this was old in the art as shown. There is no infringement of claim 2 of the patent in suit, as defendant has no sleeve upon which any clutch member is carried interposed between the engine or driving shaft and the transmission shaft ("two sections of allied shafting") or sleeve surrounding the interposed shaft, or spring "contained within the hollow shaft," or means connecting any sleeve with the spring device. I will not hold claims 4 and 5 void, but as limited to the devices and structure shown in the drawings and specifications, and that, so limited, they are not infringed. It is clear that claim 6 is not infringed, as the intermediate shaft of defendant does not have a movable clutch ring for clutching the other shaft and a detachable clutch ring "surrounding" and co-operating with said movable clutch ring; "said rings being one within the other in operative position." If we say that, inasmuch as one set of the friction disks of defendant's clutch mechanism is carried by the driving shaft and the other set by the intermediate shaft and that the disks so engage each other that the one set, in a sense, can be said to be within or surrounded by the other, and therefore not removable until the slotted arm or ring carrying the disks moved by the engine or driving shaft is detached from the shaft, we are clearly within the prior art, and in view of such art and the limitations referred to infringement is not shown. If broadly construed to cover defendant's clutch, the claim is void. Claim 7 calls for the driving shaft and the driven shaft, or transmission shaft, and also the intermediate shaft coupled to the driven (transmission) shaft, and "having a bearing in the driving shaft separable therefrom" and clutch devices, etc. This "bearing in the driving shaft separable therefrom" is all that distinguishes this claim from the others. It is the bearing, i, of figure 1, and is bolted to the flywheel. I cannot find this or anything like it in defendant's structure. As in all similar structures of the prior art, the one shaft is centered upon the adjacent one at their respective adjoining ends if they are to be kept in alinement. The bearing of the defendant's structure is the well-known ball bearing of the prior art, and, in accordance with the prior art, is mounted on and is not in the driving shaft, and it acts in the old way to perform its old function as in the prior art. This bearing of the complainant is somewhat unusual, and may be a patentable improvement, but the defendant does not use it. Claim 8 is directly within the prior art, except as to the bearing mentioned, and must be limited to the structure shown and described. So limited, defendant does not infringe, as its structure does not have the

bearing described. In all the prior art there was a bearing or an equivalent for centering the driving and the intermediate shafts. Removable bearings are old in the art. Claim 11 is not infringed, as defendant has no "spring carried within the intermediate shaft for engaging the clutch members" as shown, or not shown for that matter. Claim 12 calls specifically for "an intermediate clutch member mounted on a sleeve," and also "a driving connection permitting longitudinal movement between said sleeve and said shaft," etc. Defendant has no such sleeve and no clutch member mounted on a sleeve. We cannot broaden this claim or any claim to cover all the clutches of the prior art having mechanism which permit and provide for the movement of the male and female members for engagement and disengagement. Such mechanism in the prior art may be improved and the improved mechanism patented, but in such case the defendant must use the improvement or he does not infringe. Here, if Mabley and Franquist have improved mechanism, the defendant does not use it. Claim 13 calls simply for (1) a detachable clutch member secured to the flywheel outside the plane thereof; and (2) a co-operating clutch member on a second detachable shaft, carried within said clutch member and the flywheel. This is nothing more nor less than a reverse acting cone clutch with the female member made detachable from the flywheel by a series of bolts and nuts or otherwise, with the driven shaft made in two parts. This fails to disclose patentable invention in view of the prior art. Such a reverse acting cone clutch with detachable female member carried by the flywheel and driving shaft is fully shown in the Horseless Age of July, 1902, "Beginner's Page." Bolts and nuts, plainly shown, fasten a friction ring, female member, to the flywheel carried by the driving shaft, and within this, and surrounded by it, is the male member carried by the driven shaft. The description says:

"The conical friction clutch is the one mostly used when only a single clutch is employed for all the gears. Sometimes the engine flywheel forms one member of the clutch, while otherwise this member is bolted to the flywheel, as is the case in the clutch illustrated in Fig. 1.

"Referring to Fig. 1, A is the motor crank shaft, to which is keyed the flywheel, B. To this flywheel is bolted a ring, C, with an internal tapered surface, which is smoothly turned and serves as the friction surface.

"The driven shaft, D, is arranged in line with the motor crank shaft, and is counterbored at the end to receive a pin projecting from the crank shaft to keep it in line therewith. The end of the driven shaft is squared, and on this square portion is fastened the clutch member, E, a dish-shaped casting bolted to a hub. The outer conical surface of this clutch member is turned down, and has applied to it a friction lining, F, of leather. The clutch member, E, is capable of sliding along the shaft, on the square portion thereof, and the two conical surfaces are pressed together by a strong coiled spring, G, which tends to force the clutch member, E, farther onto the shaft, D.

"Normally, then, the spring, G, holds the two members of the clutch in engagement, and thereby the shaft, D, is driven from the shaft, A. When it is desired to disconnect the shaft, D, from the shaft, A, the spring, G, must be compressed and this is accomplished by the operator by pressing on a foot lever, which is connected with the bell crank, H."

Another reverse acting cone clutch with female member detachable is shown and fully illustrated in the Horseless Age of May 7, 1902, of which we read:

"The clutch is of the conical type, and so designed as to avoid all end thrust on the shafts which are clutched together. To the flywheel, A, of the engine, is bolted the retaining ring, C, which serves as one of the clutch members. The friction cone, B, with a leather friction lining, is journaled loosely on the end of the engine shaft. Upon the transmission shaft is mounted a carrying spider, D, securely keyed in place. From the outer ends of this spider project studs which extend through somewhat larger holes in the cone. Other studs or bolts, E, project from the spider nearer the hub thereof, through considerably larger holes in the friction cone, and at their extremities support an adjusting disk for the clutch spring. Over the hub of the spider, D, slides a sliding collar, G, from which releasing pins, F, extend to the clutch cone. By means of this collar and the pins, the spring can be compressed and the clutch disengaged. Since the driving pins on the spider have some play in the holes in the cone, the motor shaft and transmission shaft may be out of line without affecting the operation of the clutch or causing heating of the bearings."

It involved no patentable invention in view of the then practiced and well-known prior art of making the driving shaft in two parts, one the intermediate shaft carrying the clutch mechanism, and the other the transmission shaft, to make the driven shaft of the two reverse acting cone clutches just shown in two parts. Aside from changes in construction which defendant does not use, as we have seen, this was all that complainant's patentees did. It is evident that the two reverse acting cone clutch mechanisms could be substituted for the direct acting cone clutches of the prior art already described under the head "Prior Art," and placed on the intermediate shaft shown as coupled to the transmission shaft. Remove from the shafts shown the direct acting cone clutches and all the mechanism and place thereon the reverse acting clutch mechanism, all within the skill of the ordinary mechanic, and we have all that the patent calls for except specific construction of certain parts. However, claim 13, limited, as it must be, to the clutch mechanism shown and described and illustrated in the specifications and drawings of the patent in suit, is not infringed by defendant, as it does not use such a clutch mechanism. If the function of the mechanism of the patent in suit is to provide a removable clutch mechanism carried by an intermediate driven shaft, the prior art shows several constructions performing that function and having such intermediate shaft. Mabley and Franquist were not pioneers. They were mere improvers. Assume that in the claims describing that function they have improved means which are patentable, defendant does not use them or their allowable equivalents when we have in mind the prior art and the limitations imposed by the Patent Office and acquiesced in by Mabley and Franquist. These claims are to be given a reasonable interpretation in view of that art and those limitations, but we cannot broaden them to make out infringement, and we cannot import into them, or any one or more of them, elements not found therein for the purpose of according to them novelty or of establishing infringement. *McCarty v. Railroad*, 160 U. S. 110, 116, 16 Sup. Ct. 240, 40 L. Ed. 358.

Complainant's expert, Mr Nathan, as I understand him, reads into claims 4 and 5, under the words, "an intermediate shaft coupled to one of said shafts (meaning the transmission shaft) and having movable devices for clutching the other shaft," not only the male member, d, but the sliding sleeve, f, the friction facings, e, the pin, m, the slot, o,

and also the shoulder against which the spring expands. "Movable devices for clutching the other shaft" would also, if we are to include the movable devices which in fact operate or move to clutch "the other shaft," the driving shaft, include the friction ring or female member, b, and the flywheel, a, inasmuch as "the other shaft" is not clutched except through the instrumentality of all these elements, all of which move. However, taking the parts enumerated by Nathan and first mentioned, and assume they are included in the description "movable devices" in claims 4 and 5, and defendant does not infringe such claims, as it does not have all of such elements in its structure.

The complainant contends that:

"The object of the invention (of the patent in suit) was to provide a clutch mechanism, removable as a whole with all of its wearing parts without disassembling, from between the engine and transmission shafts, and without disturbing either of these shafts."

Mabley as a witness said:

"All of this had been entirely impossible of accomplishment up to this time (time of the invention) and the repairing of a clutch was a piece of work that could only be properly accomplished in a shop with the most experienced and expert mechanics, and even then at great cost and time. To devise a clutch mechanism which would accomplish what we desired, and did accomplish, was an exceedingly difficult and delicate task. Up to that time there had been nothing done that would indicate even the possibility of such a thing being accomplished."

In short, he claims for himself and Franquist all the merit and all the privileges of a pioneer inventor. He makes other statements along the same line indicating that he was not familiar with the prior art, and was ignorant of the fact that what he claims that he and Franquist had done first had been done before. The broad claim as made here had been made in the Patent Office and rejected and such rejection acquiesced in as we have seen.

The result is that, giving the claims of the patent the broadest construction to which they are entitled, the defendant company does not infringe.

There will be a decree dismissing the bill, with costs.

JOHN F. McCANNA CO. v. LAVIGNE MFG. CO. et al.

(Circuit Court, N. D. Illinois, E. D. March 24, 1910.)

No. 29,411.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—FORCE-FEED LUBRICATOR.

The McCanna patent, No. 822,900, for a force-feed lubricator, especially adapted to automobile purposes, is for a combination of old elements, but the combination was not anticipated, and discloses invention; also held infringed.

In Equity. Suit by the John F. McCanna Company against the Lavigne Manufacturing Company and Brandenburg & Co. On final hearing. Decree for complainant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

Coburn & McRoberts, for complainant.
Parker & Burton and Alexander J. Innes, for defendants.

KOHLSAAT, Circuit Judge. Complainant seeks to enjoin infringement of claims 2, 3, and 5 of patent No. 822,900, granted to J. F. McCanna, June 5, 1906, on application filed December 1, 1905, for a force-feed lubricator, with special reference to means for regulating the throw of the pumps employed. The claims in suit read as follows, viz.:

"2. In combination in a force-feed lubricator, a reservoir, a pump within the reservoir, means for operating the pump arranged within the reservoir, and means for adjusting the throw of the pump extending outside of the reservoir, and movable therethrough to indicate the amount of the movement of the pump, substantially as described.

"3. In combination in a force-feed lubricator, a reservoir, a pump therein, means for actuating the pump located within the reservoir, and mechanism arranged externally of the reservoir and connected to the said actuating means, said mechanism being adjustable to vary the movement of the actuator, substantially as described."

"5. In a lubricator, the combination with a reservoir, a pump within the reservoir, a member within the reservoir, and connected to the movable part of the pump to reciprocate the same, and an adjustable stem extending through the wall of the reservoir to regulate the amount of movement of the said member and indicate the throw of the pump."

This is a patent granted on a divisional application out of the earlier application of the patentee filed June 15, 1903, numbered 161,458. Complainant successfully carries the date of the invention back to about April, 1902, thereby eliminating from the realm of the prior art six of the patents set up by the defense, viz., Sturtevant patent, No. 762,103, dated June 7, 1904, application filed February 27, 1904 (cited in the Patent Office, but not in the answer); Haynes patent, No. 777,413, dated December 13, 1904, application filed February 13, 1904; Neely patent, No. 799,574, dated September 12, 1905, application filed June 10, 1905; Hodges patent, No. 820,419, dated May 15, 1906, application filed March 11, 1905; and Enos patent, No. 720,121, dated February 10, 1903, application filed May 24, 1902. The same rule would apparently exclude McClure patent, No. 722,183, granted March 3, 1903, on application filed April 1, 1898, for the purpose of showing anticipation. This patent is discussed in the record as properly in the prior art, and not seriously objected to by complainant, since it is not deemed to pertain to those parts of the combination in suit.

The features which complainant claims for its patent as new and in advance of the disclosures of the prior art are:

(1) Compacting or unifying the pumps with their operating and adjusting devices in the area of the reservoir of their oil supply and extending their stems through the covers, thereby forming a setting gage for the stems, which, in turn, form indicator gages in their operation relative to the cover; and

(2) The adjustment of the stroke or throw, so that the same may be from zero to full stroke, and that the pumps may be cut out when desired, or hand operated when desired.

The elements of the device of the three claims in suit may be summed up as follows, viz.:

(a) A reservoir; (b) a pump within the reservoir; (c) means located within the reservoir for actuating the pump; (d) an adjustable stem, extending and movable through the wall of the reservoir, so as to afford ready means for regulating and indicating the amount of the throw of the pump.

The claims cover a combination constructed of well-known parts, the invention of which must be found, if at all, in the novelty of the arrangement of the parts. It is asserted for the patentee that he was the first to devise and place upon sale a lubricator suitable, among other uses, for automobile purposes, sure in operation, easy of adjustment, and so compact as to be readily attachable to the dash. This is attained, it is said, by locating the pump, pump stem, and actuating means all within the oil reservoir, and in the oil itself, and having adjusting and indicating stems outside the tank.

This feature of the location of the pump was not new. It is an element of Harlow patent, No. 295,919, dated April 1, 1884, of the Sturtevant patent aforesaid, the Hochgesand patent, No. 687,377, and of several other patents in evidence.

The Harlow device, that part which corresponds to the protruding stem of the patent in suit, always makes the same length of stroke, no matter how adjusted. It is never out of contact with its actuating device, even when not forcing the oil into the leads to the machinery to be lubricated. The variation between its lower and upper stroke limit is no indication of the extent of its co-operation with its corresponding nipple, d. This pump cannot be hand-operated while the machine is running.

Defendant rests its prior art defense upon the foregoing Harlow patent, the Kane patent, No. 595,717, granted December 21, 1897, the Hochgesand patent, No. 687,377, dated November 26, 1901, and the Marchant patent, No. 413,759, dated October 29, 1889.

The Kane lubricator patent was cited in the Patent Office, and relates, as Kane says, more particularly to a multiple pump. It shows a small reservoir at the bottom of the lubricator frame. The claims in suit were rejected by the examiner on this Kane patent and the Sturtevant patent. No copy of the latter is produced. On motion for reconsideration, based upon the ground that Kane had no reservoir, and no pump and actuating means located therein, and that Sturtevant showed no means for varying the stroke of the pump, the rejection was vacated, and the claims allowed. Kane's pump and actuating means are located on a frame constructed upon and above a small oil chamber or reservoir. No part of the same, except the piston, is in touch with the oil. The adjustment is such that, so long as the engine runs, the pump works altogether. The specification says that it can be regulated for supplying a greater or less quantity of oil. This device was intended largely for lubricating triple-expansion and steam engines, and, according to complainant's contention, is not adapted to automobile lubrication. The stems extend beyond the frame, and are, within the limit above set out, adjustable. Kane does not seem to have deemed this feature new. The whole is more or less exposed to dust and dirt. To meet the demands of automobiles, Kane's lubrication would require some overhauling, especially with reference to the

features which provide for continuous action of the pumps while the engine is in motion and the use of a reservoir containing the pump and actuating means, though complainant's claim in this respect is not free from doubt. So far as appertains to the adjustment of the length of the stroke by manipulating the stems above the yoke, the regulation of the length of the stroke is otherwise very similar to that of the patent in suit, being a matter of degree only. Counsel for complainant sums up the difference between the two by saying (page 59, brief):

"* * * The capacity of complainant's and defendants' pumps to be adjusted from zero to full stroke, instead of only from half stroke to full stroke, as in Kane, make them practical automobile lubricators."

The Hochgesand patent shows a pump for liquid, gaseous bodies, and for the distribution of oil for lubrication, located within an oil tank or reservoir, as in the claims in suit. It covers one lubricator pump, etc., but, manifestly, the duplication of it would not, in the absence of novel adjustment, constitute invention. The patentee provides for an indicator, located outside of the reservoir wall, whereby the amount of liquid delivered at every stroke of the piston can be ascertained. There is also provided outside the reservoir wall a means for adjusting the throw of the oil. The piston stroke is uniform; but it cannot be said that its actuating device can be regulated from the outside. The usefulness of its stroke is varied, however, from zero to full, by the adjustment of a cylinder in its relation to certain valves and to its seat upon the wall of a chamber, *c'*, through which the plunger moves and forces the oil or other liquid.

In order to justify the claim of Hochgesand that the delivery of the oil may be entirely cut off, it is necessary to assume that, when the cylinder is not closely seated upon the wall of the chamber, viz., the seat, *c*, the oil in the chamber will press back between the piston and the said chamber wall, and overflow into the body of oil in the tank. He makes no suggestion to this effect, nor can it be seen from the drawings that the piston fails to exactly fit into the chamber. The provision he makes for a full delivery of the oil, however, shows that by reversing the process such leakage is assumed. For instance, by means of the outside regulating device, the oil chamber is made air and oil tight, wherein the plunger or piston acts by simply displacing a volume of oil equal to its own volume. It is thus unnecessary that the plunger should closely fit into its corresponding oil chamber. The valve at the lower end of this chamber, being the point of least resistance, yields, and the oil is forced out in an amount equal to the displacement, at least. Manifestly, when the valves between the oil chamber and the reservoir, or other means of escape for the oil, are left open, these would furnish points of least resistance, and no oil would be delivered. This device can be read literally upon claim 2, and is deemed a complete anticipation thereof, unless the latter is limited to the regulating means disclosed in the specification and drawings. It does not, however, show the regulating connection between the outside and the actuator, as provided in claim 3, or of a member connected to the movable part of the pump to reciprocate the same, shown in claim 5. In the

one case, the means of escape of the oil from the displacement of the plunger is adjusted and indicated from the outside; in the other, the length of the stroke of the plunger is indicated and regulated. The one controls the extent of the stroke of the plunger; the other simply avoids it. In this respect there is a substantial distinction between the combination of claims 3 and 5 in suit and Hochgesand.

The several patents above discussed fairly sum up the prior art for the purposes of this suit. While they contain between them all the essential features of the claims before the court, no one of them covers all the elements embraced within the claims relied on. The latter, so far as they differ from the prior art, present but slight evidence of patentable novelty. Considering, however, the state of the art, and the presumption arising from the action of the Patent Office in granting the patent, and the further fact of the dearth of lubricating devices adapted to meet the demands of the automobile art, it is the judgment of the court that the patent is valid, subject to the limitation as to claim 2 aforesaid. Aside from a different cam adjustment and the elimination of the yoke in form, while retaining the substantial features of the operation thereof, there is no difference between the device of the defendants and that of the claims in suit. As to the above two variations, there seems to be no doubt but that they are the equivalents of the parts which they supplant, even in a patent so narrow as here involved. There is no doubt of the fact that it is an infringement.

The prayer of the bill is therefore granted, and the injunction will issue.

SHEFFIELD CAR CO. v. BUDA FOUNDRY & MFG. CO.

(Circuit Court, N. D. Illinois. E. D. March 24, 1910.)

No. 29,187.

1. PATENTS (§ 312*)—INFRINGEMENT—SUFFICIENCY OF EVIDENCE.

Evidence alone that a defendant had an infringing device in its possession, without proof that it made, used, or sold the same, does not make out a case of infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 549; Dec. Dig. § 312.*]

2. PATENTS (§§ 26, 56, 328*)—VALIDITY AND INFRINGEMENT—RAILWAY VELOCIPEDE.

The Hovey patent, No. 876,058, for a railway motor velocipede, covers a combination of old elements in a machine to adapt it to be propelled by hand, foot, or motor, and in such feature was not anticipated, and discloses invention. It is not infringed, however, by the machine of the Jenkins patent, No. 914,845, which lacks the means of the Hovey machine for disconnecting the motor from the driving mechanism while in motion.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 30, 376; Dec. Dig. §§ 26, 56, 328.*]

3. PATENTS (§ 237*)—INFRINGEMENT—EQUIVALENT PARTS—"SPROCKET CHAIN DRIVE."

A sprocket chain drive is the equivalent of a belt drive as a means for propelling a vehicle.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 374, 375; Dec. Dig. § 237.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the Sheffield Car Company against the Buda Foundry & Manufacturing Company. On final hearing. Decree for defendant.

Chappell and Earl, for complainant.

Synnestvedt & Carpenter, for defendant.

KOHLSAAT, Circuit Judge. Complainant files its bill to restrain infringement of claims 14, 16, 18, 20, 23, 24, 30, 32, 35, 36, 38, 39, and 41 of patent No. 876,058, granted to W. S. Hovey January 7, 1908, for improvements in railway motor velocipedes. The number and length of the claims preclude their being restated here. The patentee's avowed object was to provide: (1) A compact, light weight, and strong motor velocipede. (2) One in which the engine of the explosive type may be readily started. (3) One which may be connected up quickly for either manual or motor propulsion. (4) One in which the parts are effectively balanced and the engine protected. Defendant relies on the usual defenses of want of invention, the state of the art considered, and noninfringement.

Complainant charges infringement as to two devices on the part of defendant: The first of these consists of a certain structure advertised in defendant's so-called "Buda Bulletin No. 121." The evidence utterly fails to show any more than that defendant had such a device in hand. Nothing is shown as to who made it, or that it was ever used or sold. This fails to make out infringement, and need not be further considered on final hearing. *Allis v. Stowell*, decided by Judge Dyer at this Circuit in about 1881. See *Allis v. Stowell*, 9 Fed. 304; *Minter v. Williams*, 1 Webster, 135; *Robinson on Patents*, § 899.

The remaining device, Complainant's Exhibit No. 2, defendant's railway motor velocipede, defendant claims to be manufacturing under patent No. 914,845, issued to M. L. Jenkins on March 9, 1909. In the specification, line 8, p. 1, it is said that the invention has for its objects a new railway velocipede with motor actuating means therefor, the same being compact, light, and strong, having chain driving means of a positive nature, an improved form of throw-out mechanism for disengaging hand driving gear, whereby the hand mechanism can be readily disconnected and locked after the machine has started.

Complainant's contention that this patent is not for a combination, but for specific details, is not deemed well taken. Claims 1, 2, and 3 each call for a complete velocipede. It appears from the record that a railway motor velocipede was at the date of the application a well-known device. With reference to the question of invention in the device of the claims in suit, it is conceded that none of the elements were new with Hovey. What is claimed is that the combination of the three motive powers, hand, foot, and motor, and the adjustment of the parts was new. It is admitted that hand and foot propelled cars of this character were old in the art. Defendant's Exhibit, "Complainant's old car stipulated," so called in the briefs, and Lindsley's patent No. 270,320, issued in 1883, disclose them. In adapting one of these old structures, the Lindsley, to the application of motor propulsion, including several necessary, or, at least, desirable, changes or additions

thereto, such as connecting and disconnecting means, rests the claim of the patent to invention.

It was not new to install a motor in track or other velocipede frames. Patent No. 599,912, issued to J. McGeorge on March 1, 1898, for a locomotive hand car, covers a railroad tricycle propelled by gasoline motor, which should still be light, strong, and effective. This device was manufactured for complainant, has no hand or foot power for propelling the car, and was a failure, probably for want of a suitable motor, as much as for any other reason. A similar attempt was made in Boulton and Wade English patent, No. 16,331, granted in 1898, for an ordinary motor tricycle.

The Ellis patent, No. 710,048, granted in 1902, covers a four-wheel motor velocipede capable of being propelled by either foot or motor power or both. This device is relied upon by defendant as an anticipation. It cannot be folded for transportation, nor worked by manual power. The motor is located above the wheels, and its connections and adjustments are in essential respects so unlike those of the device in suit as to be practically incapable of application to a railroad tricycle. Meijer patent, No. 738,559, is for an automobile bicycle which has no pedals, cranks, handle bar, saddle, or transmission chain.

The device of Manson patent, No. 678,963, shows a motor mounted between the side rails of a four-part bicycle frame. It has no hand power, and cannot be considered as pertinent to the present inquiry. Various other devices of the prior art are referred to, but none of them serve to illuminate the railway motor velocipede art as well as those above discussed. There is nowhere found in the prior art any device employing in combination the three methods of propulsion, viz., handle bars, pedals, and motor. From the record it appears that there is on occasion serious demand for all three of these. Steep grades, rapid movement to escape trains, failure of any two of them to work—each of these possible events make the three very desirable elements of a track velocipede. These, together with the various convenient adjustments for cutting in and out any one or more of the actuating means, together with the general balancing of the parts, give to the patent some degree of invention, and a consequent right to the protection of the court against infringers. To hold that defendant's tricycle infringes requires, among other things, that its sprocket chain drive be held to be the equivalent of complainant's belt drive.

Complainant's expert, Cooley, says the two methods are recognized as equivalents. This seems to be reasonable, and, considered alone, is deemed true. It will further be necessary to hold that the disc friction device of defendant's car corresponds to the belt-tightening device of complainant. As said by the expert, if complainant's belt-tightening device be adjusted so as to prevent slipping of the belt when the engine is starting up or driving the car, it will then perform the identical function performed by the disc friction device on the sprocket wheel of defendant. It will be seen, however, that while the belt tightener enables the degree of frictional contact with the flanged driving wheel, to be varied at the will of the driver, by means of a convenient lever, the defendant's frictional contact is fixed and uniform

until the same is varied by advance or withdrawal of the nut upon the shaft or axle. It cannot be said that defendant's method of adjustment by means of a wrench is the equivalent of complainant's lever-operated belt tightener. This lever and its adjustment are essential parts of complainant's car. By the slackening or loosening of the belt complainant's connection between the motor and the forward driving wheel is entirely cut out. Defendant's patent, as well as its said alleged infringing device, discloses no means for cutting out the motor other than the stopping of the motor itself until the car comes to rest, and then adjusting the friction discs by means of a wrench to relieve the impact thereof upon the driving wheel, and cause same to slip freely upon the flanged wheel through the medium of the steel plate, 50.

On the other hand, complainant's motor may at choice be kept in motion, even when not pulling, which would seem to be a desirable feature. The friction in complainant's device is applied at or near the periphery of the front driving wheel. In defendant's tricycle it is applied at the side of the wheel, and covering a circular area at its central portion, having a diameter equal to that of the disc, and concentric therewith. Both, it is true, depend upon frictional contact. Complainant's device, however, is not to be looked upon as in any sense a basic invention, but only as an advance upon the prior art, slight at that, and therefore entitled to only a narrow range as to equivalents. Considering the other variations between the two in the adjustment, connection, and disconnection of the manual and pedal actuating details, there seems to be in both of the devices substantially the arrangements followed by Lindsley, varied only to suit the new feature of the motor. Necessarily there are some differences, but none which would seriously tend to determine the presence or absence of invention. It appears from what has been said that defendant's device lacks at least one of the elements of complainant's combination—i. e., the lever-operated adjustment of the connection between the motor and the driving or flanged wheel—not to mention the differences in the application of the frictional contact of the two. It further appears that defendant has followed complainant in adjusting a motor to the Lindsley manual and pedal track tricycle. Both of these were open to be used by any one separately. While the complainant seems to have been the first to place a motor in the Lindsley device, and the first to combine a manual-actuating element with a pedal and motor propulsion in track tricycles, his invention, as above stated, is very narrow, so narrow indeed as to limit him to the combination claimed. Having omitted one of the elements of complainant's railway motor velocipede as disclosed in each of the claims sued on, either directly named or necessarily included, it follows that defendant's device does not infringe. *Wright v. Yuengling*, 155 U. S. 52, 15 Sup. Ct. 1, 39 L. Ed. 64.

The bill will be dismissed for want of equity.

BEMIS et al. v. CHARLES A. STEVENS & BROS.

(Circuit Court, N. D. Illinois, E. D. March 24, 1910.)

No. 28,385.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PNEUMATIC DESPATCH TUBE SYSTEM.

The Bemis patent, No. 696,305, claims 8, 33, and 40, for a station terminal in a pneumatic despatch tube system, are not limited to the station terminal described as a whole in the specification, but each covers and protects the parts of such terminal therein described in combination. As so construed, such claims were not anticipated and disclose patentable invention; also *held* infringed.

In Equity. Suit by Thomas Bemis and the Taisey Pneumatic Service Company against Charles A. Stevens & Bros., Charles A. Stevens, Thomas A. Stevens, and John H. Stevens. On final hearing. Decree for complainants.

V. H. Lockwood, for complainants.

Griffin & Bernhard, Harry P. Simonton, and Long & Pierce, for defendants.

KOHLSAAT, Circuit Judge. Complainants brought this suit to restrain infringement of claims 8, 33, and 40 of patent No. 696,305, granted to Thomas Bemis March 25, 1902. It is the contention of defendants that the claims in suit are for the station terminal in the pneumatic tube system claimed by the patentee, and shown in the specification, and not for that part thereof used by defendants.

The claims read as follows, viz.:

"8. In a pneumatic despatch tube system, a station terminal having a discharge branch and an air branch which are substantially parallel, guides for preventing the passage of a carrier into the air branch, and a valve arranged to close the discharge branch opposite the mouth of the air branch with its lower and immediately below the same."

"33. In a pneumatic despatch tube system, a station terminal having a discharge branch and an air branch connected thereto, guides for preventing the passage of a carrier into the air branch, and a valve arranged to close the discharge branch opposite the mouth of the air branch and pivotally supported at its rear end upon an axis located upon the side of the discharge branch opposite from the air branch."

"40. In a pneumatic despatch system, a station terminal having a discharge branch, and an air branch leading from the side of said branch, and a valve arranged to close the discharge branch, a portion of said valve lying in line with the mouth of the air branch."

It will be observed that the three claims are, in substance, the same, each emphasizing a separate element of the terminal. In the specification, the station terminal is described as follows, viz.:

"The station terminal consists of a hollow head 59, within which is pivoted a wheel 60, similar to the wheel 48, the said wheel being preferably mounted at the center of the curve on the outer portion of the head 59, and being of such diameter as to form a channel 61, within which the carrier may travel. Head 59 is provided with a pair of tubular branches, 62 and 63, the branch 62 being adapted to be secured to the end of one of the tubes 22. * * *

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Head 59 is also provided, immediately adjacent its branch 63, with a branch 66, which is led from the channel 61, parallel with branch 63, and forms substantially a continuation of channel 61. The inner wall of branch 66 is slotted at 67 to provide passage for the air from channel 61 into the branch 63. Pivoted at 68 in the branch 66 is a door 69. Door 69 may be held normally closed by a spring; but such spring is not necessary, as the door will be normally held closed by suction. The branch 66 is of a length, below door 69, greater than the length of the carrier, and the lower end of the branch is normally closed by a spring door 70 of the usual type."

In lines 70 to 75, col. 2, p. 1, the station terminal is referred to as station terminal 25, having reference to the drawings. Defendants' device covers only what might be said to correspond to branch 63 and (except that part below valve 69) branch 66 of the head 59 of the patent in suit. A fair interpretation of the language of the specification leads to the conclusion that the station terminal claimed includes the head 59, the wheel 60, and the tubular branches 62 and 63 of Figure 5. That such was the patentee's intention further appears from the fact that Figure 4 is described as an axial section of the discharge end of the cashier's terminal. If the claims in suit are to be limited by the language of the specification, the defendants do not infringe, for the reason that they do not use the above described station terminal. The claims in suit undertake to describe certain elements of a station terminal, the latter being a part of a pneumatic despatch tube system. In order to show infringement, it is essential that the complainants' station terminal be construed to mean only that part of the station terminal of the specification which includes branch 67, and that part of branch 66 which includes and extends above the valve 69. So far, therefore, as the alleged infringement is concerned, the question is: Shall complainants be held to the form of station terminal set out in the specification, or may they, for the purposes of this suit, apply the term to a fraction of that station terminal? It is a well-settled rule that a specification may be invoked to explain and to narrow a claim. In the present case, to follow the specification would result in a narrowing of the claims so far as the use of the term "station terminal" is concerned. But complainants insist that, inasmuch as some of the other claims cover parts of the station terminal of the specification, therefore the claims in suit should be limited to the elements described specifically in each claim. For instance, claim 4 calls for a station terminal consisting of a curved tubular head and a revolvable wheel mounted therein. Claims 10 and 11 also speak of the station terminal as consisting of a channel, a depending discharge end, and an air tube, etc. Thus it will appear that patentee uses the phrase "station terminal" very loosely, and with no intention of limiting himself to the complete device of drawings 4 and 5. That being so, it is necessary, in order to give effect to the patent considered as a whole, to treat the station terminal of complainants as limited to branches 66 and 67, and their several details of arrangement. Complainants further insist that so much of branch 66 as lies below the valve 69 may be dispensed with as in no degree essential to the device of the claims in suit. Coupling this lower branch 66 with defendants' corresponding feature, it is seen that it is a receptacle into which the carrier is driven on its way out, while defendants' carrier is driven into an open basket

or receptacle at once. As with the so-called head, so with regard to the lower extension of branch 66, with its second valve, certain claims of the patent specifically provide for it, as, for instance, claims 9, 10, 11, 12, 13, 34, and 41. Here, again, complainants have elected to call branch 63 and (except that part thereof below valve 69) branch 66 a station terminal. Thus trimmed, complainants' device anticipates that of defendants, lacking only the basket into which the carrier descends. Bearing in mind the declaration found in *Wooden Ware Co. et al. v. Miller Ladder Co.*, 133 Fed. 541, 66 C. C. A. 517, that a patentee has the right to term the legs of a trestle a trestle, notwithstanding Webster's or his own different definition, it does not seem to be an overstraining of the language of the patent to hold that the phrasing of the claims in suit may be properly construed to evidence an intention on the part of the patentee to secure to himself the benefit of any part of his particular device for taking care of the carrier at and near the point of discharge thereof. If, therefore, the said immediate discharge device constitutes a valid invention, the prior art considered, the court is bound to find for the complainants, since defendants' external receiving basket or receptacle cannot be held to be an essential element of their device, being entirely independent of pneumatic delivery equipment. Bemis was not a pioneer in the pneumatic despatch tube art, nor with that part of it appertaining to the station terminal devices. Defendants introduce in evidence among others six patents of the prior art, viz., patent No. 417,828, granted December 24, 1889, to E. D. Leaycraft, patent No. 451,619, granted May 5, 1891, to E. D. Leaycraft, patent No. 460,160, granted September 29, 1891, to J. Reilly, patent No. 564,965, granted August 4, 1896, to L. G. Bostedo, patent No. 594,090, granted November 23, 1897, to J. W. & A. Mathis, and patent No. 604,405, granted May 24, 1898, to J. W. & A. Mathis, bearing upon the subject-matter of the claims in suit.

Leaycraft patent, No. 417,828, discloses two devices, one consisting of a curved discharge tube, having a section of the outer curved wall of the tube arranged to operate as a discharge valve, whereby the carrier is impacted upon the valve tangentially or centrifugally, being directed by a curved guide, which it would have a tendency to leave at or near the valve, thus striking the valve at varying distances from the pivotal point and increasing the force necessary for its operation, the other consisting of a straight discharge tube having its valve also cut from the wall of the tube, and depending perpendicularly from its pivot as a section of such wall. The guide extends across the tube obliquely in such a manner as to direct the carrier obliquely against the valve with what would seem to be a tendency to wedge, or, at least, lose some of its impetus, whereby the valve would operate slowly, and perhaps fail to discharge the carrier. These valves are necessarily larger and heavier than they would need to be, were they in the direct line of travel of the carrier. Moreover, they present their concave sides to the carrier—a circumstance which could hardly fail to affect the promptness of the response of the valves. So far as here required, Leaycraft's later patent, No. 451,619, presents no features not found in the foregoing patent, and will therefore not be further considered.

Reilly patent, No. 460,160, calls for a station terminal having the air and discharge branches, the latter being provided in its lower end with a valve which is operated by a pivotably secured lever, which lies at an angle across the path of the carrier. The carrier strikes the lever and throws the valve open. The impact of the carrier upon the valve is made through a perpendicular tube, and is applied at right angles to the valve. Should the lever not be sensitive, or the carrier delivered with force, there would seem to be danger of a wedging effect upon the carrier between the lever and the wall of the tube, whereby discharge might be uncertain. The intervention of the lever element above serves to distinguish this device from Bemis'.

The Bostedo patent, No. 564,965, is for a receiving box in connection with a pneumatic despatch tube "adapted to have the carrier discharged upwardly therein." The box seems to cover a head similar to that of complainants' device, without the wheel. The carrier passes into this head, having upper and lower curved guides which deliver it into a perpendicular delivery tube, through which it descends by gravity upon two doors or shutters hinged outwardly, and which respond to the impact by swinging downwardly from the center of the tube toward its walls. They are directly in the line of the carrier. The valve does not close the discharge branch opposite the mouth of the air branch. Otherwise the device is much the same in principle as that in suit.

So far as pertinent here, the Mathis patents, Nos. 594,090 and 604,405, are for the same device—the latter differing from the former, in that it provides a closed delivery branch 6, having a self-closing valve or gate in the bottom thereof. The avowed function of this housing chamber is stated to be that in consequence thereof the outside atmosphere cannot pass through the discharge opening into the despatch tube, etc. Complainants' expert Stoddard gives it as his opinion that, with the receiving chamber 6 omitted, this patent 604,405 is substantially the same as the Leaycraft straight-branch device. This statement is correct so far as appears of record. The discharge branch or tube is pivoted at the top and normally fitting into and filling the opening left by cutting it from the tube wall. The valve is practically like that of the Leaycraft patents—long and heavy. It is struck at an oblique angle by the carrier, and, as stated above, with regard to the Leaycraft device, and for the same reasons, does not respond fully and effectually to the impact of the carrier.

Other patents are cited by defendants, but the above are all that are deemed material in this inquiry. It will be seen that there is a substantial, though slight, difference between the construction of the station terminal in suit and those cited. It consists in the arrangement of the guides and valves, so that the carrier will strike the valve at the most effective point in the pneumatic device, and consequently result in a clean delivery of the carrier. The idea appears in the prior art, but it was never fully accomplished.

Bemis' advance was simply that of adjustment. His valve was smaller and placed more directly in the line of travel of the carrier than that of either Leaycraft or Mathis. It differed from Reilly in that it projected the carrier directly upon the discharge valve, as above stated, but is otherwise very close to Bemis' device. Looking, however, at the

result attained, together with the difference above named, I am inclined to think there is some degree of invention in complainants' device. I give no weight to complainants' experiments made in the absence of defendants. Such attempts at making evidence are not to be encouraged.

Let a decree go for an injunction and for an accounting.

SMITH v. THOMPSON et al.

(Circuit Court, D. Connecticut. March 28, 1910.)

No. 1,313.

PATENTS (§ 114*)—SUIT IN EQUITY TO OBTAIN PATENT—RIGHT TO MAINTAIN—EFFECT OF ASSIGNMENT.

Where an applicant for a patent has made an absolute assignment of his rights in the invention, the right to bring a suit in equity to obtain issuance of the patent under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), is vested in the assignee.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 166, Dec. Dig. § 114.*]

In Equity. Suit by Lester C. Smith against Hugh L. Thompson and the Coe Brass Manufacturing Company. On demurrer to bill. Demurrer sustained.

Walter E. Ward, for complainant.

John P. Croasdale and Howard S. Okie, for defendants.

PLATT, District Judge. Here is the gist of the bill demurred to: Prior to March 1, 1901, complainant had valuable property rights in an invention relating to improvement in wire drawing machines. On July 6, 1903, he had perfected his invention and made application for letters patent thereon. On March 11, 1904, defendant Thompson filed an application which included the same invention, and thereupon interference proceedings were instituted between the parties, upon which the examiner decided in favor of complainant. An appeal to the examiner in chief resulted in a decision for Thompson. An appeal to the Commissioner resulted in a decision for complainant. An appeal to the Court of Appeals of the District of Columbia resulted in favor of Thompson. Certain claims not in interference are still being prosecuted in the Patent Office by the Coe Brass Manufacturing Company, assignee.

While the interference was pending, after the Commissioner had awarded priority to the complainant, and before the decision by the Court of Appeals, the complainant made a contract with the Coe Brass Manufacturing Company, in which it was agreed that in consideration of an absolute assignment, made that day, by the complainant, of all his rights in the invention to the Coe Brass Manufacturing Company, the latter would pay him \$2,500; that complainant would carry to a final determination his interference proceedings with Thompson, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 177 F.—46

if he succeeded the Coe Brass Manufacturing Company would pay him \$2,500 more; that after final determination of the interference proceedings with Thompson the Coe Brass Manufacturing Company would perfect the invention just sold to it by Smith, making no material change in the claims without the consent of Smith's attorney; that after the Coe Brass Manufacturing Company had perfected the invention and obtained the patent therefor it would issue to Smith, the complainant, an exclusive license under the patent.

The bill then goes on to show that the complainant assigned his rights under the application for letters patent in accordance with the contract, and that the Coe Brass Manufacturing Company paid him \$2,500, as provided for therein, but has not paid the further sum of \$2,500 referred to therein; that the application is still pending in the Patent Office, but that the Coe Brass Manufacturing Company will not tell complainant anything about it; that he has asked the Coe Brass Manufacturing Company to join him in this suit, but that they refuse; that the Commissioner of Patents will soon issue a patent to Thompson, based on the interference claims; that complainant was the first inventor of the invention involved in interference, and is in law and equity entitled to letters patent therefor as assignor of the Coe Brass Manufacturing Company; that said Thompson will probably soon get his patent therefor.

Upon this showing he wishes the court to decree: That the complainant is entitled to receive a patent for his invention upon the claims specified in the interference, and upon the other claims not in that dispute, so that the patent may issue to complainant as assignor, and to the Coe Brass Manufacturing Company as assignee, and that the Commissioner of Patents be enjoined from issuing a patent to defendant Thompson as the result of the latter's successful interference; also to decree that Thompson be enjoined from receiving the patent, and from making use of it to complainant's disadvantage.

The argument of the complainant in behalf of the bill is simply this: That he is the equitable owner of the right to secure a patent for his invention, that all parties in interest are before the court, and to secure equity, truth, and justice it is imperatively necessary that the court should hear the parties.

The trouble with the contention is that the jurisdiction of the court in this particular instance is of purely statutory creation. It must be found in section 4915, Rev. St. (U. S. Comp. St. 1901, p. 3392), or it does not exist. I am satisfied that in pursuance of that statute the only one entitled to secure a right to the patented invention at the time of the bringing of this suit was the Coe Brass Manufacturing Company. The present complainant had of his own accord so treated his original right as to locate it absolutely and permanently in the possession of the Coe Brass Manufacturing Company. For this act he can blame no one but himself. He did what he did because he deemed such action to be for his own best interests. He cannot now whiffle about, and, finding no support from the Coe Brass Manufacturing Company, come to the court in the guise which he would have been warranted in assuming if he had not dealt with the Coe Brass Manu-

facturing Company at all. He cannot trade for his cake, and, when he finds it made of ashes, calmly ignore the trade.

Let the demurrer be sustained, and bill dismissed, with costs.

GOLDEN-ANDERSON VALVE SPECIALTY CO. et al. v. MONESSEN
FOUNDRY & MACHINE CO. et al.

(Circuit Court, W. D. Pennsylvania. November 26, 1909.)

No. 26.

PATENTS (§ 328*)—TRANSFER OF EQUITABLE TITLE—INFRINGEMENT.

The Anderson patent, No. 901,222, for valve mechanism, *held* for an improvement on the device of patent No. 811,813 to the same inventor, the equitable title to which passed to complainant under an assignment of the latter patent by the patentee, "together with any and all improvements which I may hereafter make thereon." Both patents also *held* infringed on a motion for preliminary injunction against the patentee and a corporation of which he was an officer, and which had full knowledge of such assignment.

In Equity. Suit by the Golden-Anderson Valve Specialty Company and Charles E. Golden against the Monessen Foundry & Machine Company and Edward V. Anderson. On motion for preliminary injunction. Motion granted.

F. W. H. Clay and Marshall A. Christy, for plaintiffs.

J. M. Nesbit, for defendants.

ORR, District Judge. This is a bill filed by licensees of patents against the patentee and a corporation associated with the patentee to prevent infringement. A motion for a preliminary injunction has been made and has been fully argued. This motion is now under consideration.

The bill avers the invention by the defendant Anderson of sundry new and useful improvements in valves and the grant to Anderson of several letters patent of the United States, of which two only may be now mentioned, being Nos. 811,813 and 901,222. The bill further avers that the complainant corporation has the legal title to No. 811,813 and the equitable title to No. 901,222, by virtue of divers contracts and assignments hereinafter specially mentioned, and that the defendant corporation was fully informed thereof. The bill further sets forth that the complainant corporation, which was at one time manufacturing valves, entered into a contract with the defendant corporation, whereby the latter would manufacture the valves for the account of the former, and whereby for that purpose the latter had acquired the machinery theretofore used by the former; that said agreement was still in force; that, nevertheless, the defendant corporation, in conjunction with the defendant Anderson, were manufacturing valves covered by each and both of said letters patent, in open and notorious competition with the complainants. The bill prays for the customary relief.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index.

The title of the complainant corporation as set out in the bill is clearly sustained by the proofs. On the 11th of November, 1904, the said Anderson and the said Golden entered into an agreement reciting that: Whereas Anderson has invented an improvement on valves, an improvement on cocks, an improvement in traps, an improvement in altitude valves, an improvement in float valves, an improvement in pressure-reducing valves, an improvement in non-return valves, and improvements in railroad water columns or standpipes with valves, complete for the various types for which he desired to make application for letters patent of the United States; and whereas Golden was desirous of acquiring an interest in said inventions and each and all of them and in the letters patent to be obtained therefor, the said Golden should pay all reasonable expenses of obtaining letters patent for each and all of the said inventions, including the aforesaid application on file, "together with any improvements" which the said Anderson "may hereafter make thereon"; and providing that the said Anderson should assign to said Golden a two-thirds interest in and to each and all of the said inventions; and further providing, after setting forth that it was the purpose of the parties to license others to manufacture and sell the apparatus embodying said inventions, that the royalties and license fees should be distributed, one-third to the said Anderson and two-thirds to the said Golden.

On April 14, 1906, in pursuance of said agreement of November 11, 1904, the said Anderson executed an assignment to the said Golden, in which he recited said former agreement, and affirms that by the same he agreed to assign and convey to said Golden an undivided two-thirds interest in the inventions made by him as enumerated in said agreement, "together with all improvements which I should thereafter make thereon"; and he then assigned three letters patent, including letters patent No. 811,813, aforesaid, and also certain other inventions for which he had made application for letters patent, being application Serial No. 264,315 (patent No. 819,497), and covered in said assignment, "the inventions therein respectively described, and claimed or intended so to be, together with any and all improvements which I may hereafter make thereon, or upon any of them." On July 9, 1906, the said Anderson and Golden entered into a contract with the Golden-Anderson Valve Company, the complainant corporation, wherein it was recited that the said Anderson and Golden were vested with the entire title to five letters patent, including 811,813, and the inventions described in three applications then on file in the patent office, and reciting that the corporation was desirous of acquiring the exclusive license to manufacture all of said inventions, "together with any and all improvements thereon which either or both of said parties, either severally or jointly, may make or acquire." On December 23, 1907, Anderson, without the knowledge of Golden, filed an application (No. 407,826) for a new and useful improvement in valves, and received letters patent No. 901,222. Claim 1 in said patent is as follows:

"In a valve mechanism, the combination of a casing having a passage throughout, a valve controlling said passage, a cylinder, a piston arranged in said cylinder, a port or passage through the piston for conducting fluid un-

der pressure to that side of the piston where it will operate to shift the valve to closed portions."

This patent Anderson refused and still refuses to assign to either of the complainants, although covered by the above-recited agreements.

Anderson's denial that the said agreements were not intended to include No. 901,222 will not avail him, especially when we consider his recitals in application No. 471,113, filed January 7, 1909. He says that the invention contained was:

"A non-return valve, having in combination a casing having a passage therethrough, a valve controlling said passage, a cylinder, a piston arranged in said cylinder, a port on one side of said piston adapted to be connected to a source of pressure, a port on the opposite side of said piston adapted to be connected to a line of pipe extending from said source of pressure."

This claim 1 in said application is a very accurate description of the invention of patent No. 901,222. On the day when said application was signed and executed, Anderson executed an assignment of an interest in the invention therein recited to Golden, and both assigned to complainant company, and in said assignment stated that the same were made because said invention was included within the terms and meaning of the original agreement between them dated November 11, 1904. The invention recited in said application being within the terms of said agreement, it must have been the intention of the parties that patent No. 901,222 was also within the agreement, because of the remarked identity of claims. It follows, therefore, that the complainant corporation, by the agreement of July 9, 1906, above referred to, became the equitable owner of No. 901,222.

The connection between Anderson and his codefendant is clear. Prior to May 28, 1906, the Golden-Anderson Valve Specialty Company had been manufacturing the Anderson valves, and owned machinery and equipment for that purpose. On that date, by agreement in writing, the Monessen Foundry & Machine Company acquired such machinery, and undertook to thenceforth manufacture the valves for and on account of the former. This contract is still in force. That agreement recited the title of the Golden-Anderson Valve Specialty Company to the five several patents, including No. 811,813, "together with all other patent rights which the said Edward V. Anderson or Charles E. Golden, of the Golden-Anderson Valve Specialty Company, may hereafter procure," etc. Anderson immediately afterward became and is now the vice president of the defendant company. Before patent No. 901,222 was applied for, the president of the defendant company and the said Anderson were doubtful as to the inclusion of the invention covered by the said patent within the terms of Anderson's agreements with the complainants. They acted under mistaken advice, and resolved the doubt in their own favor. The defendants admit that they are now manufacturing valves covered by letters patent No. 901,222.

Reserving for further consideration the charge of infringement of No. 811,813, I am of opinion that the controversy with respect to No. 901,222 is not alone a matter of title but of infringement, and therefore arises under the patent laws of the United States. Authority for this is found in *Littlefield v. Perry*, 21 Wall. 205, 22 L. Ed. 577, a pro-

ceeding instituted by a licensee against the patentee and inventor. The difference between the valve described in No. 811,813 and that described in No. 901,222 is so slight that the latter must be considered an improvement upon the former. In the former a piston is movable; in the latter it is not. This is the sole difference, and for the purpose of this case is immaterial.

The defendants, with full knowledge of complainant's title, are infringers of both patents No. 901,222 and No. 811,813, and should be enjoined by preliminary injunction, as prayed for.

POSTAL CABLE TELEGRAPH CO. v. CUMBERLAND TELEPHONE & TELEGRAPH CO.

(Circuit Court, M. D. Tennessee, March 30, 1910.)

No. 358.

1. TELEGRAPHS AND TELEPHONES (§ 28*)—DUTY TO FURNISH SERVICE.

A telephone company is engaged in a quasi public service as a common carrier of news, and is therefore bound to furnish an impartial and non-discriminating service to the public, both at common law and as expressly required by Acts Tenn. 1885, c. 66, § 11.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 16, 17; Dec. Dig. § 28.*]

2. TELEGRAPHS AND TELEPHONES (§ 34*)—RATES—DISCRIMINATION.

A telephone company under its common-law obligation to furnish equal and nondiscriminating service is bound to charge the same tolls to all persons for the rendition of similar service.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 21; Dec. Dig. § 34.*]

3. TELEGRAPHS AND TELEPHONES (§ 34*)—RATES—DISCRIMINATION.

A telephone company was not entitled to charge a telegraph company a greater rate for service than it charged other business houses for similar service, because the telegraph company derived a greater profit from the use of its telephone in the receipt and delivery of telegraph messages, since the rates chargeable by the telephone company depend on the character of its service rendered, and not on the value of the service to the customer.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 21; Dec. Dig. § 34.*]

4. TELEGRAPHS AND TELEPHONES (§ 34*)—RATES—DISCRIMINATION.

That a telephone company also furnished telegraph service did not authorize it to charge discriminating rates for telephone service furnished to a competing telegraph company, in order to enlarge the profits derived from the telegraph part of its business.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 21; Dec. Dig. § 34.*]

5. TELEGRAPHS AND TELEPHONES (§ 34*)—RATES—DISCRIMINATION.

That a telephone company was engaged in transmitting long-distance telephone communications, and therefore came into competition to some extent with a telegraph company, did not justify a discriminating charge for telephone service furnished the telegraph company higher than that charged other business patrons for like service as legitimate competition, nor was it made lawful merely because complainant did not discriminate between telegraph companies, but endeavored to charge all tele-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

graph companies a higher rate, and that at least one other telegraph company had consented thereto.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 34.*]

6. TELEGRAPHS AND TELEPHONES (§ 34*)—RATES—DISCRIMINATION—DIVISION WITH TELEGRAPH COMPANIES.

Where a telephone company charged a flat rate for similar service against other business patrons, it could not require telegraph companies, in order to obtain full telephone service, to share with the telephone company an arbitrary percentage of receipts from business received by the telegraph company from the telephone, yielding a greater or less compensation to the telephone company for the same service according to the distance which the telegram is sent.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 34.*]

7. INJUNCTION (§ 137*)—RIGHT TO RELIEF—INJUNCTION PENDENTE LITE.

In a suit to restrain a telephone company from charging increased and discriminating rates for service furnished to a telegraph company, complainant was not entitled to a preliminary injunction as to rates in towns and cities where complainant had contracted to pay the increased rates, and where service had been furnished on that basis for a considerable period.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 307; Dec. Dig. § 137.*]

8. INJUNCTION (§ 67*)—ADEQUATE REMEDY AT LAW—MULTIPLICITY OF SUITS.

Where a telephone company had imposed increased and discriminating rates for service furnished to telegraph companies throughout the state, a telegraph company had no complete and adequate remedy at law, and was entitled to sue in equity to restrain the enforcement of such rates to prevent a multiplicity of suits.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 15, 18; Dec. Dig. §§ 16, 19.*]

In Equity. Suit by the Postal Cable Telegraph Company against the Cumberland Telephone & Telegraph Company. On motion for preliminary injunction to restrain defendant from removing its telephone instruments from complainant's offices in Nashville, and certain other towns and cities in Tennessee, and from refusing to furnish telephone service to complainant at rates charged and paid by other patrons of the company having telephones in their business houses. Granted.

John W. Green, John D. Caldwell, Anderson, Felder, Rountree & Wilson, and William W. Cook, for complainant.

William L. Granbery, for defendant.

SANFORD, District Judge. I am of opinion that the motion of the complainant telegraph company should be granted so as to enjoin the defendant telephone company pending this litigation from removing its telephone instruments in the office of the telegraph company in Nashville and other towns and cities in Tennessee, and from refusing to furnish such instruments and telephone service to the telegraph company at the same rates as heretofore in all such towns and cities where

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the telegraph company has been heretofore paying merely the flat rates paid by other patrons of the telephone company having telephones in their business houses.

1. A telephone company, which is often described as a common carrier of news, is engaged in a quasi public service, affected with a public interest, for which it is endowed with some of the sovereign powers of the state, and as such is held to the obligation of an impartial and undiscriminating service to the public upon common-law principles. *Cumberland Telephone & Telegraph Co. v. Kelly* (C. C. A., 6th Cir.) 160 Fed. 316, 87 C. C. A. 268; *State v. Telephone Co.* (C. C.) 23 Fed. 539; *State v. Telegraph & Telephone Co.* (C. C.) 47 Fed. 633, 638; *Chesapeake Telephone Co. v. Railway Co.*, 66 Md. 399, 414, 7 Atl. 809, 59 Am. Rep. 167; *Hockett v. State*, 105 Ind. 250, 258, 5 N. E. 178, 55 Am. Rep. 201; *Cent. Union Telephone Co. v. State*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; *State v. Telephone Co.*, 61 S. C. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870; *State v. Telephone Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404; *State v. Telephone Co.*, 93 Mo. App. 349, 67 S. W. 684. Thus, in accordance with this general rule, it is held under the great weight of authority that a telephone company operating a telephone system under a license from the owner of the patent binding it not to furnish telephone service to any telegraph company except to one particular telegraph company may nevertheless be compelled to discharge its obligation of equal service and to furnish like facilities and service to other telegraph companies under like terms and conditions. *State v. Telephone Co.* (C. C.) 23 Fed. 539; *State v. Telegraph & Telephone Co.* (C. C.) 47 Fed. 633, 638; *Delaware Telephone Co. v. State*, 50 Fed. 677, 2 C. C. A. 1; *State v. Telegraph Co.*, 36 Ohio St. 296, 38 Am. Rep. 583; *American Union Telegraph Co. v. Telephone Co.* (C. C.) 1 Fed. 698; *Bell Telephone Co. v. Commonwealth* (Pa.) 3 Atl. 825; *Chesapeake Telephone Co. v. Telegraph Co.*, 66 Md. 399, 7 Atl. 809, 59 Am. Dec. 167. This common-law obligation of a telephone company is enforced, under severe penalty, by chapter 66, Tenn. Acts 1885, § 11, which provides that:

"Every telephone company doing business within this state, and engaged in a general telephone business, shall supply all applicants for telephone connection and facilities without discrimination or partiality, provided such applicant comply with the reasonable regulations of the company, and no such company shall impose any condition or restriction upon any such applicant that is not imposed impartially upon all persons or companies in like situations, nor shall such company discriminate against any individual or company engaged in lawful business by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant or otherwise, under penalty of one hundred dollars for each day such company continues such discrimination and refuses such facilities after compliance or offer to comply with the reasonable regulations, and time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused."

This statute is merely declaratory of the common-law obligation of telephone companies, giving a new remedy and imposing severe penalties for nonobservance. *Cumberland Telephone & Telegraph Co. v. Kelly*, supra.

2. This common-law obligation of equal and undiscriminating service clearly requires that the same charges shall be made to all persons for the rendering of similar service. The rule governing in the analogous case of telegraph companies was stated in *Western Union Telegraph Co. v. Call Pub. Co.*, 181 U. S. 92, 100, 21 Sup. Ct. 561, 564, 45 L. Ed. 765, as follows:

"They are endowed by the state with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast-iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and, even when based upon difference of service, must have some reasonable relation to the amount of differences, and cannot be so great as to produce an unjust discrimination. To affirm that a condition of things exists under which common carriers anywhere in the country engaged in any form of transportation, are relieved from the burdens of these obligations is a proposition which, to say the least, is startling."

Applying this same rule to telephone companies, it follows that all individuals have equal rights both in respect to services from the telephone company and the charges therefor, and that there can be no lawful difference in charge which is not based upon difference in service and has a reasonable relation to the amount of the difference.

It appears, however, from the bill and the affidavits filed in support of the motion for an injunction that there is no substantial difference in the mode and kind of service rendered by the telephone company to the complainant and to other users of telephones at their business houses. It follows, therefore, that the rule of equal and undiscriminating service prevents the telephone company from charging the telegraph company a higher rate for such service than it charges its other business patrons for similar service.

It is clear that a greater charge is not justified against the telegraph company merely on account of the greater profit which it may receive from the telephone service than other business patrons. To consider as an element entering into the proper charge for service performed by a common carrier the financial value of such service to the customer, irrespective of the nature of the service rendered by the carrier, would manifestly be to introduce an entirely new basis of regulating its rates of service, directly violative of the fundamental rule that they are to depend upon the character of the service rendered, and one which cannot be supported either upon principle or authority. If the telephone company were justified in imposing a greater rate upon a telegraph company than upon other business patrons because of the greater financial benefit of such service to the telegraph company, it could make like discrimination between its other business patrons, and could charge business houses doing a profitable business by means of the telephone a higher rental than others doing a less profitable business; and, if on account of the greater profit involved it is entitled to charge a telegraph company a percentage on the business received by it over the

telephone, it might with equal propriety require every business man having a telephone to keep an account of the orders which he receives over the telephone, and charge him, in addition to the usual rental for business telephones, a percentage on the business so received. The mere statement of such proposition carries its own conclusive answer.

Neither can the charging of a higher rate to the complainant telegraph company than to other business patrons receiving similar services be supported on the ground that it is a competitor in business with the telephone company.

In so far as this defense is predicated upon the statement in the answer that the defendant is engaged not merely in the telephone business but also in the telegraph business proper, it is to be observed that it nowhere appears from the answer that it is engaged in any telegraph business in the state of Tennessee; and, further, the affidavit of G. A. Paine, which is not contradicted, shows that the defendant does practically no public telegraph business for the public.

But, even if the defendant were engaged to any material extent in the telegraph business in addition to its telephone business, I am of opinion that its obligations in respect to its telephone business must be determined with reference to that business alone, and that it has not the right to discriminate in charges for telephone service merely because it may also be engaged in another branch of business which it desires to protect by such discrimination. In *Louisville Transfer Co. v. American Dist. Telephone Co.*, decided in the Louisville Chancery Court in 1881 and reported in 1 Ky. L. J. 144, 1 Chicago Leg. News 15, and 24 Alb. L. J. 283, the plaintiff carried on a public transfer business in public omnibuses and carriages, and the defendant operated a telephone exchange, and also organized as a part of its business a system of public transfers by carriages and coupés. The defendant, having placed a telephone in the plaintiff's office, afterwards threatened to remove it, and, upon the plaintiff's application for an injunction, the Chancellor held that the defendant, being engaged in two distinct employments, one the operating of a telephone exchange and the other a transfer service, there was no rivalry between the plaintiff and the defendant in the telephone business; that the defendant as to its telephone business was a distinct person from that as to its transfer business, and that as to its telephone business it occupied the same position towards the plaintiff as towards the rest of the public, and, being a quasi public servant, was as such governed by the law of common carriers, and bound to serve alike all the general public, including the plaintiff, on reasonable terms, without impartiality. See, also, *Sunset Telephone & Telegraph Co. v. Pomona* (C. C.) 164 Fed. 561, 568.

The underlying question in this case then resolves itself into this: Does the fact that the telephone company furnishes not merely the means for local communication, but also engages in the business of furnishing a means for long-distance communication or transmission of news by telephone, and that the telegraph company is also engaged in the business of furnishing a means for long-distance communications or transmission of news by telegraph, relieve the telephone company from

its obligation of equal and undiscriminating service to the telegraph company, and justify the telephone company in refusing to furnish the telegraph company facilities which it may use as an aid to securing the business of transmitting long-distance telegraph messages, coming in a sense in competition with the long-distance telephone business of the defendant, except upon its paying the telephone company a higher rate for such service than that charged to other business patrons for like service, and based, in part, at least, upon a percentage of the business obtained by the telegraph company through the use of the telephone facilities? After a careful consideration, I am of opinion that such discrimination is not justified, and that it is not made legal merely because the telephone company does not discriminate between the complainant and other telegraph companies, but seeks to impose the same additional rates, involving a percentage on the business obtained by the telegraph companies through the use of the telephones, upon all telegraph companies alike, and that at least one other telegraph company has consented to such increased rates.

Aside from the objection to the particular form of increased rates proposed, which requires the telegraph companies, in order to obtain full telephone service, to share with the telephone company an arbitrary percentage of their receipts from business received over the telephone, yielding a greater or less compensation to the telephone company for the same service according to the greater distance which the telegram is sent by the telegraph company, and the further objection that the system of rates demanded involves either the requirement that the telegraph company shall, as a condition of obtaining the telephone service, go to the expense of keeping a record of the business received and delivered over the telephone and of submitting accounts of such business to the telephone company, or else that the telephone company shall, by a system of espionage, inform itself as to the use made by the telegraph companies of its lines for the receipt and delivery of messages, I am of opinion that, even if the proposed increase in charges were relieved of these objections and put in the form merely of an increase in the flat rate charged to the telegraph companies, such increase of rates would be an unlawful discrimination against them as compared with the rest of the business community receiving from the telephone company similar service at a lesser rate.

In its last analysis, the defendant's argument that it is justified in charging a greater rate to telegraph companies for its facilities than is charged to other business patrons for similar services must rest upon the underlying proposition that it is authorized to altogether decline to furnish telegraph companies, as business competitors, such facilities for use in their business in the receipt and delivery of messages; and that hence, being authorized to altogether refuse to furnish them such facilities for such use, it may therefore charge them such rates therefor as it may deem proper, provided all telegraph companies are charged on the same basis, without violating its obligation of equal and impartial service. And obviously, if the telephone company is authorized to arbitrarily charge telegraph companies a higher rate for such service than is charged to other business patrons, entirely apart from the character of the service rendered, it may evidently increase

such rate to a point where it is practically prohibitive of the business altogether.

While it is true that the right of a telephone company to provide that its telephones shall not be used for the transmission of messages on which tolls shall be paid to any other party than itself is apparently upheld in the decision by Judge Parker in *People v. Hudson River Telephone Co.*, 19 Abb. N. C. 466, rendered at Special Term in 1887, and fully recognizing the weight to be given to the views of the eminent judge delivering the opinion, I am unable to concur in the conclusion reached. I am of opinion that the common-law obligation imposed upon telephone companies of equal and indiscriminating service imposes upon them the obligation of rendering such service to all members of the public desiring the same for a lawful purpose, and that, upon grounds of public policy, they are not exempt from the obligation of such equal services merely because a person desiring the same is in a sense a competitor, who desires to use such service as an additional facility to aid him in transacting his business. As was said by the Supreme Court in *Western Union Telegraph Co. v. Call Pub. Co.*, supra, in reference to telegraph companies:

"They are endowed by the state with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have an equal right both in respect to service and charge."

The portion of the sovereign power with which telephone companies are as common carriers endowed is likewise given them for the purpose of serving not merely part of the public, but all of the public; and all persons composing the public, even though they be, in a sense, competitors, are entitled to use their privileges upon equal terms, and "have equal rights both in respect to service and charge." And the Tennessee statute above quoted expressly forbids a telephone company to discriminate against any other corporation engaged in a lawful business by requiring as a condition of furnishing its service that such service shall not be used in the business of the applicant; and such other corporation, being entitled to equality of service regardless of the use of such service in their business, is likewise entitled to equality of charges for such service.

I am of opinion that a telephone company cannot lawfully refuse to a telegraph company the use of a telephone to aid it in receiving and delivering messages, any more than the telegraph company could in the converse situation refuse a telephone company the right to transmit by telegram a telephone message which had been received over the telephone lines destined to a person living at another place where there was a telegraph service, but no telephone. The telephone company in such case would, I think, clearly have the right to send such telegram, and the telegraph company could clearly not refuse to send it merely because this would be an aid and benefit to the telephone company in its business of long-distance transmission of news.

The argument in behalf of the defendant in this matter entirely overlooks the public right and interest which is involved. It is shown by the affidavits of various business men that the privilege of sending messages over the telephone to a telegraph office is of great public

convenience. If, however, a telephone company could refuse a telegraph company permission to use a telephone for the purpose of receiving messages to be transmitted by it, it results that the public would be deprived of the right of transmitting over the telephone to the telegraph office messages which they desire to deliver to a telegraph company for transmission by telegraph. To deny the public such right would, in my opinion, be in conflict with the purpose for which telephone companies are endowed with part of the sovereign power of the state. It is the purpose of their creation that they shall serve the public, and it is, as I view it, the right of every member of the public becoming a subscriber to a telephone exchange to be connected with and send messages to any other person or corporation engaged in a lawful business willing to pay the telephone companies the rate for a telephone which it charges generally for the character of service involved. This right of the public and of the users of other telephones to have the benefit of communication with telegraph offices would, in my opinion, be unlawfully impaired if the telephone company could refuse to furnish telegraph companies telephones for use in receiving messages.

And if a telephone company may, in accordance with defendant's argument, lawfully refuse to furnish its facilities to a competitor in the long-distance transmission of news, it would appear that a railroad company might, for like reason, refuse to transport over its line coal consigned to a competing railroad to be used in driving its engines, or, by parity of reasoning, charge it a higher rate than it charged for transporting coal for other persons, or might refuse to carry altogether, or, except at a higher rate than it carried passengers generally, the traffic agent of a competing railroad traveling over its line for the purpose of securing business. Clearly, however, a railroad would not in such case be exempt from the obligations of equal and undiscriminating service to its competitor as to any other member of the public requiring a like service in the transportation either of commodities or persons, without reference to the object or purpose of the transportation; and so, I think, the obligation of the telephone company must depend entirely upon the character of the service required, and not upon the purpose for which it is desired or its own business relations to the applicant as competitor or quasi competitor, or otherwise.

I find nothing contrary to this view in the Express Cases, 117 U. S. 1, 24, 6 Sup. Ct. 542, 628, 29 L. Ed. 791, which merely held that as railroad companies were not obliged either by the common law or by usage to do more as express carriers than to furnish the public at large with reasonable express accommodation, and manifestly could not extend like facilities upon their trains to all express companies, they were not required in the very nature of things to furnish all independent express companies equal facilities for doing an express business upon their trains.

Being of opinion, therefore, that a telephone company cannot properly, either at common law or under the Tennessee statute, refuse to furnish a telegraph company with telephone facilities under the condition that they shall not be used in furthering the business of the tele-

graph company, it follows in my opinion that it cannot lawfully discriminate against a telegraph company by requiring from it a greater charge for such service than is imposed upon other business patrons receiving similar service, either in the form of percentage on its business or otherwise.

3. It is also urged by the telephone company that to prevent the enforcement of the rates in question will bring about a discrimination as between telegraph companies by requiring it to furnish the Western Union Telegraph Company, under its contract, with service at a higher rate than that charged to complainant. This difficulty may, however, be avoided by the telephone company by not insisting upon the payment by the Western Union Telegraph Company of the additional rate which it is not authorized to charge.

4. As it appears, however, from the defendant's answer, that in some towns and cities in Tennessee the complainant has acquiesced in the increased rates, and has heretofore contracted to pay the same, and has had service on the basis of this increased rate for a considerable period of time, and this is not denied by the complainant, I am of the opinion that as to such points, without further information as to the precise facts and the nature of the contract, the complainant is not in a position entitling it to an injunction pendente lite, but that the matter of such rates may well rest until the final determination of this case upon its merits.

5. As to the defendant's argument that the complainant has a plain and adequate remedy at law, I am of opinion that in view of the continuing nature of the demand made by the defendant and the multiplicity of suits to which complainant would have to resort to enforce its rights, if it should pay the increased rate and sue to recover the same, the remedy at law would not be complete and adequate, and equity therefore has jurisdiction. *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 304, 26 Sup. Ct. 91, 50 L. Ed. 192; *Northern Pac. Ry. Co. v. Lumber Manufacturers' Ass'n* (C. C. A., 9th Circuit) 165 Fed. 1, 91 C. C. A. 39.

6. I deem it proper, however, in granting an injunction pendente lite in this case, in order that any rights of the defendant may be fully secured pending the final hearing, to provide as a condition of the granting of the injunction that the complainant shall, pending this litigation, keep in its several offices in the towns and cities in Tennessee to which the injunction applies a full and accurate record of all messages received by it over the telephone lines of the defendant, and its tolls therefor, and of all telegraph messages delivered by it over telephone lines of the defendant, such statement to be filed monthly in this cause within 10 days after the 1st day of each successive month, and reserving the right of the defendant to move to dissolve the injunction if this condition is not properly complied with.

9. An order will accordingly be entered granting the complainant's motion for an injunction pendente lite to the extent herein above stated and subject to the condition hereinabove expressed, and upon the complainant's executing an injunction bond in the sum of \$10,000 with good and sufficient security to be approved by the clerk of this court.

UNITED STATES v. AMERICAN EXPRESS CO. et al.

(Circuit Court, D. Massachusetts. February 16, 1910.)

No. 464 (2,031).

1. CUSTOMS DUTIES (§ 34*)—TREASURY REGULATIONS—STANDARD SAMPLES OF WOOL.

The standard samples of wool prescribed by the Secretary of the Treasury on the authority of Tariff Act July 24, 1897, c. 11, § 1, Schedule K, par. 352, 30 Stat. 182 (U. S. Comp. St. 1901, p. 1664), are conclusive in respect to classification and quality, except, perhaps, where the issue is one of fraud or mistake, and regulations in respect to such samples are not subject to review by the courts or the Board of General Appraisers; and where imported wools answer the quality of the standard samples, they should be classified accordingly, regardless of whether such standards operate unjustly, oppressively, or disproportionately to other classifications and values.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 34.*]

2. CUSTOMS DUTIES (§ 34*)—MERINO WOOL—"MERINO BLOOD, IMMEDIATE OR REMOTE."

In Tariff Act July 24, 1897, c. 11, § 1, Schedule K, par. 349, 30 Stat. 182 (U. S. Comp. St. 1901, p. 1664), relating to wools, the words "merino blood, immediate or remote," convey an unmistakable meaning, and include wool in which the presence of merino blood is marked, though of inferior quality.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 34.*]

3. CONSTITUTIONAL LAW (§ 73*)—RELIEF FROM HARDSHIP OF TREASURY REGULATIONS—FUNCTION OF COURTS.

Relief from hardships of authorized government regulations should be sought from the executive department, which, under expressly delegated authority, established such regulations, rather than from the courts.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 73.*]

4. CUSTOMS DUTIES (§ 1*)—TARIFF TAXATION—REVIEW—CONSTITUTIONAL POWER.

There is no vested right to import superior to the power of Congress to say upon what terms it shall be done, and it is quite within the constitutional discretion of Congress to say upon what terms foreign trade may be had, and to determine how the justice of the claims for alleged excessive tariff taxation shall be ascertained and disposed of. Such claims may in the discretion of Congress be left altogether to an executive department, or in suits against the collectors of customs, or to the determination of a Board of General Appraisers, subject to review by the courts upon such particulars only as the law may prescribe.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 1; Dec. Dig. § 1.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

The Board of General Appraisers sustained the importers' protest against the assessment of duty by the collector of customs at the port of Boston. The Board's opinion reads as follows:

MCCLELLAND, General Appraiser. These protests are against the assessment of duty at the rate of 10 cents a pound on the estimated weight of wool on Cape sheepskins, as class 1 wool. The returned weight of the wool is not disputed, but it is claimed that the wool so returned is of class 3, and dutiable at the rate of 3 cents per pound, under the provisions of paragraphs 358 and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

360, tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule K, 30 Stat. 183 [U. S. Comp. St. 1901, p. 1665]).

It is contended with almost stubborn insistence on the part of the government, as shown by the testimony and an elaborate brief, that the classification of the said wool was correctly made by the collector, for the sole reason, as alleged, that it conforms to standard sample 137 deposited in the principal custom houses in the United States under authority of the Secretary of the Treasury, pursuant to the provisions of paragraph 352 of said act.

In G. A. 6,695 (T. D. 28,632) we considered and determined adversely to the government an issue in all respects comparable with that here involved, and we do not consider that anything, either by way of evidence or argument, has been presented by the government to lead us to depart from the conclusion therein reached.

It would seem as though the government's side of the issue has been presented upon an entirely erroneous theory, to wit: That since the government examiner was satisfied that certain of the wool found on these skins was comparable with standard sample 137, it must therefore be returned and classified as of the first class, and that there remains no power, either in the Board of General Appraisers or the courts, to change that classification, which is, in effect, contending that the persons chosen by the Secretary of the Treasury to select the standard samples contemplated by paragraph 352, and the official examiners passing the wool, were to be the sole arbitrators during the life of the tariff act under which such standard samples were chosen as to what wools should be included within the classes specified in the act.

Counsel for the government seems to lay much stress upon the words in paragraph 349, "or other wools of merino blood, immediate or remote"; but we think, when it is considered that the growth on the skins of these so-called Cape-sheep is a mixture of wool, hair, and kemp, with the two latter largely predominating, and that such sheep are a degenerate species, with only a trace of the merino blood left in some of them, and that the value of the so-called wool, after being pulled from the pelt and washed, ranges from 3 to 10 cents a pound, it is not difficult to conclude that such a mixture was never intended by Congress to be classified as wool of the first class, subject to a rate of duty almost, if not altogether, twice greater than the average price per pound for which it will sell in the market, without considering the cost of labor and the cost of washing.

It is not to be overlooked that the wool which is taken from these skins, considering the great aggregate of skins imported, is of infinitesimal value. The skins are primarily imported to be made into leather, and it is only in the necessary course of the preparation of such skins for tanning that this so-called wool must be removed from the pelts.

It is clearly our view that when Congress arranged the wool schedule of the tariff, dividing wools into classes, and vesting in the Secretary of the Treasury authority to deposit in the principal custom houses of the United States standard samples as guides for the classification thereof by collectors of customs, Congress contemplated only straight wools, and not such a combination of wool, hair, and kemp as is involved in these protests.

We see no reason to depart either from the reasoning expressed or the conclusion reached in G. A. 6,695, supra, and we therefore sustain the protests and reverse the decisions of the collector.

D. Frank Lloyd, Deputy Asst. Atty. Gen. (Charles D. Lawrence, Asst. Counsel, of counsel), for the United States.

Albert S. Hutchinson (Putnam B. Smith, of counsel), for the importers.

ALDRICH, District Judge. In this case the collector of customs at Boston assessed duty upon an importation of wool as in class 1 in accordance with sample No. 137, which was on file in the custom house in Boston as a standard for the classification of Cape of Good Hope native skin wool. These standard samples were officially ar-

ranged and established under the direction of the Secretary of the Treasury as authorized by and in pursuance of paragraph 352 of the tariff act of 1897, and the duty imposed was that required upon the first class of wools and hair provided by paragraph 357, reduced under paragraph 360 one cent per pound because the wools were on the skin at the time of the importation. The action of the collector of customs was reversed by the Board of General Appraisers, and the case comes here on appeal from that tribunal.

Contrary to the view held by the Board of General Appraisers, I am inclined to view the authorized treasury regulation in respect to samples of wool in the Boston port as a government or department regulation, promulgated under power conferred by Congress upon the executive branch of the government, and as conclusive in respect to classification and quality, except in cases, perhaps, where the issue is one of fraud or mistake; and whether relief upon that ground would be afforded by the courts rather than by the executive branch of the government need not be considered here, because the claim in this case is not fraud or mistake, but one based upon the idea of an unsound interpretation of the act of Congress authorizing the regulation. In other words, the claim is that Congress intended to authorize a classification and regulation in respect to samples of straight wool only, while the regulation in question, it is claimed, covers the wool of the degenerate merino, or the wool of sheep so remote in blood as to have only a trace of the merino.

It is quite unnecessary to give attention to the object of legislation of this kind, except to say that the growth of business in this department, as in many others, has required that Congress should authorize classifications, commissions, and other instrumentalities for simplification in the field of government transactions. If such a defense as the one made here is admissible under the usual protest, where would the line be drawn? If it holds good in one case upon the ground that the standard sample is from sheep too remote in blood and race, why is not the efficacy of the regulation altogether lost, and for the reason that if the issue of fact can be raised in one case, it can in all, and the question as to quality and classification would therefore at once be at large again.

Paragraph 349 of the act of Congress in question includes in class 1 merino, mestiza, metz, or other wools of merino blood, immediate or remote, imported into the United States from Cape of Good Hope and other countries. The evidence is very strong that the importation answered the quality of the sample, and, indeed, it is not contended otherwise; the contention of the importer being that the sample in question is inferior to samples in classes 2 and 3. The case of the importer upon this ground is very strong, and if the question of the quality, value, and proper classification were an open one here, it might not be difficult to find that the classification and duty based upon the samples operated with inequality in respect to value. But it would seem, as already said, as the issue was not one of fraud or mistake, that relief from the hardships of the authorized government regulation should be sought from the executive department, which under

expressly delegated authority established the samples and prescribed the lines upon which the classifications should be made.

Cramer v. Arthur, 102 U. S. 612, 26 L. Ed. 259, would seem to indicate that, when Congress regulates things to be done through the agency of the official instrumentalities of the Treasury Department, devised for the purpose of nearer approximation to the actual state of things, which in practice operate with inequality, the one remedy for inaccuracies is to apply to the President through the Treasury Department to change the regulation. The doctrine of this case was recognized in *United States v. Klingenberg*, 153 U. S. 93, 14 Sup. Ct. 790, 38 L. Ed. 647.

Aside from the view that the Chinese exclusion cases, like *Fong Yue Ting v. United States*, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905, and *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040, and others, have a strong analogous bearing upon the question of the conclusiveness of an authorized executive regulation of the kind in question, is the very pertinent illustration of Mr. Justice Gray in the *Fong Yue Ting Case*, 149 U. S. 714, 715, 13 Sup. Ct. 1022, 37 L. Ed. 905, based upon the authorities which he cites, that:

"Claims to recover back duties illegally exacted on imports may, if Congress so provides, be finally determined by the Secretary of the Treasury. *Cary v. Curtis*, 3 How. 236 [11 L. Ed. 576]; *Curtis v. Fiedler*, 2 Black, 461, 478, 479 [17 L. Ed. 273]; *Arnson v. Murphy*, 109 U. S. 238, 240 [3 Sup. Ct. 184, 27 L. Ed. 920]. But Congress may, as it did for long periods, permit them to be tried by suit against the collector of customs. Or it may, as by the existing statutes, provide for their determination by a board of general appraisers, and allow the decisions of that board to be reviewed by the courts in such particulars only as may be prescribed by law. Act June 10, 1890, c. 407, §§ 14, 15, 25, 26 Stat. 137, 138, 141 [U. S. Comp. St. Supp. 1909, p. 818]; *In re Fasset*, 142 U. S. 479, 486, 487 [12 Sup. Ct. 293, 35 L. Ed. 1087]; *Passavant v. United States*, 148 U. S. 214 [13 Sup. Ct. 572, 37 L. Ed. 426]."

See, also, *Buttfield v. Stranahan*, 192 U. S. 470, 496, 497, 24 Sup. Ct. 349, 48 L. Ed. 525, which would seem to be strikingly in point as covering the question here.

Thus, as there is no vested right to import superior to the power of Congress to say upon what terms it shall be done, it is quite within the constitutional discretion of Congress to declare upon what terms foreign trade may be had and to determine how the justice of claims for alleged excessive tariff taxation shall be ascertained and disposed of. Such claims may be left altogether to the executive department, or in suits against the collector, or to the determination of a Board of Appraisers, subject to review by the courts, or subject to review by the court upon such particulars only as the law may prescribe; and it would seem clear that Congress did not intend to have the regulation in question in respect to standard wool samples subject to review by the courts or by the Board of Appraisers, because paragraph 352 imperatively declares that the standard samples of all wools which are now or may be hereafter deposited in the principal custom houses of the United States under the authority of the Secretary of the Treasury shall be the standards for classification.

Congress having delegated to the executive department of the government full authority to establish standards under the broad terms

of the statute expressive of merino wool, immediate or remote, coupled with an express statutory declaration that such standards shall be the standards for classification, the question whether a regulation standard operates unjustly, oppressively, or disproportionately with reference to other classifications and values, and whether relief should be granted, are questions addressing themselves to that branch of the government to which the authority was fully delegated, rather than to the courts.

The decision of the Board of Appraisers was that Congress, investing authority in the Secretary of the Treasury in respect to standards, contemplated only straight wools; but, if the regulations and acts of the executive department under this statute are subject to review by the courts, it will be seen that in this case the evidence is very strong that the wool, although of an inferior quality, was merino wool, and it is beyond question, and not disputed, that the wool was from sheep of merino blood, immediately or remote, and therefore the importation would seem to be within the express terms of paragraph 349 in respect to class 1. The words "merino blood, immediate or remote," convey an unmistakable meaning, and would seem, whether justly or unjustly, to clearly indicate this importation. The sample and importation answered the descriptive words of the statute with respect to merino wool. The evidence is strong as to the marked presence of merino blood, and the inferior quality of the wool was variously accounted for as resulting from the introduction of merino blood, or from the introduction of other blood into the merino, or through the merino blood pure and simple going back on itself under climatic, feed, and other influences.

The decision of the Board of General Appraisers is reversed.

SPARKS v. MARSH et al.

(District Court, E. D. Arkansas, W. D. April 4, 1910.)

No. 490.

1. BANKRUPTCY (§ 159*)—PREFERENCES.

To set aside and recover an alleged preference in violation of Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), it must be established by competent proof that the bankrupt was insolvent when he made the payment, that he intended it to be a preference, and that the creditor receiving it or benefited thereby had reasonable cause to believe that it was so intended.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 247; Dec. Dig. § 159.*]

2. BANKRUPTCY (§ 303*)—PREFERENCES—VACATION—INTENT TO PREFER—KNOWLEDGE—EVIDENCE.

In a suit to recover an alleged preference, evidence, while sufficient to show that the bankrupt intended to give a preference, *held* insufficient to show that the creditor had reasonable ground to believe that the bankrupt was insolvent, or that a preference was intended, under the rule that mere grounds of suspicion that a debtor is insolvent or that a payment is in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tended to create a preference is insufficient to establish that the creditor receiving it had reasonable cause to believe that a preference was intended.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 462; Dec. Dig. § 303.*]

In Equity. Suit by Charles C. Sparks, trustee of the estate of J. S. White, bankrupt, against T. T. Marsh and another, to recover an alleged preference. Bill dismissed.

The object of the bill is to recover the sum of \$1,000 alleged to have been paid by the bankrupt to the defendants, creditors, four days before involuntary proceedings in bankruptcy were instituted against him, which payment it is charged was made by the bankrupt to the defendants "when insolvent and in contemplation of bankruptcy and was received by the defendants with knowledge of the insolvency of the bankrupt and with such information as would put a reasonable person upon notice that the bankrupt was insolvent," and said payment, it is claimed, constituted an unlawful preference.

The answer of the defendants admits the allegations in the bill, except that it denies that "the payment was an unlawful preference, and that it was received by the defendants with knowledge of the insolvency of said bankrupt or with such information as would put a reasonable person upon notice that said White was insolvent, and that said payment constituted an unlawful preference, or that defendants had reasonable cause to believe that a preference was intended."

Rose, Hemingway, Cantrell & Loughborough, for plaintiff.
Moore, Smith & Moore and H. M. Trieber, for defendants.

TRIEBER, District Judge. There is no direct evidence that the defendants had any knowledge of the bankrupt's insolvency, or that the payment was intended as a preference at the time it was made, but it is claimed that the evidence establishes the fact that they had such information as would put a reasonable person upon notice that the debtor was insolvent at the time, and that the payment was intended as a preference within the meaning of the bankruptcy act.

The evidence establishes the following facts: That the defendants are, and have been since 1903, engaged in the liquor business, owning a saloon and having an interest in some other saloons, and are also wholesale dealers in beer in the city of Hot Springs. That up to July, 1908, they were also engaged in a general mercantile business with one Williams as a partner, which was located at Oaklawn, about 1½ miles from Hot Springs. That that business was operated under the name of the Oaklawn Mercantile Company, and was in charge of Williams. That in July, 1908, the partner, Williams, suddenly left, and thereupon the defendants took charge of the business. The stock of merchandise, which consisted of dry goods, groceries, and feed stuffs, invoiced \$1,991.50, and the liabilities amounted to about \$1,500, of which \$1,000 was due the Bunch Grain Company and \$500 to Plunkett & Jarrell. That the defendant Marsh on his way to Oaklawn met the bankrupt White, with whom he had had business transactions theretofore, as will be hereinafter set out, and who had had some experience in mercantile business of that nature and employed him to assist in taking an invoice of the goods on hand. The bankrupt and the defendant Wheatley had known each other for a long time, and the bankrupt had also known the defendant Marsh, and had business trans-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

actions with him for a number of years. In 1904, when the defendants were in the mercantile business, they bought goods from White. Afterwards White opened a saloon in the city of Hot Springs, and defendants furnished him with the money to pay for his license, and also with some whisky and all the beer he used on credit. White remained in that business for one year, during which time the transactions between him and the defendants were very satisfactory. Thereafter he worked for the defendants for five months as barkeeper in one of their saloons, and afterwards, until July, 1908, White was engaged in other vocations. After the invoice of the Oaklawn Mercantile Company stock had been taken by the defendant Marsh and White, which was found to be of the value of \$1,991.50, Marsh proposed to White to sell him the business on credit, as defendants could not give it much attention, and White was familiar with such business. White had no means to pay for it, so it was agreed that he should assume the Bunch Grain Company debt, amounting to \$1,000, and execute his note to the defendants for the \$991.50 balance, payable on June 1, 1909, with 8 per cent. interest per annum. The Bunch Grain Company was willing to accept the notes of White for the indebtedness if indorsed by the defendants as sureties. Thereupon White executed to the grain company 10 notes for \$100 each, which were indorsed by the defendants. The storehouse was rented by defendants to White, and the rent was promptly paid by him monthly. On March 1, 1909, White borrowed \$1,000 from the Arkansas National Bank of Hot Springs to be used in his business; defendants indorsing the note as sureties. The Bunch notes were duly paid as they matured, and in April, 1909, only two of them were still unpaid. On that day White sold out his stock of merchandise to one Wheatley, a brother of one of the defendants, but, so far as the evidence shows, he had no connection with the defendants. The price paid for the stock was \$2,500 in cash. The stock invoiced from \$3,000 to about \$3,500, and White had about \$3,000 in accounts due him from customers which were not included in the sale, but a part of them had been assigned before to another creditor. The purchase money received by White was used to pay the thousand dollar note held by the Arkansas National Bank and indorsed by the defendants, the \$991.50 note due to the defendants, and other debts. Neither of these two notes were due at that time, and upon the solicitation of White, the defendants, although at first they refused to do so, remitted the interest on their note amounting to \$55.10. There is no evidence tending to show that the defendants, or either of them, knew at the time that White was insolvent, or that he had sold out his store. Marsh, the member of the firm who attended to this matter, testified positively that he did not know that White was insolvent, but, on the contrary, believed him to be doing a prosperous business; that every month he collected the rent from him, which was paid promptly, and in conversation with White a short time before he told him that he was making about \$100 per month over and above all his expenses, including his living expenses; that in speaking to one of the wholesale dealers from whom White bought goods extensively he was informed that White paid his bills promptly, and seemed to be doing well. White also testified that he did not consider himself insolvent at the

time, and that, if no bankruptcy proceedings had been instituted, he thought he could have paid all his debts with the collections of his accounts and the sale of some timber lands belonging to his son who had authorized him to sell it and use the money realized in his business and for the purpose of paying his debts. The law is now well settled that, to set aside or recover a preference under the provisions of section 60b of the bankruptcy act, it must be established by competent evidence that the bankrupt was insolvent at the time he made the payment, that he intended it as a preference, and that the creditor receiving it or benefited thereby had reasonable cause to believe that it was intended thereby to give a preference. *Coder v. Arts*, 152 Fed. 943, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372, affirmed 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772; *In re Leech*, 171 Fed. 622, 96 C. C. A. 424.

The insolvency of White being admitted, the first question to be determined is: Did he, when he made the payment to defendants, intend it as a preference? Considering the relationship existing between the parties, the friendship of years, and the assistance rendered him by the defendants at various times, there is little room for doubt, and the court so finds, that the payment was made by White with the intent to give a preference within the meaning of section 60a of the bankruptcy act. Did defendants have reasonable cause to believe that this was his intention? There is no direct evidence to establish that fact, but mere surmises arising, it is claimed on behalf of the complainants, from the circumstances shown to have prevailed at the time. No evidence whatever has been offered to show that defendants or either of them knew White to be insolvent. The only evidence on that point is that of the defendant Marsh, who testified positively that he did not know it, but that from what White had told him about his business, the promptness with which he paid his rent, and as a result of the inquiry he made of Plunkett & Jarrell, the wholesale house with which White was dealing, he believed him to be making money, about \$100 a month over and above all his expenses. While the personal relations existing between the parties might raise a presumption that defendants knew White's financial condition, this presumption is satisfactorily rebutted by the fact that they indorsed a note for \$1,000 only a month before that time, and that the several notes for \$100 each given to the Bunch Grain Company and indorsed by the defendants were promptly paid by White, as nonpayment of any of them would have led to protest and notice to the defendants as indorsers. These acts are certainly strong circumstances to dispel the presumption of knowledge of insolvency, for it is hardly reasonable to suppose that they would have become indorsers on a note for \$1,000 if at the time they doubted his solvency and consequent ability to pay it at maturity.

The well-settled rule of law is that mere grounds of suspicion that a debtor is insolvent or that a payment made by him is intended to create a preference are insufficient to establish the fact that the creditor who received it has reasonable cause to believe that a preference was intended thereby. There must be substantial evidence of reasonable grounds for such belief. *Grant v. National Bank*, 97 U. S. 80, 24 L. Ed. 971; *Stucky v. Masonic Savings Bank*, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640; *Hussey v. Richardson-Roberts Dry Goods Co.*,

148 Fed. 598, 78 C. C. A. 370; *Tumlin v. Bryan*, 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960; *First National Bank v. Abbott*, 165 Fed. 852, 91 C. C. A. 538.

In *Grant v. National Bank* Mr. Justice Bradley, speaking of the provision "having reasonable cause to believe such person insolvent" in the bankruptcy act of 1867, said:

"It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. * * * A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further. He may feel anxious about his claim and have a strong desire to secure it, and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances, is not prohibited by the law. * * * Hence the act, very wisely, as we think, instead of making a payment or a security void for a mere suspicion of the debtor's insolvency, requires, for that purpose, that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man."

In *Hussey v. Richardson-Roberts Dry Goods Co.* the facts were that a mercantile creditor had sold a bankrupt goods only a few months prior to his bankruptcy. He was slow in making payments, and, learning that he had placed a mortgage on his stock, the creditor sent an attorney to look after the claim. The bankrupt stated to him that he did not have sufficient capital to meet his bills promptly, but was doing a profitable business and was entirely solvent; that he had an offer for his stock in cash and land amounting in value to a sum largely in excess of his indebtedness which he could not accept at once. The attorney advised its acceptance, and in the meantime took a chattel mortgage on the stock for the amount of his claim. The debtor was, in fact, insolvent, and became a bankrupt within four months thereafter. Upon these facts, it was held, Judge Adams delivering the opinion of the court, that such a showing supported the finding of the District Court that the creditor did not have reasonable cause to believe when the mortgage was taken that a preference was intended, and therefore it was not void under section 60b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]).

Great stress is laid on the fact that the payments to the bank and the defendants were made before the maturity of the notes. There is no evidence whatever to show that when the defendants received payment that they had any knowledge of the fact that the bank had been paid, but, even had they been advised of that fact, that alone would not have justified a finding that they had reasonable cause to believe the payment was intended as a preference. When White had the money to pay these debts, what would be more natural than that he should do so, especially if by paying the note held by the defendants he saved the accumulated interest amounting to over \$50?

In *Wright v. Sampter* (D. C.) 152 Fed. 196, the facts were much stronger than those in this case. There the defendant had had money on deposit with a bankrupt firm of which her uncle was the financial head, he being a man of supposedly large means. Nine days before insolvency proceedings in bankruptcy were begun against the firm she

received by mail a letter inclosing a check for the full amount of her deposit and interest, with the statement that the firm could no longer use her money. Neither the defendant nor her sister nor mother, who also used the firm as a depository and received similar checks, had any suspicion that it was embarrassed. The firm was in fact insolvent on the day the checks were sent. Upon these facts it was held that they were insufficient to show that the defendant had any reasonable cause to believe that the payment to her was intended to constitute a preference within the meaning of section 60b of the bankruptcy act.

Upon the findings made by the court, the defendants are entitled to a decree dismissing the bill.

TEXAS STAR FLOUR MILLS CO. v. MOORE et al.

(Circuit Court, W. D. Missouri, W. D. March 21, 1910)

1. SALES (§ 168*)—QUALITY—INSPECTION—BOARD OF TRADE REGULATIONS.

Where plaintiff and defendant were well acquainted with the regulations of the Kansas City Board of Trade concerning the inspection of grain, and especially one providing that a certificate of quality by an inspector appointed by the board was evidence between buyer and seller of the quality of the article sold and should be binding between the members of the board and others interested or requiring or assenting to the employment of such inspectors, etc., plaintiff having purchased sample wheat from defendant in Kansas City subject to the rules of the board and to the inspection there of H., a Board of Trade inspector, plaintiff, in the absence of fraud, was concluded by the certificate of H. that the grain shipped was in accordance with the sample.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 403-408; Dec. Dig. § 168.*]

2. SALES (§ 168*)—INSPECTION—PLACE.

A contract for the sale of wheat f. o. b. Kansas City meant that the wheat should be inspected there.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 403-408; Dec. Dig. § 168.*]

3. SALES (§ 437*)—WARRANTY—PLEADING.

Plaintiff, having declared on an express warranty, cannot recover on an implied one.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1251; Dec. Dig. § 437.*]

4. EVIDENCE (§ 441*)—PAROL EVIDENCE—SALES—ANTECEDENT NEGOTIATIONS.

An antecedent representation of the quality of an article offered for sale, which the prospective buyer declined to accept, cannot be carried forward and attached to a subsequent convention relating to a sale of the same commodity, evidenced in writing, which did not mention the former assurance as an integral part of the agreement.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 441;* Sales, Cent. Dig. § 721.]

5. SALES (§ 261*)—PUFFING.

A representation that a commodity offered for sale was "good wheat" did not impart a warranty, and was mere puffing.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 727-735; Dec. Dig. § 261.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

At Law. Action by the Texas Star Flour Mills Company against Benjamin C. Moore and others. Judgment for defendants.

This is an action at law to recover damages for an alleged breach of contract. By stipulation of parties, trial by jury was waived, and the case was submitted to the court on the pleadings and proof. The court makes the following

Finding of Facts.

(1) The contract is evidenced by written correspondence between the parties in the form of letters and telegrams respecting the sale of wheat by the defendants to the plaintiff. The plaintiff was at the times in question the owner and operator of a flour mill at Galveston, Tex. The defendants were grain merchants, operating on the Board of Trade at Kansas City, Mo.

(2) On the 3d day of February, 1908, the defendants, doing business under the name of "Moore Grain Company," sent the plaintiff the following telegram:

"Offer ten thousand bushels No. 2 red winter wheat 96½ fob Kansas city within ten days answer by telegraph immediately."

The plaintiff did not make answer by telegram as requested but on the 4th day of February, 1908, sent to the defendants by mail the following letter:

"Your message quoting soft wheat received, but sorry we are unable to trade with you. Do not anticipate placing further orders in Kansas City for the present."

On the 3d day of February, 1908, the same day on which the defendants sent the telegram above quoted, they wrote the plaintiff the following letter:

"Your valued favors of the 31st ult. and first before us and contents carefully noted. Whenever you thing the market has had enough decline and you are in the notion of buying, will be glad to have you wire us and we will name you lowest price possible to name on 2 red and 2 hard wheat. You know the quality of our red wheat, as we shipped you twenty or thirty thousand bushels of it and the wheat we have on hand is the same quality of wheat and we know it will please you."

The said letter of February 4, 1908, presumably not having then reached the defendants, on the 5th day of February, 1908, they again telegraphed the plaintiff as follows:

"Offer ten thousand bushels No. 2 red winter wheat 97½ within ten days answer by telegraph immediately."

On the 5th day of February, 1908, the plaintiff wrote the defendants the following letter:

"We have your message quoting soft wheat again today, but as previously advised it is not necessary for you to wire us these quotations unless we request them, as we are not buying anything from your market in soft wheat now. We are of course always glad to hear from you, but telegrams are an unnecessary expense. Will be pleased to have you write us conditions frequently."

On the 6th day of February, 1908, and prior to the receipt of the letter last above named, the defendants wrote the plaintiff the following letter:

"Answering your valued favor of the 4th, will state that, whenever you are in the market for any red wheat, will be glad to have you take the matter up with us by wire and we will endeavor to trade with you. As we stated to you in previous letter, this red wheat that we are offering is just exactly like the 20,000 bu. we shipped you in November and such as we can guarantee for sound wheat."

The foregoing correspondence pertained to No. 2 wheat and resulted in no contract between the parties.

(3) After the foregoing, and on the 18th day of February, 1908, the plaintiff sent the defendants the following telegram:

"Express sample and make price ten thousand bushels No. 2 red winter wheat basis Chicago May."

On the same day the defendants sent to the plaintiff the following telegram:

"Offer sample red wheat 1½ over Chicago May fob Kansas City our weights

and inspection within ten days shipment subject to your immediate reply by telegraph. This is good wheat."

To this last telegram the plaintiff replied on the same date as follows:

"Telegram received. Book ten thousand No. 2 red winter wheat at today's closing."

On the same day the defendants sent the plaintiff the following telegram: "Have booked you ten thousand bushels sample red 93 $\frac{3}{4}$ Kansas City. What routing do you wish?"

On the same day plaintiff telegraphed the defendants as follows:

"Ship Chicago, Rock Island & Pacific care H. & T. C. if possible. Bill export. Otherwise route your option."

(4) On the 19th day of February, 1908, the defendants telegraphed plaintiff as follows:

"Just have fifteen thousand bushels more sample red left. Will book it to you at 1 $\frac{1}{2}$ over Chicago May, fob Kansas City within ten days subject Hiddleston's approval. Answer by telegraph immediately."

To which the plaintiff on the same day replied by telegraph as follows:

"Accept offer fifteen thousand bushels basis today's closing subject Hiddleston's approval."

Whereupon on the same day the defendants telegraphed the plaintiff as follows:

"Have booked you ten thousand bushels sample red wheat 93 $\frac{3}{4}$ fob Kansas City subject Hiddleston's approval. Had sold other five thousand bushels before receiving your wire."

On February 18, 1908, the plaintiff sent the defendants the following letter by mail:

"Exchange of wires date resulted in our purchase of you ten thousand bushels sample red wheat 93 $\frac{3}{4}$ cents fob Kansas City, ten days' shipment. We have further wired you to ship swooned care H&TC if possible; bill export, 'otherwise route your option,' which we confirm. Trust you will make a point of loading us out a very nice line of stuff and have particular care used in the matter of cooperating the cars, so that the weights will hold out fully here. Trust you have complied with our telegraphic request regarding the sample. Awaiting your shipping documents, we beg to remain."

On the day last aforesaid, the defendants mailed the plaintiff the following letter:

"We have a wire from you this morning saying, express samples and make price 10,000 2 red wheat basis Chicago May. We immediately wired you, sample red wheat 1 $\frac{1}{2}$ cents over Chicago May fob Kansas City, our weight and grades, ten days shipment, subject to your immediate reply. We also stated that this was good wheat. We later had a wire from you stating that our telegram had been received and to book 10,000 2 red wheat at today's close. Chicago May today closed at 91 $\frac{3}{4}$ cents; our sale to you was 1 $\frac{1}{2}$ over Chicago May, which was 93 $\frac{3}{4}$ cents Kansas City. We herewith enclose confirmation covering sale. Kindly sign duplicate and return to us. We are expressing you tonight a large sized sample of this red wheat. You of course, understand that we are not selling this as 2 red wheat but are selling it like sample and guarantee it to be fully equal to same. We have ordered Kansas City Southern empties for this loading and trust that same is satisfactory."

On the 19th day of February, 1908, the defendants wrote the following letter:

"In answer to our inquiry yesterday asking what routing you desired on the 10,000 wheat, we had your reply saying ship Rock Island care H. & T. C. if it was possible to do so, and to bill for export; otherwise route our option. When the writer sent you this wire he did not know the elevator had already put in orders for Kansas City Southern empties to use on contract, so when we received your wire saying we could use our own routing if Rock Island was not convenient, we decided to let the order stand with the Kansas City Southern, and let the 10,000 wheat go via that route, which we trust will meet with your approval. We can get the cars much quicker via Kansas City Southern and their time is much better than the Rock Island. We turned over to J. J. Hiddleston, Board of Trade Sampler, a good sized sample of red wheat and will have him approve of each car before shipment. We wired

you today that we had just 15,000 bushels more of this sample red wheat left, and that we would book it to you at $1\frac{1}{2}$ cents over Chicago May fob Kansas City, ten days shipment, subject to Hiddleston's approval, but we have heard nothing from you. Since wiring you we have sold 5,000 bushels of this wheat, so that we only have 10,000 bushels of this red wheat on hand. This cleans us up and if you are in the market for any more of this wheat, we will be glad to sell you the 10,000 bushels and clean it up. How about some hard wheat? We have a sample hard wheat that we call sample 'B' wheat, testing 60 pounds, which is giving excellent satisfaction throughout Texas. We are mailing you under separate cover tonight, a sample of this wheat, and our ideas on this wheat are $1\frac{1}{2}$ cents over Kansas City May fob cars Kansas City. Basis tonight's market, this would be $90\frac{1}{2}$ cents Kansas City for sample 'B' wheat."

On February 20, 1908, the defendants wrote to the plaintiff the following letter:

"In answer to our quotation yesterday stating that we had just 15,000 bushels of red wheat left unsold and offering it to you a cent and a half over Chicago May fob cars Kansas City, we had your reply late yesterday afternoon booking the 15,000 bus. basis close of the market last night, subject to Hiddleston's approval. Not hearing from you promptly, we had disposed of 5,000 bus. of this sample red wheat, so when we received your wire last night booking 15,000 bus. we immediately wired you as follows: 'Have booked you 10,000 bus. sample red wheat $93\frac{3}{4}$ fob cars Kansas City, subject Hiddleston's approval. Had sold other 5,000 bus. before receipt your wire.' We enclose herewith confirmation covering 10,000 bushels, duplicate of which kindly sign and return to us. Sorry we could not book your full order, but we are afraid to sell any more now until we fill all of our orders for this red wheat. We might have four or five thousand bushels left, but as stated before, we prefer to load all our orders and then if we have any left, will give you the first show at it."

On the same day last aforesaid, the defendants wrote the plaintiff the following letter:

"Your valued favor of the 18th at hand confirming 10,000 bushels wheat sold you on that date. We wrote you last night that we were going to let this wheat go to you in Kansas City Southern cars. So long as it is to be billed for export we presume the route makes no difference to you, and as the Kansas City Southern we believe will make much quicker time than any other line, we are going to let it go that way. Now in regard to cooping the cars; we will be very careful. We have instructed our elevator foreman to line each one of the cars with cloth so that there will be absolutely no chance for leakage, and our weights should hold out, practically no shortage at all."

On February 21, 1908, the plaintiff wrote the defendants the following letter:

"We have your two favors of 18th and 19th and beg to return herewith confirmation duly signed on the first ten thousand bushels of soft wheat at $93\frac{1}{4}$ fob Kansas City. Please bear in mind that we want this wheat routed in care of the T & N O at Beaumont when billed out of Kansas City on the KCS, and as previously advised, if it comes via Rock Island, we want it billed in care of H & T C at Fort Worth."

February 22, 1908, the plaintiff wrote the defendants the following letter:

"We are in receipt of your favors of 20th inst. and have noticed same carefully. Beg to return herewith copy of confirmation on the last ten thousand bushels duly signed, and call your attention to the fact that it reads $93\frac{1}{4}$ fob Kansas City, the purchase price, however, being for $93\frac{3}{4}$ fob Kansas City. We confirmed in our previous letter at the right price of $93\frac{3}{4}$."

On February 24, 1908, the defendants wrote the plaintiff the following letter:

"In answer to your valued favor of the 20, will state that as you requested, all of our shipments to you will go care of Kansas City Southern care T & N O at Beaumont. However, there will be one 80,000 pound car which will arrive in Galveston over the G & I S, as we only loaded 60,000 pounds in this car and to avoid being charged this extra 20,000 pounds, it is necessary to ship it as above stated."

On March 5, 1908, the defendants wrote the plaintiff the following letter: "We had your wire of even date before us this morning and note that five cars of the wheat has arrived and that you are complaining of the quality. The writer has been out of town the greater part of the last ten days, account of sickness and did not see all the wheat when loaded, but upon looking up our records, find that Mr. J. J. Hiddleston, Board of Trade Sampler, sampled each and every car of the grain shipped to you, and issued a certificate that the grain was up to sample. We asked Mr. Hiddleston to investigate the matter at once and to advise us and we will then take the matter up with you further."

On April 9, 1908, the defendants sent the plaintiff the following letter: "Your valued favor of the 6th at hand and contents carefully noted. The mill has before them all the papers covering this trade and we know that we have filled our contract to the letter and knowing this, insist that our responsibility in the matter has ceased."

On March 12, 1908, the defendants sent the plaintiff the following letter: "Your various favors of the 9th received and contents carefully noted. As we have written you and wired you, this wheat was sold by sample subject to Mr. J. J. Hiddleston's approval here at Kansas City. Mr. Hiddleston examined the wheat when loaded and approved it as being up to sample, therefore we have filled our contract and you must not expect us to do anything further in the matter."

(5) On February 18, 1908, the defendants sent by mail to plaintiff the following confirmation of the first 10,000 bushels of wheat shipped:

"Moore Grain Company, 508 Board of Trade, Kansas City, Mo. Members Kansas City Board of Trade.

"Confirmation.

"This contract is subject to the Rules and Regulations of the Kansas City Board of Trade.

"We hereby confirm sale to you today by wire of 10000 bu sample red wheat at 93¼ fob cars Kansas City.

"Subject to KC inspection and KC weights. Shipment within 10 days.

Our routing.....

.....Awaiting instructions.....

Care

.....Wheat

.....Subject approval J. J. Hiddleston.

"Terms:—Demand draft with Bill of lading attached, payable on presentation."

On the 20th day of February, 1908, the defendants sent the plaintiff the following confirmation of sale:

"Moore Grain Company, 508 Board of Trade, Kansas City, Mo. Members Kansas City Board of Trade.

"Confirmation.

"This Contract is Subject to the Rules and Regulations of the Kansas City Board of Trade.

"We hereby confirm sale to you today by wire of 10000 bu sample red wheat at 93¼ fob cars Kansas City.

"Subject to K. C. inspection and K. C. weights. Shipment within 10 days.

"Subject Hiddleston's inspection.

"Terms: Demand draft with Bill of Lading attached, payable on presentation."

Both of the foregoing confirmations were received by the plaintiff in due course of mail, and by it signed as follows: "Texas Star Flour Mills, W. A. Barlow."

(6) The plaintiff honored and promptly paid the bills sent on said shipments.

Among the published rules of the Board of Trade of Kansas City, in question, section 4, is the following:

Sec. 4. It shall be the duty of the board of directors when deemed necessary to fix and establish standards of grades or qualities for flour, grain, provisions and hay, and, as occasion may require, any other articles or commodities dealt in by members of this association and the certificate of any inspector, weigher, gauger, or measurer, appointed by the said board, as to the quality or quantity of any such article, or his brand or mark upon it or upon any package containing such article, shall be evidence between buyer and seller of the quality, grade or quantity of the same, and shall be binding upon the members of this association, and others interested or requiring or assenting to the employment of such inspectors, weighers, gaugers, or measurers."

The plaintiff was, at the time of the transaction in question, familiar with said rule of the Board of Trade.

(7) Samples of the wheat in question were furnished by the defendants to Mr. Hiddleston, official inspector of the said Board of Trade of Kansas City, taken in the usual, customary manner, from which the said Hiddleston was to make the inspection of the wheat in question. Prior to the shipments of the grain said inspection was duly made according to the usual, customary method pursued on said Board of Trade; said inspector made and furnished his official certificate showing that said wheat so inspected by him corresponded with the said sample. The sample was designated in the certificate as "sample No. 5," which was the mark placed thereon by Mr. Moore and left with Mr. Hiddleston. The defendants forwarded these certificates to the plaintiff, and drew on it for the wheat, attaching bills of lading to the drafts. Upon receipt of said certificates, the plaintiff paid the drafts, and took up the bills of lading without waiting for the arrival of the wheat, and without claiming the right to further inspection.

A sample of the wheat from which said Hiddleston made said inspection was forwarded by the defendants to the plaintiff. It was what is known as a "mail sample," and not an express sample. The sample sent was not a large sample; the smaller sample being sent by the defendants for the reason that they were not able to furnish larger sample. The plaintiff made no objection at the time, to the defendants, to the sample sent.

(8) The shipments were made at Kansas City, Mo., f. o. b. to the plaintiff at Galveston, and routed according to directions. On receipt of the shipments the plaintiff had an inspection made of the wheat by its inspector at Galveston, who saw the sample held by the plaintiff, but it does not appear affirmatively from the evidence that the inspector had before him the same at the time of his inspection.

(9) The wheat sent by the defendants to the plaintiff was partially binburnt, weevil-cut, and musty. It was, however, such as could be milled successfully, especially when mixed with a small per cent. of hard wheat. The defendants did sell such wheat of the bin in question at Kansas City for milling purposes at said time. The wheat was not all binburnt, or weevil-cut, or musty. Weevil cutting tends to make the grain lighter. The grain in question weighed 59 pounds to the bushel, one pound more than No. 2 wheat is required to weigh.

(10) The said wheat so shipped, to wit, 10,000 bushels, was at the price of 93¼, and 10,000 bushels at 93¾ cents per bushel, or an average of 93½ cents per bushel. It was worth that amount in the market where sold, and it was sold to the plaintiff at a price of 3 to 3½ cents per bushel less than the then market price of No. 2 wheat.

(11) The plaintiff sold the wheat at Galveston at 92¾ cents per bushel delivered at the elevator; in addition to which is the charge of loading on vessel of 1½ cents per bushel, which made 94¼ cents per bushel f. o. b. at Galveston. At that date No. 2 wheat at Galveston was worth between 96 and 97 cents per bushel f. o. b. vessel at Galveston.

(12) Kansas City, Mo., at that time, was a grain market for all kinds of wheat, hard and soft, and of all grades. At Galveston the only general market is export of hard wheat. The only purchaser there of soft wheat was the plaintiff company. Soft wheat when sold at Galveston for exportation was mixed in with some hard wheat, and graded as hard, which brought practically the same price as hard wheat.

(13) The amount of the freight charges paid by the plaintiff on said shipments was at the rate of $18\frac{1}{2}$ cents per hundred, which amounted to \$2,204.13. The amount paid for switching 15 cars at Galveston at \$1.50 per car amounted to \$22.50.

Conclusion of Law.

On the foregoing facts found the court declares the law to be that the plaintiff cannot recover.

It is therefore ordered and adjudged by the court that the plaintiff take nothing by its action, and that the defendants go hence without day with their costs in this behalf had and expended, and that they have execution therefor.

[Signed]

Jno. F. Philips, Judge.

Stewart Taylor, for plaintiff in error.

E. R. Morrison, for defendants in error.

PHILIPS, District Judge (after stating the facts as above). As the dealings between the parties, resulting in the contract of sale of the wheat in question, is evidenced by telegrams and letters between them, they must determine what the contract was.

The first correspondence, beginning on the 3d day of February, 1908, pertained to No. 2 wheat, and resulted in no contract, for on the 4th day of February, 1908, the plaintiff wrote the defendants saying:

"Your message quoting soft wheat received, but sorry we are unable to trade with you. Do not anticipate placing further orders in Kansas City for the present."

On the 5th day of the month, and evidently before the letter above quoted was received, the defendants telegraphed the plaintiff:

"Offer 10,000 bushels No. 2 red winter wheat $97\frac{1}{2}$ within 10 days. Answer by telegraph immediately."

The plaintiff did not answer by telegraph, but on that date wrote to the defendants saying:

"As previously advised it is not necessary for you to wire us these quotations unless we request them, as we are not buying anything from your market in soft wheat now. We are of course always glad to hear from you, but telegrams are an unnecessary expense. Will be pleased to have you write us conditions frequently."

Evidently before the receipt of the last above letter, the defendants wrote the plaintiff, in answer to its letter of February 4, 1908, saying, in substance, that, whenever the plaintiff was in the market for any red wheat, they would be pleased to take up the matter by wire and then would endeavor to trade. It was in this letter the defendants stated the red wheat, then offered, was like the 20,000 bushels shipped in November previously. As there was no response to this by plaintiff, the defendants' proposal was at an end. Thus matters stood until the 18th day of February, 1908, when the defendants sent to the plaintiff a telegram offering sample red wheat at $11\frac{1}{2}$ cents over Chicago May f. o. b. Kansas City. "Our weights and inspection within 10 days. Shipment subject to your immediate reply by telegraph." To which, on that day, the plaintiff replied by telegram, directing to express sample and make price 10,000 bushels No. 2 winter wheat. From

which it is manifest that the proposals made by the defendants embraced two distinct features: (1) That it was on defendants' weight and inspection. (2) That it was subject to the plaintiff's immediate reply by telegram. The reply sent was to express sample and make price 10,000 bushels No. 2 red wheat. The defendants did not accept such counter proposition to ship No. 2 red wheat. But their proposal was a sale to be made by sample; and, as no price was fixed, the contract was yet incomplete. Thereafter the defendants answered: "We booked you 10,000 bushels sample red wheat 93 $\frac{1}{4}$ Kansas City"—enquiring as to what routing the plaintiff wished.

Thus the purchaser was again advised that what the defendants were offering and selling was sample red wheat at the price of 93 $\frac{1}{4}$ at Kansas City f. o. b. The answer made to this by the plaintiff was simply a direction as to the routing of the cars.

The additional 10,000 bushels of wheat was sold on telegram of February 19, 1908, which offer the plaintiff then accepted. As the defendants had sold 5,000 bushels of the 15,000 bushels offered, they shipped only 10,000 bushels, which the plaintiff accepted.

The only difference, therefore, in the two transactions of the 18th and 19th days of February, is that the first shipment was "on our inspection," and the second named Hiddleston as the inspector. Both sales were by sample and on inspection on Kansas City Board of Trade. While the sample sent was not a large express sample as requested by the plaintiff, the sample sent was received by the plaintiff without objection made at the time to the smaller quantity; and the inspection was made as proposed at Kansas City. The official certificate thereof was made by the duly constituted and recognized inspector at Kansas City according to the rules and regulations of the Board of Trade, with which the plaintiff, as a dealer, was familiar. Confirmations of these sales were duly forwarded by the defendants; the first on the 18th day of February, 1908, reciting on its face that "this contract is subject to the rules and regulations of the Kansas City Board of Trade," and further stating on its face, "Subject approval J. J. Hiddleston." The other sent on the 20th day of February, 1908, contained the same recitations on its face. These confirmations were accepted by the plaintiff on receipt, and returned to the defendants without objection.

These confirmations with the acknowledgement thereof were a clear recognition by the plaintiff: (1) That the transaction was subject to the rules and regulations of the Kansas City Board of Trade; and (2) that it was subject to Hiddleston's inspection. If the plaintiff did not so understand the telegrams and letters, the time for it to say so was on receipt of the confirmations. No more wholesome rule for the interpretation and application of such contracts between parties is to observe the construction placed thereon by them before any litigation arises between them respecting the same. This rule was expressed as follows in *Moore v. Beiseker et al.*, 147 Fed. 367, 77 C. C. A. 545:

"There has never been any rule of construction of contracts more instinct with the spirit of justice and practical sense than that which declares that, where the provisions of a contract become the subject of controversy between the parties, the practical interpretation placed thereon by their acts, conduct,

and declarations is of controlling force. This for the reason that the interest of each leads him to a construction most favorable to himself, and, when differences have become serious and beyond amicable adjustment, it is the better arbiter."

So it was said in *Long-Bell Lumber Company v. Stump*, 86 Fed. 578, 30 C. C. A. 264:

"Courts may use the actual construction put thereon by the conduct of the parties under the contract as a controlling circumstance to determine the construction which should be put upon the contract in enforcing the rights of the parties. The most satisfactory test of ascertaining the true meaning of a contract is by putting ourselves 'in the place of the contracting parties when it was made, and then considering, in view of all the facts and circumstances surrounding them at the time it was made, what the parties intended by the terms of their agreement.' And when this intention is made clear by the course of their subsequent dealing and action thereon, it must prevail in the interpretation of the instrument, regardless of inapt expressions or careless recitations."

See, also, *District of Columbia v. Gallaher*, 124 U. S. 505, 8 Sup. Ct. 585, 31 L. Ed. 526.

As shown by the testimony of its manager, the plaintiff was quite familiar with the rules of the Kansas City Board of Trade, among which was the following:

"The certificate of any inspector, etc., appointed by the said board as to the quality, etc., of any such article, etc., shall be evidence between buyer and seller of the quality, grade or quantity of the same, and shall be binding upon the members of this association, and others interested or requiring or assenting to the employment of such inspector, etc."

That inspection was made by the sample furnished by the defendants to the inspector, and the part sent by them to the plaintiff.

There is no charge preferred in the petition of any fraud respecting the sample that was sent, or respecting the inspector's certificate. This action is a simple suit at law for breach of contract. The plaintiff would have been required to resort to a suit in equity surcharging the certificate and sample with fraud, to avoid the certificate. The authorities are all one way touching this proposition. Accordingly, Mr. Justice Harlan, in *Martinsburg & Potomac R. R. Co. v. March*, 114 U. S., loc. cit. 553, 5 Sup. Ct. 1037 (29 L. Ed. 255), said:

"Upon the supposition that the engineer made such a certificate as that provided by the contract, there is no allegation that entitled the plaintiff to go behind it; for there is no averment that the engineer had been guilty of fraud, or had made such gross mistake in his estimates as necessarily implied bad faith, or had failed to exercise an honest judgment in discharging the duty imposed upon him. The first count of the declaration was, therefore, defective for the want of proper averments showing plaintiff's right to sue on the contract," etc.

It would have been utterly unbusiness like and abnormal for the vendee to expect, or for the parties to have intended, that the inspection of the wheat should be committed to the vendee at Galveston. The well-established rule of law is that the contract f. o. b. means a delivery at Kansas City, and that that was the place of inspection. *Fraser v. Ross*, 1 Pennewill (Del.) 348, 41 Atl. 204; *Stafford v. Pooler*, 67 Barb. (N. Y.) 143; *Armsby v. Blum*, 137 Cal. 552, 70 Pac. 669; *West-*

ern Construction Co. v. Romona, etc., Stone Co., 41 Ind. App. 229, 80 N. E. 856; Brownlee v. Bolton, 44 Mich. 218, 6 N. W. 657.

Counsel for the plaintiff has cited the court to a number of authorities based upon rules of law respecting implied warranties as to soundness and quality of a commodity or article sold. They have no application here, as the plaintiff has declared upon an alleged expressed warranty. On such a declaration no recovery can be had upon a claim of implied warranty. *Pemberton v. Dean*, 88 Minn. 60, 92 N. W. 478, 60 L. R. A. 331, 97 Am. St. Rep. 503; *Duncan v. Fisher*, 18 Mo. 404; *Irwin v. Chiles*, 28 Mo. 578; *Harris v. Railroad Co.*, 37 Mo. 307.

The petition, for instance, counts upon the statement made in the first letter written by the defendants February 3, 1908, "You know the quality of our red wheat," etc. It would be sufficient of this to say that, as the plaintiff expressly declined to enter into any contract based thereon, it ought not now to fall back on that representation. Two weeks intervened thereafter before the defendants renewed by telegram proposals, and the contract was closed upon what supervened, which was not for the sale of No. 2 wheat such as had been sold the fall before, but was by sample, and subject to inspection. It is too absurd for serious consideration for the representatives of the plaintiff company now to put forth the claim that they understood the defendants were selling them the wheat as No. 2 hard, the same as that delivered in the preceding fall, when the evidence shows, without contradiction, that the market price of such wheat at the time was approximately 3 cents per bushel more than the price at which they were offering the wheat in question. As alert millers, running such business at Galveston, they were well advised from the daily market quotations of the current price of such No. 2 hard wheat.

I know of no recognized rule of law by which a statement made respecting the quality of an article offered for sale, where the offeree had declined to accept the proposal, can be carried forward and attached to a subsequent convention between the parties evidenced in writing which does not mention such former assurance as an integral part of the present agreement. The law, I think, is to the contrary. *Benjamin on Sales*, § 610, succinctly states—

"that antecedent representations made by the vendor as an inducement to the buyer, but not forming part of the contract when concluded, are not warranties."

See, also, 1 *Lawson on Rights & Remedies*, § 212; *Ashcom v. Smith*, 2 Pen. & W. (Pa.) 211, 21 Am. Dec. 437; *Iron Works v. U. S.*, 34 Ct. Cl. 174.

But counsel for plaintiff says that in one of the subsequent letters, wherein the defendants were trying to renew negotiations, they used the expression this is "good wheat." Aside from the testimony of witnesses, commission grain dealers on the Board of Trade, that such term has no defined significance in the trade, it is not too much to say that it has no legal force, as it is mere puffing. In *Hogins v. Plympton*, 11 Pick. (Mass.) 97, the writing adverted to "good fine wine," and "good Hermitage." Of this Chief Justice Shaw said:

"We are of opinion that the writing in question cannot be considered as a warranty that the wine was of any particular description or quality. One objection is that the words are too uncertain and indefinite."

In *Holden v. Dakin*, 4 Johns. (N. Y.) 421, paint was sold as good paint, which proved to be useless. The court held that it constituted no express warranty, saying:

"Here was no express warranty as to the quality of the paints. All that was proved upon the trial was that the clerk of the vendor sold the paints for good paints and at a fair price; but this was not sufficient to raise a warranty."

Likewise, in *House v. Fort*, 4 Blackf. (Ind.) 293, in an action for breach of warranty for the soundness of a horse, it was held that the court should have directed the jury:

"That if the defendant at the time of the exchange, on being questioned as to the horse's eyes, said 'they are as good as any horse's eyes in the world,' this does not amount to a warranty."

The rule is well stated in *Mason v. Chappell*, 15 Grat. (Va.) 572, loc. cit. 583, as follows:

"No affirmation, however strong, will constitute a warranty unless it was so intended. If it is intended as a warranty, the vendor is liable if it turns out to be false, however honest he may be in making it; but, if it is intended as a mere expression of opinion or simple praise and commendation of the article, he is not liable, unless it can be shown that he knew at the time it was untrue. And in that case it is inaccurate to say that he is liable for a breach of his warranty. His liability arises from the fraud which he was guilty of and should be enforced in an action on the case for deceit."

Plaintiff's counsel relies much upon the ruling in *Columbian Iron Works v. Douglas*, 84 Md. 44, 34 Atl. 1118, 33 L. R. A. 103, 57 Am. St. Rep. 362, which holds that, in a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and, therefore, the delivery of some other similar article is a substitution and a breach of the contract. In which case, no question of warranty is involved. That was the sale of certain quantity of steel scrap, consisting only of clippings, etc., from the steel plates of cruisers built by the defendant for the United States navy. After the steel scrap was delivered and paid for, it was found that, of the total 159 tons shipped, 89 tons were cruiser steel and 70 tons were not, and the plaintiff was obliged to sell the 70 tons for a much less sum than he paid for it. It was held that plaintiff was entitled to recover the difference between the price paid and the value of the article delivered. It was further held that where there is a sale of goods by description, subject to inspection by the buyer, the description is not subordinated to the inspection, unless the parties both agree to substitute an inspection by the buyer for the description furnished by the seller.

That is not this case. The concrete case here involved is this: The sale was made by sample subject to inspection at Kansas City. The plaintiff so understood it, for it asked that sample be forwarded. It accepted the defendant's offer, and acted thereon, which stated "on our inspection" and "inspection by Hiddleston." It approved the confirmation of the sales sent by the defendants, expressly reciting the

fact respecting such inspection. As applied to such state of facts, the later ruling by the Maryland court in *Lawder Co. v. Mackie Grocery Co.*, 97 Md. 1, 54 Atl. 634, 62 L. R. A. 795, is more in point. This was an action for breach of contract on the sale of shipment of cases of tomatoes. The contract was made in Baltimore, Maryland. "Buyer to give shipping instructions when required by seller. To be delivered as packed during season of 1901, f. o. b. Baltimore." Touching the question raised by the purchaser as to the right to have the articles inspected before acceptance, the court said:

"The mere fact that the buyer has the right to inspect goods before acceptance does not necessarily mean that the inspection is to be made at the residence or place of business of the buyer. He might inspect at the seller's place of business; but, if the contract provides for the delivery at a particular place, he must accept or reject at that place, unless otherwise provided for in the contract. In short, a contract to deliver at one place cannot be made to mean delivery at another place, because the buyer lives there and has a right to inspect the goods, and there is no uncertainty as to the place of delivery in this contract as would justify the court in holding that it was at New Orleans, because the appellee had its place of business there."

Further on the court said:

"If they determine that by their contract it must control, and if it is silent as to inspection, but it is as clear as this is as to delivery, any inspection that is desired pro tem must be made before or at the time of delivery, when the terms are cash."

In short, it was held that the words "f. o. b." indicated that the seller was to deliver the goods at Baltimore, free on board, to the carrier. The goods went thenceforth at the risk of the buyer, and, even without any specification as to the place of inspection, the implication of law is that it was to be Baltimore, the place of the shipment. In the case at bar, it is manifest from the correspondence that Kansas City was the place of delivery, and the inspection was to be made there, and by a designated person, to determine whether or not the wheat corresponded with the sample. His certificate was to be the evidence of that fact, and, until set aside for fraud, it is conclusive. *Cook v. Foley*, 152 Fed. 41, 81 C. C. A. 237; *Wood v. Railway*, 39 Fed. 52. And, in addition to this, the defendants were not selling wheat on a written description, but by sample. In their letter of February 18, 1908, to the plaintiff, they expressly stated:

"You of course, understand that we are not selling this as 2 red wheat, but are selling it like sample and guarantee it to be fully equal to same."

That was before the wheat was received by the plaintiff, and it received it with knowledge of that statement by the defendants. By its silence—making no protest—it acquiesced in and recognized that that was the contract the defendants were acting under.

In the absence of any charge of fraud upon the part of the defendants in not having submitted the proper sample to the inspector at Kansas City, and in the absence of any charge that the sample sent by the defendants to the plaintiff did not correspond with the sample submitted to the inspector at Kansas City, I must rule that the plaintiff cannot recover.

ILLINOIS CENT. R. CO. v. SHEEGOG et al.

(Circuit Court, W. D. Kentucky, March 18, 1910.)

1. REMOVAL OF CAUSES (§ 119*)—JUDGMENT—VALIDITY—JURISDICTION OF COURT.

A judgment of a federal court, rendered in a cause removed from a state court, is not void because of the insufficiency of averment of jurisdictional facts in the petition for removal, where, as in this case, the plaintiff on a motion to remand had by his answer put in issue the truth of the allegations made in the petition for removal and upon the answer and the evidence the issue was decided against him.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 252; Dec. Dig. § 119.*]

2. COURTS (§ 508*)—CONFLICTING JURISDICTION—JUDGMENT—ENFORCEMENT—ESTOPPEL.

A defendant in an action in a state court filed a petition for removal, which was overruled. Thereupon it filed a transcript of the record in the federal court, and a motion by plaintiff to remand was denied. The action was tried on the merits in the state court, resulting in a judgment for the plaintiff, which was taken on writ of error by defendant to the highest court of the state, and from there to the Supreme Court of the United States, by which it was affirmed on the ground that the petition for removal was not sufficient to oust the state court of jurisdiction. In the meantime the case was also tried on the merits in the federal court, resulting in a judgment for defendant. *Held* that, while such judgment was valid, the defendant was estopped to enforce it by the judgment of the Supreme Court obtained at its instance, and that it could not be made the basis for a suit to enjoin the enforcement of the judgment of the state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1430; Dec. Dig. § 508.*]

In Equity. Suit by the Illinois Central Railroad Company against Robert W. Sheegog and others. On motion for preliminary injunction. Motion denied.

Trabue, Doolan & Cox, for complainant.

Hendrick & Miller and P. B. Miller, for defendants.

SEVERENS, Circuit Judge. It appears from this bill that the defendant Sheegog brought suit in the circuit court for Union county, Ky., against this complainant, and a conductor of one of its trains, and the Chicago, St. Louis and New Orleans Railroad Company, to recover damages for the alleged negligence of the three defendants, whereby his intestate lost his life. The Illinois Central Railroad Company, one of the defendants in that suit, filed a petition for removal to this court upon the ground that there was a separable controversy in the case between it and the plaintiff in that suit, and charged that the other defendants, who were citizens of the same state with the plaintiff, were fraudulently joined with the petitioner for the sole purpose of preventing the removal of the cause by the petitioner into this, a federal court, as the petitioner might have done but for such fraudulent joining of defendants. And the petitioner tendered a proper bond. The particular allegations of the charge in the petition, made in support of the allegation of the fraudulent joinder, need not here be stated. They

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

are fully set forth in the opinions of Mr. Justice Holmes and Mr. Justice Day in the case of *Illinois Central Railroad Company v. Sheegog*, 215 U. S. 308, 30 Sup. Ct. 101, 54 L. Ed. —.

The Union county circuit court denied the petition and refused to accept the bond. This was done, as must be supposed, for the reason that that court was of opinion that a proper case for removal was not made out by the petition. Thereupon the petitioner procured a transcript of the proceedings in the state court and filed it in this court. The plaintiff in the state court filed in this court a motion to remand, taking issue on the allegations of the petition. Witnesses were produced by the parties in support of, and in opposition to, the motion. The court, upon hearing the evidence, being of opinion that the allegations of the petition for removal in respect to the fraudulent joinder of the resident defendants were clearly established, denied the motion to remand. The plaintiff took the proper course. It is a convenient practice. It in some measure disposes of the uncertainty which is liable to attend the progress of the suit. But if, as is conceded, the court has power to determine its own jurisdiction, and the plaintiff invokes the exercise of that power, how does he escape the judgment if he does not in some way obtain a reversal of it? The plaintiff, however, prosecuted his suit in the state court, in which the defendants answered and made defense. At the trial the court directed a verdict for the other two defendants, and the jury found a verdict against the *Illinois Central Railroad Company* for \$8,250. Judgment was entered thereon on March 23, 1905.

The railroad company carried the case by writ of error to the Court of Appeals for Kentucky, where the judgment was affirmed. From that court the case was taken by writ of error to the Supreme Court of the United States, and the judgment of the Court of Appeals was there affirmed. In the latter court the question was whether the original state court erred in holding that the petition for removal failed to state a case which entitled the petitioner to have the case removed; and the Supreme Court held that it did not err. Mr. Justice Holmes, speaking for the court, discussed the allegations of the declaration and the petition for removal, and expressed the opinion that upon the allegations of the declaration the plaintiff was entitled to join the defendants, as he had done, provided he had done so in good faith, and not fraudulently, and, further, that the allegation in the petition that this was done "fraudulently" was charging by an epithet, and not a specification of any fact to which the epithet was intended to be applied. Other reasons for the judgment were given, but it seems unnecessary to enlarge upon them now. It would, perhaps, have been sufficient to say that the Supreme Court affirmed the ruling of the lower court in holding that the case was not removable. This court does not presume to inquire into the reasons which the Supreme Court held sufficient.

After this court had denied the plaintiff's motion to remand, the defendant filed its answer, stating the defense to the plaintiff's original petition. The plaintiff filed his replication thereto, and on May 2, 1905, the cause came on to be tried by a jury. The plaintiff's evidence was heard, and on motion of the defendant's counsel the court instructed the jury to return a verdict for that party, which was done. A judg-

ment for the defendant was thereupon entered, and it remains unaffected by any subsequent proceeding to reverse it.

The bill alleges that the plaintiff in the state court is threatening to assign to other persons the judgment recovered in that court. The prayer is that this court, by preliminary injunction, restrain the defendants, pending the suit, from attempting to enforce the judgment of the state court.

The circumstances are such as to impress the court with embarrassment; but it conceives that its duty to investigate and determine the questions presented is imperative. It is the right of a party that the duty be exercised. The primary question, as it seems to the court, is whether the judgment rendered here on the 2d day of May, 1905, is a valid judgment, or is void because of the lack of legal authority to pronounce it. Another question is: If it be held valid, what effect does it have upon the right of the plaintiff to enforce his judgment in the state court? The case is novel in respect to some of its conditions, but it would seem to be determinable by the application of certain recognized principles. First, did this court have lawful authority to render the judgment? In other words, is the judgment void because of the lack of authority to render it? The Supreme Court has never yet held that, where the federal Circuit Court has taken and exercised jurisdiction of a case removed from the state court upon an insufficient petition, its judgment, not appealed from, would be utterly void because of the imperfection of the statements of jurisdictional facts in the petition. To so hold would, as it seems to me, lead to highly mischievous consequences. The judgment in every removed case would depend upon the correctness of the court's holding in respect to the sufficiency of the petition for removal, and the question of its correctness would have to be canvassed and determined, and the risk of a right conclusion would put the party in peril of the consequences. If a sale of property ensued in carrying the judgment into effect, can it be that the purchaser would be bound to explore the proceedings leading to the judgment, and determine for himself whether the court judged correctly in holding that it had jurisdiction? Or, to apply another test, suppose the state court refuses to yield to a petition undeniably showing proper ground for removal, and goes on to try the case and render judgment, and no step is taken to reverse it, is the judgment void? I think the law is that in neither case is the judgment void, so long as it is not reversed or set aside, or otherwise impugned, by competent judicial authority. Ample means are pointed out in a number of decisions of the Supreme Court whereby errors of the state court and of the federal court in determining their jurisdiction may be corrected; and the inference is that one complaining of a judgment upon such ground must, in the way pointed out, seek his relief. There seems to be no other way of reconciling opposing judgments. The public inconvenience of leaving the judgments of the court to hazard is, of itself, sufficient to support the rule which appears to me to be the sound one. Moreover, it accords with the decisions which have long since established the doctrine that the judgments of the federal courts are not void because of the lack of averments in the record of the requisite jurisdictional facts. *McCormick v. Sullivant*, 10 Wheat. 199, 6 L.

Ed. 300; *Des Moines Nav. Co. v. Iowa Homestead Co.*, 123 U. S. 552, 8 Sup. Ct. 217, 31 L. Ed. 202; *Dowell v. Applegate*, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463; *Chesapeake & Ohio R. R. Co. v. McCabe*, 213 U. S. 207, 29 Sup. Ct. 430, 53 L. Ed. 765.

The fact that two Justices of the Supreme Court dissented in the case which went up from the state court is enough to justify the observation that the question whether the petition for removal was sufficient and valid was at least open to debate, and one upon which fair-minded men might differ. In that case the question came up directly on the record of the state court. And on that record it would only appear that a petition and bond for removal had been filed and denied. The Supreme Court was dealing with the case as one coming up on error from a holding of the state court that it had jurisdiction. It was simply the question whether the state court erred in holding the petition insufficient. The holding of the Supreme Court in that case did not have the effect of reversing the judgment of this court, however potent the reasons found why it should have been reversed if it had been brought up for review.

Coming, now, to the other question, we assume that the judgment of this court was, when rendered, valid. The question now is whether what has since transpired disentitles the defendant therein to enforce it. As already stated, the plaintiff, after the trial and judgment in the state court, pursued the case in the federal court and brought it on for trial and judgment, instead of dismissing or deserting it. He was not in the position of a defendant, who cannot control the action. He was free to withdraw or proceed as he chose; and he chose to go on. The judgment was rendered upon the merits of the case. He might have taken the case to the proper appellate court, and had the determination of this court corrected, if it was wrong, either upon the question of jurisdiction or upon the merits. If this were all, I could find no ground for denying the injunction prayed for.

But upon another ground I think the defendant in the action at law in this court, and who is the complainant here, is precluded from enforcing the judgment. It defended the action in the state court, as it had the right to do, without prejudice to the right to a removal which it had exercised. It was defeated at the trial, and it carried the case to the state Court of Appeals, where the judgment of the lower court was affirmed. Thereupon it prosecuted a writ of error to the Supreme Court of the United States, where the sole question was whether the lower state court lost jurisdiction by the removal proceedings. The Supreme Court held that the petition for removal was not sufficient in law to deprive the state court of jurisdiction, and affirmed the judgment. This holding is inconsistent with a holding that this court acquired jurisdiction by the attempted removal. The judgment of the Supreme Court was rendered in a case where the parties were the same, and the questions for decision were substantially the same, as here, and it would seem to me that the principle of judicial estoppel applies; and, if so, the complainant here cannot allege a matter which is inconsistent with the ruling of the Supreme Court in the other case. That court is the final arbiter in a controversy of this sort; and it would seem that when it has once determined the question on a con-

test made by one of the parties, and by a recognized procedure, adequate for the purpose, such determination should conclude it, as between the parties. The railroad company carried that case there for the only purpose of obtaining the judgment of that court upon this question. I am quite conscious of technical difficulties, but am persuaded that the reasoning by which my conclusion is reached is substantially correct.

The motion for a preliminary injunction must therefore be denied.

WELCH v. CINCINNATI, N. O. & T. P. RY. CO. et al.

(Circuit Court, E. D. Tennessee, N. D. December 3, 1908.)

1. REMOVAL OF CAUSES (§ 61*)—NATURE OF CAUSE—DETERMINATION—PLEA.

Where a removal petition is filed before the declaration is filed or due under the state practice, whether the suit involves a separable controversy is to be determined from plaintiff's sworn plea to the petition for removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 115; Dec. Dig. § 61.*]

2. REMOVAL OF CAUSES (§ 49*)—DIVERSE CITIZENSHIP—MASTER AND SERVANT JOINT LIABILITY—SEPARABLE CONTROVERSY.

Where plaintiff, a member of a bridge crew in the employ of defendant railroad company, was injured in a collision between a camp car occupied by the crew and a portion of a freight train, alleged to have been caused by the negligence of defendant's conductor and engineer of the same citizenship as plaintiff, and the defendant railroad company, whose citizenship was diverse, while switching the camp car, a cause of action stated by which plaintiff sought to enforce a joint liability against the defendant railway company and the conductor and engineer on the principle of respondeat superior did not show a severable controversy, for the purpose of removing the cause to the federal court from a state court in Tennessee, though there was no allegation of any concurrent act of negligence of the railroad company.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 97; Dec. Dig. § 49.*]

Separable controversy affecting right to remove cause to federal court, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co., 35 C. C. A. 155.]

3. REMOVAL OF CAUSES (§ 36*)—CITIZENSHIP—JOINDER OF RESIDENT DEFENDANTS—FRAUD.

Where plaintiff in an action against a railroad company for injuries joined defendant railroad company's conductor and engineer whose negligence was charged to have caused the injury, evidence that they were joined without inquiry as to their insolvency did not show that they were fraudulently joined to prevent a removal of the cause by the railroad company to the federal court; there being no proof that the facts alleged with reference to their negligence were not well founded or alleged in good faith.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

Fraudulent joinder of parties to prevent removal of cause to federal court, see note to Offner v. Chicago & E. R. Co., 78 C. C. A. 362.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. REMOVAL OF CAUSES (§ 36*)—CITIZENSHIP—PARTIES—FRAUDULENT JOINDER—BURDEN OF PROOF.

Where fraudulent joinder of defendants to prevent removal of a cause is alleged, the burden of proof thereof is on the removing party.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 36.*]

At Law. Action by John Welch, as administrator, etc., against the Cincinnati, New Orleans & Texas Pacific Railway Company and others. On motion to remand. Granted.

SANFORD, District Judge. I am of the opinion that the plaintiff's motion to remand this case to the state court should be granted.

1. There is no ground of removal on the ground of a separable controversy as to the defendant railway company. As the declaration had not been filed at the time the case was removed by the defendant railway company—the petition for removal having been filed before the declaration was due under the state practice—the cause of action is to be taken, so far as the question of a separable controversy is concerned, as that which is set forth under oath in the plaintiff's plea to the petition for removal, by analogy to the well-settled rule by which, when the case is removed after the declaration is filed, the cause of action is for such purpose taken to be that stated in the declaration. This will work no injustice to the defendant, since presumptively, if the case is remanded to the state court, the plaintiff will state in his declaration the same cause of action as that set forth in his plea; and, if a different cause of action should be stated in the declaration, disclosing a separable controversy on its face, the defendant railway company would then be entitled to renew its application for removal on such ground. It appears from the cause of action thus stated that the plaintiff is seeking to enforce a joint liability against the defendant railway company and the conductor and engineer of one of its freight trains on account of the death of plaintiff's intestate, resulting from a collision between a camp car occupied by a bridge crew of which the plaintiff's intestate was a member and a portion of a freight train, which collision is alleged to have been caused by the negligence of the said conductor and engineer and other servants of the defendant railway company engaged in switching said camp car. I am of the opinion that for the purposes of this motion the cause of action thus stated is to be held joint, and not severable, even though it appears from the facts alleged that the defendant railway company can only be held liable by reason of the negligence of the conductor and engineer upon the principle of respondeat superior, and although there is no allegation of any concurrent act of negligence on the part of the defendant railway company.

It is true that in the earlier cases in this circuit and elsewhere it was held that in an action in a state court seeking to hold a master jointly liable with his servant for the negligence of the servant causing an injury, where it did not appear either that the master was present in person, directing the servant, or that the work in which the servant was engaged was of a character that made the result complained of possible and probable, the liability of the master and servant was not joint, and that in such case there was a misjoinder of defendants, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the master, if a citizen of another state, might remove the suit to the federal court in spite of the joinder of the servant as a local defendant. *Warax v. Cincinnati Ry. Co.* (C. C.) 72 Fed. 637, 641; *Hukill v. Railway Co.* (C. C.) 72 Fed. 745; *Landers v. Felton* (C. C.) 73 Fed. 311.

However, the precise question involved in the present case was decided adversely to the right of removal in the recent case of *Alabama Ry. Co. v. Thompson*, 200 U. S. 206, 212, 220, 26 Sup. Ct. 161, 162, 166, 50 L. Ed. 441. There an action of tort brought in a state court in Tennessee against an Alabama railway corporation and the conductor and engineer of one of its trains having been removed by the railway company to the federal court on the ground of a separable controversy, and the Circuit Court of Appeals for this circuit, entertaining great doubt upon the question, having certified the questions arising on this point to the Supreme Court for its decision, it was explicitly held in an elaborate opinion, in which the *Warax* and other cases are reviewed, first, that a railroad corporation may "be jointly sued with two of its servants, one the conductor and the other the engineer of one of its trains, when it is sought to make the corporation liable only by reason of the negligent acts of said conductor and engineer in the operation of its train under their management and control, and solely upon the ground of the responsibility of a principal for the acts of his servant, although not personally present or directing and not charged with any concurrent act of negligence;" and, second, "that for the purpose of determining the right of removal the cause of action must be deemed to be joint," and such suit is not removable by the railway corporation upon the ground of a separable controversy. The court said:

"Does this become a separable controversy within the meaning of the act of Congress because the plaintiff has misconceived his cause of action and had no right to prosecute the defendants jointly? We think in the light of the adjudication above cited from this court it does not. Upon the face of the complaint, the only pleading filed in the case, the action is joint. It may be that the state court will hold it not to be so. It may be, which we are not called upon to decide now, that this court would so determine if the matter shall be presented in a case of which it has jurisdiction. But this does not change the character of the action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal. The case cannot be removed unless it is one which presents a separable controversy wholly between citizens of different states. In determining this question the law looks to the case made in the pleadings, and determines whether the state court shall be required to surrender its jurisdiction to the federal court. * * * Congress has not said, whatever it might do, that controversies between citizens of different states shall be removable wherein it is sought, contrary to the law as administered in the federal courts, to hold the citizen of another state to joint liability in tort with a 'citizen of the state where the action is brought. The fact that the state court may take a different view from the courts of the United States of the common law as to the character of such actions, and the right to prosecute them in form joint as well as several, affords no ground of removal."

In view of this decision, it is clear that for the purpose of determining the right of removal in the present case the cause of action set forth in the plea must be held to be joint, and that the case is not removable to this court on the ground of a separable controversy.

It is urged, however, in behalf of the railway company, that since this decision in the *Thompson Case* the Supreme Court of Tennessee

in the case of *Railroad v. Vincent*, 116 Tenn. 317, 95 S. W. 179, has decided by implication that in suits of this character, where the liability of the master is rested solely upon the doctrine of respondeat superior, the cause of action is not joint, but several. I think it true that, if the Supreme Court of Tennessee should at any time decide that a cause of action of this character is not joint, but several only, a suit in the state court to enforce such several liabilities in a joint action would under such state decision be then held properly removable to the federal court on the ground of a separable controversy—the reasoning in the *Thompson Case* only going to a cause of action prosecuted in a state court as a joint action in good faith in the absence of a state decision to the contrary. See, also, *Wecker v. Enameling Co.*, 204 U. S. 176, 183, 27 Sup. Ct. 184, 51 L. Ed. 430. However I do not understand the *Vincent Case* to have so held. The precise point in that case was merely that there was no right of removal on the ground of a separable controversy where the declaration alleged concurrent acts of negligence on the part of the railway company independent of those alleged on the part of the employés, and the question presented in the present case was not in fact involved. Furthermore, the opinion contains quotations from *Sutherland on Damages* and from the case of *Schumpert v. Southern Ry. Co.*, 65 S. C. 332, 43 S. E. 813 (pages 331, 332, 116 Tenn., page 179, 95 S. W.), which would seem to support in some measure the theory of a joint action, even where it is sought to hold the master liable solely on the principle of respondeat superior. And in the concluding portion of the opinion, written after the appearance of the opinion in the *Thompson Case*, the Supreme Court of Tennessee refers to the *Thompson Case* as “fully sustaining” its own conclusions (page 338, 116 Tenn., page 184, 95 S. W.) Therefore, while it is true that, in referring to the *Thompson Case* as holding that a case in which the plaintiff in good faith has elected to sue jointly a foreign corporation and its servants whose misconduct caused the injury complained of does not present a separable controversy, the Supreme Court of Tennessee used, parenthetically, the hypothetical phrase, “even if such joinder may be improper,” I cannot regard the opinion in the *Vincent Case* as in any wise deciding this point; this being, as I view it, an open question yet to be determined by the Supreme Court of Tennessee when properly presented.

2. I am furthermore of the opinion that under the pleadings and proof the case is not removable upon the ground that the conductor and engineer were fraudulently joined as codefendants with the railway company for the purpose of defeating a removal to this court. It is well settled, of course, that, if such fraudulent joinder of a local defendant be established to the satisfaction of the court, the case will be held removable, even though the cause of action alleged be joint upon its face. *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 474; *Chesapeake & O. Ry. Co. v. Dixon*, 179 U. S. 131, 138, 21 Sup. Ct. 67, 45 L. Ed. 121; *Alabama Great Southern Ry. v. Thompson*, 200 U. S. 206, 208, 26 Sup. Ct. 161, 50 L. Ed. 441; *Wecker v. National Enameling & Stamping Co.*, 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430; *Dow v. Bradstreet Co.* (C. C.) 46 Fed.

824; *Warax v. Cincinnati, N. O. & T. P. Ry. Co.* (C. C.) 72 Fed. 637, 641; *Hukill v. Maysville & B. S. R. Co.* (C. C.) 72 Fed. 745, 754; *Landers v. Felton* (C. C.) 73 Fed. 311; *Durkee v. Illinois Cent. R. Co.* (C. C.) 81 Fed. 1. The character of allegation to be made and proof required to establish such fraudulent joinder was clearly stated by Judge Taft in *Warax v. Railway Co.* (C. C.) 72 Fed. 637, 640, as follows:

"In order that such joinder should be regarded as fraudulent, it must appear by allegation and proof, not only that it was made for the purpose of avoiding the jurisdiction of the federal court, but also that the averments of the petition upon which the right to join the defendants is claimed are so unfounded and incapable of proof as to justify the inference that they were not made in good faith with the hope and intention of proving them. * * * One who has a real cause of action for joint tort against two persons cannot be deprived of the right to bring his action against both, and to retain both in the case, and to have the case heard with both as defendants, merely because he joined them for the purpose of avoiding the jurisdiction of the federal court. If the right exists, the motive for its exercise cannot defeat it."

And in *Hukill v. Railway Co.* (C. C.) 72 Fed. 745, 750, Judge Taft again said on this point that:

"It must be shown by proof that the averments of fact in the petition upon which the joint liability of the codefendants * * * is asserted are so palpably untrue and unfounded as to make it improbable that the plaintiff could have inserted them in his petition in a bona fide belief that he could make proof of them on the trial. If a plaintiff has a good cause of action for a joint tort against several defendants, it is not fraudulent in him to join them all in his suit, even if it does appear that he would not have joined the resident defendants with the nonresident defendants except for the purpose of avoiding the jurisdiction of the federal court. Where he has reasonable ground for a bona fide belief in the facts upon which the liability of all the defendants depends, his motive in joining them cannot be questioned. It is only where he has not, in fact, a cause of action against the defendants, and has no reasonable ground for supposing that he has, and yet joins them in order to evade the jurisdiction of the federal court, that the joinder can be said to be fraudulent, entitling the real defendant to a removal."

To the same effect are *Desty's Federal Practice* (9th Ed.) § 97, p. 478, and *Railroad v. Vincent*, 116 Tenn. 317, 326, 332, 95 S. W. 179, et seq. And in *Landers v. Felton* (C. C.) 73 Fed. 311, Judge Taft said:

"If such an averment is to be proven, it should be by circumstantial and detailed evidence, so that the court may judge whether the charge of bad faith in the averments for the purpose of evading the jurisdiction of the court is sustained."

See, also, *Offner v. Chicago & E. R. Co.* (Seventh Circuit) 148 Fed. 201, 78 C. C. A. 359; 2 *Foster's Fed. Pract.* (3d Ed.) 1543.

And the mere insolvency of the codefendant does not, it seems, of itself establish the fraudulent joinder. *Railroad v. Vincent*, 116 Tenn. 317, 334, 335, 95 S. W. 179.

And upon the issue as to fraudulent joinder the burden of proof is upon the removing party. *Plymouth Consol. Min. Co. v. Amador*, 118 U. S. 270, 6 Sup. Ct. 1034, 30 L. Ed. 232; *Landers v. Felton* (C. C.) 73 Fed. 311, 313.

In the present case the plaintiff's plea to the petition for removal was treated in effect as a joinder of issue upon the averments of fraudulent joinder contained in the petition for removal (*Dow v. Brad-*

street Co. [C. C.] 46 Fed. 824, 828; *Durkee v. Ill. C. R. Co.* [C. C.] 81 Fed. 1), and oral testimony was introduced before me on this issue by the railway company. While it was not shown by this proof that either the engineer or the conductor was in fact insolvent, it did appear that they were joined as defendants without inquiry as to their solvency, the effect of the entire proof being that they were joined as defendants in the bona fide belief upon the part of the plaintiff that under the laws of Tennessee there existed a right of joint action against them and the railway company which he was entitled to prosecute, although a motive for joining them as defendants, and probably the principal motive without which they would not have been joined, was that of preventing a removal of the case to the federal court. There was, however no proof whatever to show that the allegations of fact stated in the plea in reference to the negligence of these defendants were not well founded and made in entire good faith.

Under these circumstances, and in view of the foregoing authorities, I am clearly of the opinion that the joinder of these defendants, whatever may have been the motive, was not fraudulent, and that no right of removal arises therefrom.

3. It follows that the defendant's demurrer to the third ground stated in the plaintiff's plea to the petition for removal should be overruled, and the case should be remanded to the circuit court of Morgan county, whence it was removed.

An order will be entered accordingly.

UNITED STATES v. MAYFIELD et al.

(District Court, N. D. Alabama, S. D. March 11, 1910.)

No. 1,679.

1. FOOD (§ 18*)—VIOLATION OF FOOD AND DRUGS ACT—LIABILITY OF OFFICERS OF CORPORATION.

The officers of a corporation which manufactured a food product shipped by its manager in interstate commerce, and which was adulterated or misbranded, are subject to prosecution therefor under Food and Drugs Act June 30, 1906, c. 3915, § 2, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1188), where they employed the manager and authorized him to operate the plant and sell the product without restriction, and the previous course of business had been to ship on orders to other states.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 18.*]

2. FOOD (§ 12*)—VIOLATION OF FOOD AND DRUGS ACT—DEFENSES.

The provision of Food and Drugs Act June 30, 1906, c. 3915, § 9, 34 Stat. 771 (U. S. Comp. St. Supp. 1909, p. 1193), that no dealer shall be prosecuted thereunder for shipping in interstate commerce any adulterated or misbranded article of food or drugs when he can establish a guaranty signed by the manufacturer that such article is not adulterated or misbranded, is available to a dealer only when such guaranty relates to the identical article shipped by him, and affords no defense to him where it relates only to a constituent used by him in manufacturing the article shipped.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 12.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index.

Criminal prosecution by the United States against J. C. Mayfield, J. P. Bradley, J. F. Hawkins, and J. W. Altman. Charge to jury.

O. D. Street, U. S. Atty.

Tillman, Bradley & Morrow and John L. Stone, for defendants.

GRUBB, District Judge (charging jury). The defendants in this case are charged with having violated certain provisions of what is known as the "Food and Drugs Act"—an act passed by Congress in 1906 (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1187])—the purpose of which was to protect consumers against impure and adulterated foods and drugs, and also against the use of foods or drugs which do not show what they contain by the brands on the package. Congress did not have any power to make this law concerning matters relating to commerce entirely within one state, but only as to commerce between one state and another state. The states themselves have the exclusive power to regulate their own internal commerce. So the prohibition of this act is directed only against the introduction into interstate commerce of any article of food or drink, or of any drug, either adulterated or misbranded. These two acts—adulteration and misbranding—are made offenses when they occur in an article which is introduced into interstate commerce. Now, you will see that the first proposition in this case will be whether or not this shipment was one of an interstate character. This proposition is simplified for your consideration, however, by the admission that this particular jug, which is made the subject of this prosecution, was shipped from Birmingham, Ala., to New Orleans, La. Therefore it is conceded that it was introduced into interstate commerce by some one. Now, as I say, the prohibition is against the introduction into interstate commerce of any article of food which is either misbranded or adulterated. I charge you that the shipment in this case was a food product within the meaning of the act of Congress.

In order to make out a case under the first count of the information, which charges misbranding, three things would be necessary for you to believe from the evidence, and beyond a reasonable doubt. The first is that there was in the shipment some constituent which should have been, and was not, shown by the brand. The act itself defines what constitutes misbranding in some respects. If the article shipped contains cocaine, and that fact is not indicated by the brand, then the failure to so indicate its presence by the brand is defined to be misbranding. In order to convict on this count, you would have to find that there was cocaine in the jug which went to New Orleans, and that there was nothing on the jug which indicated that it contained cocaine, and that the defendants or some one or more of them were responsible for the introduction of that jug into interstate commerce. These three things you would have to be convinced of beyond a reasonable doubt to convict under the first count of this information. Now as to the presence of cocaine in this liquid there seems to be little dispute. The government experts testified that it was there, and there is no contradiction of this fact by the defendants. Therefore, if the testimony of the government experts convinces you beyond a reasonable doubt of the

presence of cocaine in this liquid—and you have no right to reject their testimony capriciously and without good cause—this fact is sufficiently established. It is conceded that this jug had no brand upon it indicating the presence of cocaine in the liquid in the jug.

Then, the next proposition for you to consider is whether or not these defendants were responsible for the introduction of this shipment into interstate commerce. It is admitted that this jug was introduced into interstate commerce by some one. The evidence shows that the order on which the jug was shipped was received by the Birmingham Celery Cola Company, and by it filled by shipping the jug from Birmingham to New Orleans. Clearly, the Birmingham Celery Cola Company primarily introduced this shipment into interstate commerce. The corporation, however, is not informed against in this prosecution. A corporation acts only by agents. The law is that, if any agent does an illegal act on behalf of his principal, he makes not only the principal liable for his act, but himself as well. An agent cannot shift the responsibility for wrongdoing altogether from his own shoulders onto those of his principal. If the act was illegal, the manager who filled the order and shipped the stuff would be responsible, even though his responsibility was shared by his principal. The manager is not informed against in this prosecution, however. The men who are informed against are stockholders and officers of the company. So far as the mere fact of their being officers and stockholders in the corporation is concerned, I charge you that it does not make them responsible in this prosecution; but their responsibility depends altogether upon whether or not they conferred on the manager the authority to ship Celery Cola from one state into another; and whether the shipment upon which this prosecution is based was made by the manager pursuant to the authority so conferred.

The question for you to inquire into is whether or not the defendants are shown by the evidence, to your satisfaction, to have given the manager the authority to do what he did in shipping this Celery Cola out of Birmingham to New Orleans. If, from the evidence, you are satisfied beyond a reasonable doubt that this authority was conferred upon him by the defendants, then they would be just as responsible as the manager of the Birmingham Celery Cola Company. The evidence tends to show that Celery Cola had been shipped during the time from January 1, 1908, until the date of the shipment on which was based this prosecution, which was some time in October of that year. It also tends to show that when this company began to get into financial difficulty, the defendants secured the manager to take charge of the plant, operate it, and sell its product. That much is conceded by both sides. There is also evidence tending to show that they told the manager expressly to sell the Celery Cola on hand. And I take it that the operation of the plant and the conduct of the business would imply the authority in the manager to sell its product of whatsoever kind. I think that it is to be fairly inferred that the authority conferred on the manager by the defendants was that he carry on the business and dispose of the product as it had been done according to the previous course of business. If the authority of the manager, so conferred, was not expressly restricted to sales made in Alabama, and ac-

according to the previous course of business sales had been made to other states, a fair inference would be that the manager was authorized by defendants to conduct an interstate traffic in Celery Cola. So, if the previous course of business had been to sell without branding the packages as containing cocaine, a fair inference would be that the manager was authorized by these defendants to conduct the business without such branding. The fact that the defendants in their testimony denied knowledge that Celery Cola contained cocaine is evidence that the previous course of business of the company had been to sell it without branding it as containing cocaine. If general authority was conferred on the manager by the defendants to sell Celery Cola, when he took charge, it would not be necessary that express authority be given him to fill each order. Until the authority was revoked, it would cover all shipments without renewal on the occasion of each shipment.

The Celery Cola extract was manufactured in St. Louis, and shipped by the manufacturers to the company of which defendants were officers at Birmingham. The extract was shipped in barrels; each barrel stamped with the guaranty, signed by the manufacturer, that the extract was neither misbranded nor adulterated within the meaning of the food and drug act. The Birmingham Company mixed the extract with a boiling syrup, composed of sugar and water, in the proportion of 1 part of the extract to 10 parts of the syrup, and it was the syrup, so compounded, that was shipped by the Birmingham company in the conduct of its business. The defendants testified that they had no knowledge, during the time the Birmingham Company handled the extract, that it contained either cocaine or caffeine, in any quantities, and rely on the ninth section of the act, which excuses the dealer, who buys the article from a manufacturer with the guaranty from him that the article is neither misbranded nor adulterated within the meaning of the food and drug act. Proof of the absence of knowledge on the dealer's part that the article is obnoxious to some of the provisions of the act is only a defense when the article is purchased from a manufacturer, and a guaranty taken from the manufacturer that it complies with the requirements of the act. The second section of the act prohibits the introduction into interstate commerce of any article of food, or drugs, which is adulterated or misbranded. The ninth section provides that no dealer shall be prosecuted under the provisions of the act, when he can establish a guaranty, signed by the manufacturer from whom he purchased such articles, to the effect that the same article is not adulterated or misbranded within the meaning of the act; in which case, the manufacturer shall be amenable to the prosecutions, fines, and other penalties, which would otherwise attach to the dealer. The purpose of Congress was to place liability for the violation of the law upon some one in each instance. Primarily the liability is on the dealer who introduces the article into interstate commerce. The liability can be shifted from the dealer only by imposing the same liability upon the manufacturer. This can be done only by virtue of the manufacturer's guaranty to the dealer. If, for any reason, the guaranty is insufficient to impose liability upon the manufacturer, it remains where it primarily rested—upon the dealer. To have the effect of releasing the dealer from liability for the violation of the act, complained of in this prose-

cution, the guaranty must be of a character to impose liability for the same violation upon the manufacturer, if he were substituted for these defendants in this case; otherwise, both parties would escape liability, and the purpose expressed by Congress be defeated. The act says that the manufacturer who signs the guaranty shall be subject to the same prosecution and penalties as the dealer. If a conviction could not be sustained against the manufacturer upon its guaranty, if substituted for the defendants in this case, then the taking of the guaranty by defendants would be no defense to their violation of the law in reference to the shipment in question, though they had no knowledge that it was adulterated or misbranded. In order for the manufacturer's guaranty to be effective to impose any liability upon him for any violation of law as to the article, which is the basis of this prosecution, the guaranty must relate to the identical article introduced into interstate commerce by the defendants as dealers. Otherwise the answer of the manufacturer to the prosecution would be that he had never guaranteed the article shipped by the dealer, and the answer would be complete. Change of the original package might not constitute a change of identity. In this case there was more. The manufacturer furnished the dealer with the extract, and the dealer shipped the syrup. Commercially, if not chemically, the two were different. The extract was a mere constituent of the syrup, and not the syrup itself. The manufacturer did not guarantee the article shipped by the dealer and on which this prosecution is based; could not be convicted for the violation of the act, charged against the defendants in relation to it, by reason of the guaranty, and for that reason the taking of the guaranty was not a protection to the defendants. When they changed the identity of the extract, they elected to abandon the protection of the manufacturer's guaranty, and were responsible for the character of the new article—the syrup—made and shipped by them, or under their authority. Neither the defendants' want of knowledge of the presence of cocaine in the extract, nor the guaranty taken by them from the manufacturer, would excuse their failure to properly brand the jug, under this count of the information.

The second count of the information charges the defendants with having introduced into interstate commerce an article containing a deleterious ingredient, injurious to health, viz., cocaine; and the third count relies in the same way upon an article alleged to contain caffeine. These counts are based upon adulteration, the statutory definition of which is the adding to a food product of a deleterious ingredient, injurious to health. The same principles as to the responsibility of these defendants for the acts of their manager, and with reference to the effect of the guaranty taken by them from the manufacturer, stated as relating to the first count, apply as well to the second and third counts. In order to convict on these counts, the jury must find further from the evidence, with the degree of certainty required in criminal cases, in the first place, that the Celery Cola shipped to New Orleans contained cocaine or caffeine, under the respective counts, and then that either or both was deleterious and injurious to health. The presence of each of these substances in appreciable quantities in the jug of Celery Cola in question, is testified to by the govern-

ment chemists, and is not disputed by any evidence offered by the defendants. You are the exclusive judges of the credibility of witnesses, but it would not be proper for you to capriciously reject testimony which is uncontradicted in the case.

If you determine the presence of either or both of these substances in the shipment in question, it would then become your duty to determine from the evidence whether either or both, as used in Celery Cola, were injurious to health. As Celery Cola is intended for a beverage and not a drug, you would have the right in determining this question to consider the injury from the probable frequent and repeated use of the article as a beverage, rather than its rare and occasional use as a drug. You have heard the evidence of the government witnesses, who are physicians, as to their opinion concerning the injurious qualities of both of these substances, in the quantities found in Celery Cola, when used as frequently as beverages are likely to be used. The defendants introduced no evidence to contradict that offered by the government. You are also the exclusive judges of its credibility, but should not, without good reason, disregard evidence not contradicted.

It is your duty to take the law of the case from the court, as it has been given to you in this charge. Though your opinion might be that the law imposes a hardship upon these defendants in holding them responsible for the contents of an extract of which they were ignorant, and which they had purchased with a guaranty from the manufacturer; this opinion, if you entertain it, should not operate to prevent a conviction in this case, if you are satisfied beyond a reasonable doubt of the facts necessary to constitute the offense, as I have defined it. If not so satisfied, it would be your duty to acquit the defendants, and the importance of the enforcement of the law should have no weight as against such a conclusion. The enforcement of no law is of sufficient importance to justify a conviction, except upon such evidence.

If you are satisfied to the degree required that the defendants are guilty of misbranding the jug of Celery Cola, exhibited to you, it would be your duty to find them guilty, under the first count of the information. If you are satisfied that they are guilty of adulterating it with cocaine or caffeine, then it would be your duty to find them guilty under the second or third counts respectively, or both. If you are not so satisfied of their guilt in misbranding or adulterating the Celery Cola, which is the basis of the prosecution, then you should acquit them.

UNITED STATES v. HEINZE.

(Circuit Court S. D. New York. January 22, 1910.)

1. GRAND JURY (§ 34*)—PROCEDURE—OFFICERS ENTITLED TO BE PRESENT DURING PROCEEDINGS—"OFFICER OF DEPARTMENT OF JUSTICE."

An expert accountant, who is not an attorney at law, appointed by the Attorney General "a special assistant to" a United States attorney to assist in the investigation and prosecution of a particular case is not an "officer of the Department of Justice," within the meaning of Act June 30, 1906, c. 3935, 34 Stat. 816 (U. S. Comp. St. Supp. 1909, p. 48), and cannot

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be authorized by the Attorney General to conduct, or assist in conducting, proceedings before the grand jury in connection with such case, nor to be present in the room during the examination of witnesses, to aid the district attorney by suggestions.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 73; Dec. Dig. § 34.*]

2. INDICTMENT AND INFORMATION (§ 137*)—MOTION TO QUASH—GROUNDS.

The presence in a grand jury room, during an investigation of a case which results in an indictment, of a person not authorized by law to be there is ground for quashing the indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 484; Dec. Dig. § 137.*]

Fritz Augustus Heinze was indicted for a criminal offense, and moves to quash the indictment. Motion sustained.

John B. Stanchfield, for the motion.

Henry A. Wise, U. S. Atty., opposed.

HOUGH, District Judge. This motion is based on numerous grounds, of which one only is to be considered in this memorandum; as to the rest, no opinion is expressed.

It appears from the affidavits filed and from admissions in open court that the United States attorney for this district desired, for the proper preparation and presentation of evidence in this prosecution, including proceedings before the grand jury, the assistance of an expert accountant. Owing to the nature of the case, such assistance was concededly both proper and necessary. The Attorney General was therefore requested to select Mr. John P. Fernsler for this purpose, and to employ him specifically therefor. Accordingly, on March 13, 1909, Mr. Fernsler was designated in the following language, contained in a letter signed by the Attorney General:

"You are hereby appointed a special assistant to the United States Attorney for the Southern District of New York to assist in the investigation and prosecution of the case of the United States v. Heinze. Under the provisions of the act of Congress approved June 30, 1906 (34 Stat. 816), you are authorized and directed to conduct grand jury proceedings in connection with the case mentioned above."

In pursuance of this designation, Mr. Fernsler, when this indictment was under consideration in the grand jury room, attended before that body, and took part in the proceedings to the extent of asking some technical questions of other expert accountants who were upon the witness stand, and throughout suggested, if he did not direct, the method of examining expert witnesses thought to be allied with defendant. No suggestion of personal misconduct or indecorous behavior is made against Mr. Fernsler, nor is it shown or suggested that any injury has been done to defendant by Mr. Fernsler's presence, unless it be the suspicion that it is to Mr. Fernsler's skill in reading and interpreting books of account that this indictment is largely due; this, however, can certainly not be regarded as a legal injury to defendant, if the method be otherwise lawful.

If there be a settled method of conducting the deliberations of grand jurors, established by generations of procedure, based on the experience of many courts in many communities, and evidenced by the deci-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sions of authoritative tribunals, such method must be followed until the Legislature sees fit to overturn the old rule.

It has never to my knowledge been denied or doubted that the rule of the common law is that a grand jury, while deliberating upon an indictment or presentment, shall listen to witnesses who give testimony, and to no one else except the authorized law officers of the crown or the commonwealth. The English practice of permitting the presence of the prosecutor in the grand jury room is an apparent, but not a real, exception, for it is still true that the majority of prosecutions in England are private; the expense thereof being borne by the complainant, and the crown taking no part therein unless and until authority therefor be granted by the proper departmental officer. So, too, the instances of bailiffs, clerks, and stenographers are not exceptions to this rule. These useful persons are necessary or convenient in the same way as is a piece of furniture, but if it were made to appear that such persons, having obtained audience of the grand jurors, under the excuse of their occupation, sought to influence the result of their deliberations or to participate therein, the rule would be infringed.

So far as this court is concerned, little time need be spent in collating authorities to show what the rule is. It has been done too recently by Thomas, J., in *United States v. Rosenthal* (C. C.) 121 Fed. 862. This decision has been considered in *United States v. Cobban* (C. C.) 127 Fed. 713, and the last-cited case was followed in *United States v. Twining* (D. C.) 132 Fed. 129. The Cobban and Twining Cases did not approve of the Rosenthal decision in its entirety, though it is only in the earlier of the two decisions that the matter is reasoned. In *United States v. Virginia-Carolina Chemical Co.* (C. C.) 163 Fed. 66, the point is gone into thoroughly, with some interesting comments upon the Cobban decision, and the Rosenthal Case fully adhered to. Even if this court were now inclined to depart from Judge Thomas's decision, it would be most improper to do so until the matter had been presented to and decided by a higher tribunal.

This matter then starts with the admission that if it were not for the act of June 30, 1906 (Act June 30, 1906, c. 3935, 34 Stat. 816 [U. S. Comp. St. Supp. 1909, p. 48]), the presence of Mr. Fernsler in the jury room under the circumstances above stated would require that the indictment be quashed.

The prosecution therefore urges: (1) That Mr. Fernsler is an "officer of the Department of Justice," and therefore entitled virtue officii, as well as by the express terms of his appointment, to participate in and conduct grand jury proceedings, so that he was far within his authority and right in merely assisting the United States attorney in charge. (2) That even if Mr. Fernsler had received no appointment from the Attorney General, he might under the circumstances of this case attend in the grand jury room as a de facto assistant to the United States attorney, and aid him in those technical matters whereof Mr. Fernsler's knowledge is admittedly useful and extensive. (3) That, in the absence of any showing of actual prejudice or injury to the defendant by reason of Mr. Fernsler's presence, the motion

should be denied, as raising one of those minor matters concerning which the law does not take notice.

It seems unnecessary to consider at any great length the first contention. The statutes were thoroughly reviewed in the Rosenthal Case. They have not been changed so as to affect the point under discussion by the act of June 30, 1906, and under those statutes Mr. Fernsler is not an officer of the Department of Justice; he is but an employé of the Department of Justice. The distinction between these two titles is sometimes not easy to draw, but under the legislation affecting this department the question is not a difficult one. It need only be pointed out that Mr. Fernsler's tenure of office is the will of the Attorney General, his compensation is nominal, and his connection with the department limited to a single litigation. To say that the word "officer" in the sense of the statutes, or in any sense at all, can be applied to him needs but to be said to be denied. Again, Mr. Fernsler is not an attorney at law; he does not pretend to be a qualified practitioner in any court, and it is in my judgment entirely clear that the intent of the act of 1906 was plainly not to authorize the introduction into the grand jury room of previously unauthorized laymen, but to enlarge the number of officeholding lawyers who might attend before the jury to render assistance in matters of law alone.

The necessary result of the government's position is that it is now within the power of the Attorney General to appoint a class of "special assistants to district attorneys" (not special assistant district attorneys), who may be accountants, doctors, chemists, engineers, etc., and, having severally authorized them to conduct grand jury proceedings, may put them in charge of such cases as would be benefited by special technical education. This may be a good system, but it has not been adopted by law, and the fact that Mr. Fernsler did not conduct in their entirety the proceedings in this case does not change the fact that, if his appointment be construed as the government does construe it, he might have done so.

As to the second proposition advanced by the prosecution, no authority is produced for it. The commonwealth may call expert witnesses as well as fact witnesses, but it has never before been urged that counsel is entitled to have at his elbow in a grand jury room an expert assistant. He is not entitled to it before a petit jury, though the practice is common by permission of the court; but no court has, or ought to have, the same dispensing power in grand jury proceedings that it possesses and daily exercises in the conduct of civil causes at common law.

The third proposition was treated at great length in the Rosenthal Case, and need not now be enlarged on. Instances might be multiplied wherein a violation of law cannot be seen to have produced any present injury to any one. That is a good reason for refusal to punish or refusal to prosecute, but it is no reason for justifying illegality. As was well remarked by Thomas, J.:

"The inconvenience of resubmitting the matter to the grand jury is temporary; the injustice of denying the defendant investigation pursuant to the law of the land would be perpetual."

An excused or pardoned illegality is frequently unimportant, but a justified illegality, however trivial in itself, is of the highest importance.

It need only be added that no reason is seen for departing from the general view of grand jury procedure expressed in the cases of *Farrington* (D. C.) 5 Fed. 343, and *Edgerton* (D. C.) 80 Fed. 374.

The motion to quash is granted.

UNITED STATES v. AMERICAN TOBACCO CO.

(District Court, W. D. Kentucky. March 10, 1910.)

1. GRAND JURY (§ 38*)—DELIBERATION—TAKING STENOGRAPHIC NOTES.

The fact that during the investigation of a matter by a federal grand jury, in which an indictment was returned, the assistant district attorney, who was in the grand jury room, made stenographic notes of the testimony taken, and afterward while the investigation was still in progress read the same to the district attorney and also to a special agent and attorney for the government, who was in consultation with him, was not a violation of any legal rights of the accused, and does not constitute ground for abatement of the prosecution.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 81; Dec. Dig. § 38.*]

2. GRAND JURY (§ 39*)—MOTION IN ABATEMENT OF PROSECUTION—GROUNDS.

An indictment for violation of the Interstate Commerce law is not invalid and the prosecution subject to abatement because a special agent and attorney for the Interstate Commerce Commission, who had investigated the matters out of which the indictment arose, was present at the office of the district attorney while the case was under investigation by the grand jury, was consulted by him, and advised as to the witnesses and documentary evidence to be presented.

[Ed. Note.—For other cases, see Grand Jury, Dec. Dig. § 39.*]

3. CRIMINAL LAW (§ 279*)—PLEA IN ABATEMENT—TIME FOR FILING.

A plea in abatement to an indictment, alleging matters of irregularity merely, which in a technical sense are dilatory, and which even if sustained do not finally dispose of the subject-matter of the indictment, must be presented with the greatest promptness; and such a plea, filed 19 days after service of process on the indictment and more than 2½ months after it was returned, and which contains no statement as to when the fact of the indictment or the matters alleged first became known to defendant, comes too late.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 643, 644; Dec. Dig. § 279.*]

4. CRIMINAL LAW (§ 280*)—PLEA IN ABATEMENT—SUFFICIENCY.

A plea in abatement to an indictment, alleging misconduct on the part of a witness before the grand jury, who was also a special agent and attorney for the Interstate Commerce Commission, in that while on the stand he stated his opinions as to the sufficiency of the evidence and argued its sufficiency, and alleging generally that defendant was prejudiced thereby, is not sufficiently specific to raise an issue.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 280.*]

The American Tobacco Company was indicted, and files a plea in abatement. Plea overruled.

George Du Relle, Dist. Atty., for the United States.

J. Parker and Gibson, Marshall & Gibson, for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

EVANS, District Judge. The indictment charging the defendant with receiving rebates from a railroad company was returned by the grand jury on December 2, 1909. The process issued thereon was served February 4, 1910. On February 23d the defendant filed a duly verified plea in abatement, expressed as follows:

"Comes the defendant, the American Tobacco Company, and offers herein its plea in abatement of the indictment against it herein, and for cause thereof respectfully shows to the court and alleges the facts to be as follows, to wit: One S. H. Smith is a lawyer attached to, and in the service of, the Interstate Commerce Commission as special agent. Said commission, under the power granted it by law, sent its agent or agents to Louisville, Kentucky, the first of said agents being said S. H. Smith, who, with others, under instructions and powers given them, examined the books, records, vouchers, letters, and other papers of the Louisville, Henderson & St. Louis Railway Company to see if there had been any violation of any of the provisions of the interstate commerce law as amended. Said agent or agents made said examination, and reached the conclusion that the transactions described in the indictment herein were unlawful and forbidden by law. Upon the facts, or alleged facts, being reported to said commission, it sent out to Louisville, Kentucky, from Washington, D. C., the aforesaid S. H. Smith as its attorney and agent to endeavor to procure indictments against this defendant and others. The said Smith did come to Louisville for said purpose, and was thereafter in frequent and protracted conferences with the district attorney, the said conferences and each of them having for their sole purpose and object the bringing about, and procuring, if it could be done, of an indictment or indictments against this defendant and others. At the instance of the government, this court ordered the convening of a special grand jury to inquire into the alleged offenses, and the said special grand jury, so convened, found the indictment herein. Numerous witnesses were sent into the grand jury room with various records, letters, papers, and documents which they had been required to present before the grand jury, and said witnesses testified before said grand jury and produced before said grand jury the various records and documents aforesaid, and they were examined in the grand jury room, with the said records, documents, etc., and testified before the grand jury concerning the same. Said Smith was in fact the leading active agent of the government in its efforts to procure indictments against this defendant and others on account of the matters set out in the indictment herein. He directed, controlled, and dominated the proceedings taken before and during the sessions of the special grand jury which found said indictment. Said Smith furnished the names of the witnesses to the district attorney, and also indicated the papers and documents which said witnesses should be required to produce before said grand jury, and throughout the session of the grand jury he was in constant attendance in the office of the district attorney, advising with him and directing the proceedings before the grand jury. He was constantly kept advised by the district attorney of what was occurring in the grand jury room and before the grand jury, and was thereby enabled to, and did, advise and direct the course of proceedings before it. The district attorney examined the witnesses who appeared before the grand jury, and was attended by his assistant, who is a stenographer, and who took down in shorthand notes the evidence given by the various witnesses. Frequently during the examination of witnesses before the grand jury, the district attorney would suspend the examination, withdraw with his assistant from the grand jury room, leaving the witness in attendance, and then have the evidence of the witness under examination read to said Smith by the assistant district attorney, and receive suggestions from him as to the further examination of the witness, which suggestions were then acted on by the district attorney. When all other witnesses had been examined, the said Smith appeared before the said grand jury as a witness. He had no personal knowledge of any of the facts alleged in the indictment, but was only in possession of information obtained in the course of his investigation, and knew what evidence had been heard. He

appeared before the grand jury as an attorney representing the Interstate Commerce Commission, whose special duty it was at the time to have said grand jury indict this defendant and others for violation of the interstate commerce law, and in that capacity he testified and gave to the grand jury his views, opinions, and argument, to the effect that the evidence heard by the grand jury was sufficient to warrant the finding of an indictment, and as an agent of the government manifested before the grand jury his earnest desire and that of the government and Interstate Commerce Commission that an indictment should be found against this defendant and others. Defendant says that the matters herein set out are true as it verily believes, and alleges that they were in violation of law, and prevented a fair and impartial investigation by the grand jury, and exerted an undue influence on said grand jury, to the great detriment and prejudice of this defendant."

The United States demurs to the plea, and, of course, thereby admits the truth of its averments. We may look at the plea from several points of view:

First. Assuming it to be true that Smith was a lawyer and in the service of the Interstate Commerce Commission; that he examined the books and papers of the railway company; that he was assisting the district attorney in promoting the investigation before the grand jury; that the assistant district attorney was a stenographer; that the latter when in the grand jury room heard the witnesses testify and made notes of their testimony; and that he reported it to the district attorney and to Smith, who went over it with them—nevertheless the assistant district attorney was entitled to be with the grand jury when the testimony was being heard, though not when the grand jury was deliberating thereon and determining whether to return an indictment, and we know of no law that forbids the very natural act on the part of the assistant district attorney of reporting to his chief and to any person aiding him the nature of the testimony heard by the grand jury. Apart from the absence of any law forbidding what was thus done, the possession of such information enables the district attorney to promptly and intelligently develop the facts when the case comes on to be tried in court, and the giving of such assistance should not be discouraged. These matters, we think, in no way prejudiced any right of the accused.

Nor do we think the facts set forth in some detail in the plea to the effect that Smith came to Louisville; that he had frequent consultations with the district attorney, which had for their object the finding of the indictment; that numerous witnesses, with various records, letters, documents, papers, etc., were before the grand jury; that Smith furnished the names of the witnesses, and indicated the papers and documents to be sent before the grand jury; that he was in constant attendance in the district attorney's office, directing the proceedings; that he was kept advised of the progress of the investigation; and that the district attorney or his assistant would frequently withdraw from the grand jury room and consult with Smith, and with him go over the testimony so far as it had been introduced, and receive from him suggestions as to further steps—show anything to prejudice any right of the accused. In the legal sense, all these matters in the plea, as well as others which might be pointed out, are wholly unimportant and trivial. Unquestionably it is the right and the duty of the prosecuting officers of the government to present to the grand jury for investiga-

tion any charge against any person to the effect that the law of the United States has been violated by him, in order to secure indictments against such person if the testimony should warrant it. It is conceivable that there might be doubtful questions for the prosecuting officers to decide concerning what testimony should be presented to the grand jury, particularly if much of that testimony consisted of documents, papers, letters, etc., found in the possession of some person, adversely interested, and brought into court under subpoena duces tecum; and it is also conceivable that the district attorney and his assistant might desire frequently to confer with one who, like Smith in this case, is supposed to be well acquainted with the details of the operations of the interstate commerce laws, and supposed to be well acquainted, as Smith was, according to the plea, with the contents of all the documents, books, letters, etc., intended to be presented to the grand jury. Questions as to the order of the introduction of such papers, and as to whether the evidence already heard made it desirable to introduce some of them, rendered consultations with Smith not only proper, but probably important; but at no time in the history of criminal jurisprudence has such conduct been supposed to be in any way violative of any rule of propriety, or of any right of the person whose conduct was the subject of investigation by a grand jury.

Second. As we have seen, the indictment was returned December 2, 1909, the process was served on February 4, 1910, and the plea was filed February 23d. There is no intimation in the plea of the time when the accused first ascertained the facts stated therein, nor any reason indicated for the delay of 19 days in filing the plea. This is important in view of the rules applicable to such pleas, one of which strictly exacts the most explicit averments, and another of which requires the plea to be presented with the greatest promptness—general rules which are applied not merely to objections to the formation of a grand jury, but to all those matters of abatement which, in the technical sense, are dilatory, and which even if sustained do not finally dispose of the subject-matter of the indictment; as, for example, would the death of the accused. In *Agnew v. United States*, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624, it appeared that the court opened December 3d, that the indictment was returned December 12th, and that the plea in abatement was filed December 17th. These being the facts, the Supreme Court, at page 45 of 165 U. S., page 239 of 17 Sup. Ct. (41 L. Ed. 624), said:

"The plea does not allege want of knowledge of threatened prosecution on the part of defendant, nor want of opportunity to present his objection earlier, nor assign any ground why exception was not taken or objection made before; and, moreover, the plea is fatally defective in that, although it is stated that the drawing 'tended to his injury and prejudice,' no grounds whatever are assigned for such a conclusion, nor does the record exhibit any such."

On page 44 of the report, page 239 of 17 Sup. Ct. (41 L. Ed. 624) the court had already remarked:

"That the defendant must take the first opportunity in his power to make the objection. When he is notified that his case is to be brought before the grand jury, he should proceed at once to take exception to its competency,

for if he lies by until a bill is found, the exception may be too late; but where he has had no opportunity of objecting before bill found, then he may take advantage of the objection by motion to quash or by plea in abatement; the latter in all cases of contested fact being the proper remedy. *United States v. Gale*, 109 U. S. 65 [3 Sup. Ct. 1, 27 L. Ed. 857]. Another general rule is that for such irregularities as do not prejudice the defendant he has no cause of complaint and can take no exception. *United States v. Richardson* [C. C.] 28 Fed. 61; *United States v. Reed*, 2 Blatchf. 435, 456 [Fed. Cas. No. 16,134]; *United States v. Tallman*, 10 Blatchf. 21 [Fed. Cas. No. 16,429]; *State v. Mellor*, 13 R. I. 666; *Cox v. People*, 80 N. Y. 500; *People v. Petrea*, 92 N. Y. 128."

The Circuit Court of Appeals of the Fifth Circuit had before it the case of *Lowdon v. United States*, and its opinion is reported in 149 Fed. 673, 79 C. C. A. 361. The plea in abatement in that case was delayed for 17 days after the accused returned to the state of Texas, from which he was absent when the indictment was returned. The plea, after setting up the grounds relied upon for the abatement sought, contained the general statement that the accused had been "greatly prejudiced" by what had been done. The court, pursuant to the ruling in the case of *Agnew v. United States*, held that the plea was insufficient, both because it came too late and because it did not explicitly show how there was any injury to the accused as the result of the things complained of in the plea. We cannot definitely say from the report, especially in the latter case, whether the accused had been held over at any examination had for that purpose before the return of the indictment. Here we know that such was not literally the case, though it appears from the plea itself that the accused had every reason to understand that the grand jury would be called upon to consider the subject; but whether these things should make any difference in a case where the plea itself states no reason for the delay of 19 days after service of process we need not definitely determine in view of other considerations.

Third. We come now to the conduct imputed to Smith in the presence of the grand jury. When we assume the truth of what is stated in this connection, we are most strongly inclined, if we can hold that the plea is otherwise good, to sustain the contention of the accused and quash the indictment. If Smith had knowledge of any pertinent fact which the district attorney deemed important, that officer clearly had the right to call him before the grand jury to testify thereto; but it would be grossly improper for him, when called there for that purpose, to urge any opinion of his own, or by argument to persuade the grand jury to return an indictment not upon the testimony, but upon the ground that the government and the Interstate Commerce Commission desired it. Manifestly such desire, either upon the part of the government or upon the part of the commission, would of itself furnish no reason for indicting anybody. The grand jury should be an independent body, free from such arguments, influences, or persuasions. In what it does it should act upon the testimony and the charge of the court, and any intrusive suggestions or arguments put before it by a mere witness is an impertinence, if not indeed a contempt; particularly if made by one who, occupying an official position, has gained access to the grand jury under the pretense of being a witness. The

Interstate Commerce Commission has important functions, but they are outside of the courts, and in a special sense outside the grand jury room. If any of its agents do as it is charged under oath Smith did in this instance, it was probably entirely without the knowledge or authority of the commission, and we do not say that Smith actually did what is charged against him, though the suspicion raised by the verified plea justifies comment.

We by no means question cases like *Crowley v. United States*, 194 U. S. 461, 476, 24 Sup. Ct. 731, 48 L. Ed. 1075; *United States v. Virginia-Carolina Chemical Co.* (C. C.) 163 Fed. 66; *United States v. Rosenthal* (C. C.) 121 Fed. 862; *United States v. Heinze* (decided October 12, 1909) 177 Fed. 770; and many others of like character, in which such matters, as expressed by Mr. Justice Harlan in the *Crowley Case*, at page 476 of 194 U. S., page 737 of 24 Sup. Ct. (48 L. Ed. 1075) were "seasonably brought to the attention of the court by plea in abatement," which, as we have seen, was not done here. These cases hold that no person except those authorized by law can properly be with the grand jury while it is in session. If the contrary of this happens, it may well be presumed, *prima facie*, that an accused person was thereby prejudiced. The plea before us expressly states that Smith appeared before the grand jury as a witness. This is conclusive of his right to be there at least for that purpose. If, after his lawful admission to the grand jury as a witness, he did irregular and improper things, the plea should explicitly point out what those things were, so that an issue may be formed and testimony heard thereon. Mere general characterization cannot meet the demand for those specific statements of fact exacted by the rules of pleading in such cases. *Lowdon v. United States*, 149 Fed. 674-675, 79 C. C. A. 361. So that our real trouble is with the plea itself, even when we assume all its averments to be true, including many which seem to be quite unimportant and immaterial. There is an unexplained delay of 19 days in filing the plea, and no averment indicates when the alleged facts were first ascertained. There is an absence of any statement of fact to support the conclusion that Smith exerted an undue influence on the grand jury to the detriment or prejudice of the accused, and an absence of adequate showing as to how the undue influence was exerted. Nor is there any specific statement of fact to warrant the pleader's conclusion, very generally stated, that Smith, by what he did, prevented a fair and impartial investigation by the grand jury. No specifications are given in connection with these general charges. The plea does not show what persons composed the grand jury, nor who of those persons were influenced by what Smith said or did, nor who, if any of them, voted for an indictment who would not have done so upon the evidence if Smith had not said or done anything except testify. The plea is silent on each of these matters. If it had shown who composed the grand jury, and that a sufficient number of them, giving their names, were influenced in their action by the arguments and persuasions of Smith to vote for finding the indictment, although such persons had doubts whether the testimony was sufficient to justify that action, and that but for such arguments and persuasions they would not

have voted to indict the accused, then we should have explicit statements upon which to base a conclusion that Smith's conduct in fact was detrimental and prejudicial to the accused; but we find nothing of this kind in the plea. There, as in the Agnew and Lowdon Cases, we find a conclusion stated that the accused was prejudiced, but no averment of facts to support it. There may have been, and, assuming the plea to be true, there was, palpable irregularity and impropriety in Smith's conduct after he got before the grand jury as a witness; but that should not vitiate the indictment unless it is made to appear that in fact it worked harm to the accused either in the way we have indicated or in some other equivalent way. And it is almost impossible to suppose that the accused did not have ample information that a prosecution was intended by the United States when Smith, in advance of the meeting of the grand jury, made a thorough examination of the books, papers, and correspondence of the railway company in respect to the very transactions out of which subsequently resulted the indictment. These facts may have made promptness in filing the plea all the more imperative. In short, as the plea was not presented until 19 days after the process was served, as there is in it no explanation of the delay and no statement as to when the facts were first ascertained, as the plea is vague and inexplicit, and as it does not definitely show how the accused was in fact prejudiced—for, peradventure, the grand jurors might have voted precisely as they did if Smith had not done anything except testify—we think the case is obviously within the rules laid down in the Agnew and Lowdon Cases. See, also, *United States v. Greene* (D. C.) 113 Fed. 683. Pleas in abatement, being designed to avoid a trial on the merits, are not only strictly construed but are not often favored by the courts, as this plea would be if it had come up to the rules we have noticed. We are therefore constrained to hold that the plea is not sufficient, and that the demurrer thereto should be sustained. All the authorities agree that a plea in abatement is not open to amendment, and the accused will be ordered to plead to the indictment on or before the next calling of the case.

UNITED STATES v. LOUISVILLE & N. R. CO.

(District Court, W. D. Kentucky. March 14, 1910.)

1. COURTS (§ 67*)—FEDERAL COURTS—TERMS—ADJOURNMENTS.

Under Act Cong. Feb. 12, 1901, c. 355, 31 Stat. 781 (U. S. Comp. St. 1901, p. 360), dividing Kentucky into two judicial districts, and section 10, providing that the terms of the United States District Court therein shall not be limited to any particular number of days, nor shall it be necessary to adjourn by reason of the intervention of any term elsewhere, but the court intervening may be adjourned until the business of the court in session is concluded, the terms of court held in that district, wherever held, are continuous until the beginning of the next term in each place without an adjournment; and hence a term held in Louisville did not lapse by reason of the commencement of intervening terms elsewhere.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 67.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. GRAND JURY (§ 9*)—SPECIAL TERMS—NECESSITY.

A grand jury may be summoned and impaneled during a regular term, under Rev. St. § 810 (U. S. Comp. St. 1901, p. 627), authorizing the summoning of a grand jury in term time to serve for such time as the court may direct, without the calling of a special term of the court, under section 581 (page 477), providing that a special term may be held at the same place where any regular term is held, or at such other place in the district as the nature of the business may require, etc., though such section authorized a special term.

[Ed. Note.—For other cases, see Grand Jury, Dec. Dig. § 9.*]

3. GRAND JURY (§ 19*)—COMPETENCY—WAIVER OF OBJECTIONS.

Objections to competency of grand jury, not made until 35 days after service of process, are waived, where the court was open every day, except holidays, during such period.

[Ed. Note.—For other cases, see Grand Jury, Dec. Dig. § 19.*]

4. COURTS (§ 66*)—ADJOURNMENTS.

Since adjournment orders must be the last entered on the day's proceedings, a custom of the clerk for convenience not to actually enter such orders until near the end of the term was not objectionable.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 66.*]

Indictment by the United States against the Louisville & Nashville Railroad Company. On demurrer to defendant's second plea in abatement. Sustained.

George Du Relle, Dist. Atty., for the United States.

Henry L. Stone and W. G. Dearing, for defendant.

EVANS, District Judge. The indictment in this case was returned by the grand jury on December 2, 1909, and the process issued thereon was executed on January 24, 1910. Two pleas in abatement were filed on March 10, 1910, the first of which is in this language, viz.:

"Now comes the defendant, Louisville & Nashville Railroad Company, and offers herein its plea in abatement of the indictment herein and each count thereof upon the following grounds, to wit:

"The grand jurors that found the indictment herein were not impaneled and sworn, and did not return the indictment herein at or during either a regular or special term of this court at Louisville, but were impaneled and sworn and found the indictment herein when this court was not in session, or holding either a regular or special term, as provided by law. The regular terms of this court, by 'An act to divide Kentucky into two judicial districts,' approved February 12, 1901, shall be held at the following times and places, namely: At Louisville, beginning on the second Monday in March and the second Monday in October in each year; at Owensboro, beginning on the fourth Monday in November and the first Monday in May in each year; at Paducah, beginning on the third Monday in April and the third Monday in November in each year; and at Bowling Green, beginning on the third Monday in May and the second Monday in December in each year. The regular term of this court at Louisville was convened by the honorable district judge thereof on the second Monday in October, to wit, October 11, 1909, and there continued in session by him until November 12, 1909, when the last order at that term was entered. The regular term of this court at Paducah was convened by the honorable district judge thereof on the third Monday in November, to wit, November 15, 1909, and there continued in session by him until November 17, 1909, when the last order at that term was entered. The regular term of this court at Owensboro was convened by the honorable district judge thereof on the fourth Monday in November, to wit, November 22, 1909, and there continued in session by him until November 23, 1909,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

when the last order at that term was entered. After the convening of the regular term of this court at Louisville on October 11, 1909, and prior to the convening of the regular term of this court at Paducah on November 15, 1909, no order of adjournment of the said regular October term of this court at Louisville was made or entered adjourning that term of court over to any time or future day, and the said regular October term of this court at Louisville, without such order of adjournment, thereby stood adjourned sine die, upon the convening of the said regular term of this court at Paducah on November 15, 1909. The honorable district judge of this district on November 19, 1909, upon the request of the district attorney of this district, ordered the clerk and the jury commissioner to draw the names of, and the marshal to summon, twenty-five men having the qualifications prescribed by law to appear in this court on November 29, 1909, to serve as grand jurors. Afterward, on November 26, 1909, the honorable district judge of this district made a like order for twenty additional men to be summoned to appear in this court on the last-mentioned date to serve as grand jurors. But, notwithstanding the regular October term, 1909, of this court at Louisville stood adjourned sine die, by reason of the facts hereinabove stated, and no special term of this court at Louisville to be convened or held on November 29, 1909, had been ordered or called by the honorable district judge thereof, and no notice thereof had been prescribed by him or been given therefor, sixteen men out of the number ordered to be summoned as aforesaid were on November 29, 1909, when this court was not in session at either a regular or special term, as provided by law, but in vacation, impaneled and sworn as a grand jury at Louisville, and thereafter, on December 2, 1909, when this court was in vacation and not in session, either at a regular or special term, as provided by law, found and returned the indictment herein against this defendant not in open court. Wherefore, the defendant prays that the indictment herein and each count thereof be abated, quashed, and held as void."

A demurrer to this plea was overruled, mainly because it was stated in the plea that "the grand jurors that found the indictment herein were not impaneled and sworn and did not return the indictment herein at or during either a regular or special term of this court at Louisville, but were impaneled and sworn and found the indictment herein when this court was not in session, or holding either a regular or special term as provided by law," and because it is intimated in the plea that the court at Louisville stood adjourned sine die at the time, and that no special term had been called according to law.

Issues being made upon the allegations of this plea, the court heard the testimony offered, and finds the facts to be that the grand jurors who returned the indictment were impaneled and sworn at and during a regular term of this court, to wit, at the regular term of this court which begun on the second Monday in October, 1909, that said grand jurors returned said indictment at and during said term of said court while it was in session at Louisville, and that said grand jurors were not impaneled or sworn when this court was not in session holding its regular term here, and that the said grand jurors did not return said indictment when this court was not in session nor when it was not holding a regular term at Louisville, as provided by law. And the court further finds the facts to be that this court had not adjourned sine die or for the term either at the ordering, impaneling, or swearing of said grand jurors nor at the time the indictment was found. The court finds that otherwise the facts are accurately stated in said plea, except that the last orders of the respective terms held at Paducah and Owensboro were not entered respectively on November 12th and 23d. The statements to that effect made in the plea are found not to be true.

The judge, judicially and otherwise, abundantly knows that this court, namely, the district court, is continuously in session from day to day all the year round, with few exceptions on holidays, occasional vacations, and absences at other places. He particularly knows that such has been the fact during the present term, which begun according to law in Louisville on the second Monday in October last, that being the 11th day of the month. Of course, on the third Monday in November, 1909, as provided by law, a term was opened at Paducah, on the fourth Monday in November, 1909, a term was opened at Owensboro, and, though it is not important in this case, on the second Monday in December, 1909, a term was opened at Bowling Green, and for such time as was necessary the judge remained at each of those places. But section 10 of an act to divide Kentucky into two judicial districts, approved February 12, 1901 (Act Feb. 12, 1901, c. 355, 31 Stat. 781 [U. S. Comp. St. 1901, p. 360]), provides:

"That the terms of said courts shall not be limited to any particular number of days, nor shall it be necessary to adjourn by reason of the intervention of any term elsewhere; but the court intervening may be adjourned until the business of the court in session is concluded."

An analysis of this brief section shows, first, that the terms of the courts held in this district shall not be limited to any particular number of days; second, that it shall not "be necessary to adjourn by reason of the intervention of any term elsewhere;" and, third, "that the court intervening may be adjourned until the business of the court in session is concluded." Obviously, this last clause, in terms, refers to the adjournment of the intervening court—that is to say, in its application to the pending matter it refers to the terms which in November, 1909, were held at Paducah and Owensboro, and which, under the statute, might have been adjourned, if the judge so desired, until the court at Louisville, which was in session, had concluded its business; but, under the statute, in no event is it necessary that the term should have been adjourned at Louisville by reason of an intervening term elsewhere. Hence, it is wholly immaterial whether the term in progress in Louisville, and which begun on October 11, 1909, was adjourned either for the term at Paducah or for the term at Owensboro. It is manifest, from the language of the statute, that the term at Louisville (the only one we are now considering, and where the bulk of the business of the district is done) was meant to be a continuous term, that it was not intended that the number of the days it continued should be limited, but that if the business so required, or within the discretion of the judge, it might last until the beginning of the next term. This has been the construction always given this section of the act of 1901 by the present judge, and his predecessors always construed in the same way the somewhat similar provisions of section 577 of the Revised Statutes (U. S. Comp. St. 1901, p. 476), which section was in force previous to the act of 1901, dividing the state into two districts. It is therefore obvious that the October term at Louisville was in progress during all of last November and December, and the section of the statute above copied makes it unnecessary that it should have been adjourned in order to hold intervening terms at Paducah and Owensboro. But for this section and this construction of it we could not keep

up the work nor conveniently prepare business for the different terms at the various places, nor hear the cases set at different dates for the convenience of parties, nor dispose of the great number of suits, common law, equity, admiralty, bankruptcy, and criminal, coming on to be heard at the various places where courts are held, and of which this judge alone finally disposed of 441 during the year 1909. If we had to call special terms at each place and for each case to be heard at different times, in whole or in part, the system would be insufferably cumbersome and inconvenient, whereas, under the practical construction—and doubtless the proper one—of the section, the work is so distributed over the time as to give no unnecessary inconvenience to any one. We construe the statute to contemplate exactly the reverse of what is contended in respect to it. We hold that it makes the terms at each city named in the act continuous, not expiring until the beginning of the next term at each. We hold that the October term of this court began October 11, 1909, and that by the express provisions of section 10 of the act of 1901 it was not necessary to adjourn it, and that the term had not in fact been adjourned when the indictment in this case was found; although adjournments of its daily sittings took place from day to day in the usual way of courts. We cannot hold that a term here would lapse by reason of terms intervening elsewhere, as that would be in the very teeth of the section and nullify its obvious intent. And so, on November 19, 1909, the court made and entered an order as follows:

"Upon notification by the district attorney that a grand jury will be needed, and it appearing to the court that the summoning of such grand jury is proper, it is hereby ordered that the clerk and jury commissioner do draw, and that the marshal summon, twenty-five good and lawful men having the qualifications prescribed by law to appear in this court on the 29th day of November, 1909, at 10 o'clock a. m., to serve as grand jurors."

This order and the subsequent one, directing the drawing by the clerk and jury commissioner from the box of a few other names for grand jurors, was based upon the provisions of section 810 of the Revised Statutes (page 627, U. S. Comp. St. 1901), which, in part, is as follows:

"No grand jury shall be summoned to attend any circuit or district court unless one of the judges of such circuit court or the judge of such district, in his own discretion, or upon a notification by the district attorney that such jury will be needed, orders a venire to issue therefor. And either of the said courts may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever in its judgment it may be proper to do so."

We are clearly of opinion, under the act of 1901, that there was no necessity for calling a special term under section 581 (page 477) in order to summon and impanel a grand jury. Special terms are authorized but by no means required by that section. The grand jury which found and returned an indictment in this case on December 2, 1909, was impaneled under section 810, which manifestly authorized that course.

In *Agnew v. U. S.*, 165 U. S., at page 44, 17 Sup. Ct., at page 238 (41 L. Ed. 624), it is held "that the defendant must take the first op-

portunity in his power to make the objection." The objection there had reference to the competency of the grand jury. This court has been opened every day since the process in this case was served, except holidays, and upon each of those days the defendant had an opportunity to make objection to the formation and competency of the grand jury which found this indictment. Everything necessary to be known about it has, during all this period, been within easy reach. Instead of making the objection at its first, defendant waited until about its thirty-fifth, opportunity for doing so, and has offered no explanation of the delay.

It is argued that the process served on the defendant required it to answer on the first day of the March term, 1910, and such is the fact; but while, possibly, this may have been so in the Agnew Case also, and most probably was so in the case of *Lowdon v. U. S.*, 149 Fed. 673, 79 C. C. A. 361, no importance seems to have been attached to such possibility in either of those cases. On the contrary, the reasoning of the court there indicated that the rules there announced have reference to opportunity for making objections like those before us, and not to what the process indicates. Objections such as those made here are highly technical and dilatory, and must be made, as the Supreme Court holds, "at the first opportunity," whenever that may be, or else some sound excuse for delay must be presented.

Much testimony was heard in regard to orders of adjournment and when they were entered. We regard these matters as altogether unimportant, not only in view of what we have said in construing section 10 of the act of 1901, but upon other grounds. There was no need for entering an order expressly adjourning the term until after the courts were held respectively at Paducah and Owensboro. The court in fact adjourned in the ordinary way of courts from day to day. No person has any interest or concern in the drawing up of an adjourning order on the day it is made. Such orders are often not drawn up for weeks, and sometimes the delay is unavoidable, as may be indicated by a fact well known to the court that in the pending case of *Louisville & Nashville Railroad Company v. Interstate Commerce Commission* certain orders were not entered for many days because of the inability of the three circuit judges who are hearing that case to find opportunity for settling the form of the orders. Adjourning orders must be the last entered on a day's proceedings, and many things may occur to delay the actual entry of such orders on the order book or journal. But no person is concerned with this phase of clerical duty, nor can any person be injured by what at most is a mere clerical misprision. For many years the practice here has been not to record daily the orders for adjournment, but to do it near the close of the term.

Upon all these considerations, the court is clearly of opinion that the defendant's first plea in abatement does not meet the requirements of the strict rules applicable to such pleas, and for those reasons that plea is overruled.

The defendant also filed a second plea in abatement, in which are set up matters similar to those which claimed the attention of the court in the case of *United States v. American Tobacco Co.*, 177 Fed. 774. A demurrer to this plea has been filed, and for the reasons stated in the

court's opinion in the case just mentioned, and which was delivered on the 10th inst., the demurrer to the second plea must be sustained. Indeed the views expressed in that opinion are much emphasized by the delay of 43 days in filing the plea in this case as against 19 days in that case. Besides, the second plea itself shows that the defendant had every opportunity to understand that the grand jury was investigating its own books and papers concerning the very transactions out of which the indictment grew, and thus is furnished another reason for prompt action on its part.

The demurrer to the second plea in abatement must be sustained, and the defendant will be ordered to plead to the indictment at or before the calling of the case.

NORTHWESTERN CONSOL. MILLING CO. v. WILLIAM CALLAM & SON.

(Circuit Court, E. D. Michigan, N. D. February 1, 1910.)

No. 72.

1. COURTS (§ 343*)—PRACTICE IN FEDERAL COURTS—DEATH OF DEFENDANT—ABATEMENT OF ACTION FOR INFRINGEMENT OF TRADE-MARK.

Where a suit for infringement of a trade-mark was instituted against two defendants, such infringement constituted a tort for which both were liable, so that on the death of one the suit did not abate as to the other, and under Rev. St. § 956 (U. S. Comp. St. 1901, p. 697), providing that if there are two or more plaintiffs or defendants in a suit where the cause of action survives to the surviving plaintiff or against the surviving defendant, and one or more of them dies, the right to action shall not abate, but shall be proceeded with by the surviving plaintiff against the surviving defendant.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 915, 916; Dec. Dig. § 343.*]

2. MONOPOLIES (§ 20*)—SHERMAN ACT—CONSOLIDATION OF CORPORATIONS.

Sherman Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), prohibiting trusts and monopolies, does not condemn the purchase by three corporations of two insolvent corporations engaged in the same business, nor in the conduct of the business thereafter by the three purchasers, especially in an effort to liquidate the indebtedness.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.*]

3. MONOPOLIES (§ 10*)—SHERMAN ACT—VIOLATION—EFFECT.

Sherman Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), prohibiting a monopoly, provides its own penalties for the violations of its provisions, and does not deprive the offender of redress for a civil injury.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 9; Dec. Dig. § 10.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 70*)—INFRINGEMENT—UNLAWFUL COMPETITION.

Complainant in 1891 adopted and commenced to use the word "Ceresota" as a trade-mark for its best grade of flour made from spring wheat, and built up a large trade therefor in Michigan and the other states, having expended \$500,000 in advertising. Complainant's trade-mark was registered on October 31, 1905, and in September, 1906, defendants, who operated a flourmill in Michigan, began to use the word "Certosa" as a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

trade-mark for flour which they falsely represented to be made from Minnesota and Turkey wheat, when in fact it was made from winter wheat, which makes an inferior flour. Defendants applied for registration of the word "Certosa" as a trade-mark which was denied, but, notwithstanding this, used the word in competition with plaintiff in the sale of flour in interstate commerce. *Held*, that defendants' acts constituted unlawful competition, and an infringement of complainant's trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

In Equity. Bill by the Northwestern Consolidated Milling Company against William Callam & Son for infringement of trade-mark. Decree for complainant.

P. H. Gunckel, for complainant.

Beach, O'Neire & Rockwith, for defendants.

SWAN, District Judge. Complainant is a corporation organized under the laws of Minnesota, and engaged in the manufacture of wheat flour in its several mills at Minneapolis in that state. In 1891 it adopted and commenced the use of the word "Ceresota" as a trade-mark for its best grade of flour of its manufacture, and has since that time continuously and extensively used that mark to indicate its product, and alleges that because of the high quality of the flour so made and marked, and by extensive advertisement of their product as "Ceresota" flour, has built up a large trade therefor, by that name, having expended in advertising about \$500,000; that under the name "Ceresota" that flour is dealt in and known both in foreign countries and in nearly all of the states of the Union, and that complainant has for many years had a profitable and steady trade in that flour in Michigan; that its aggregate sales under that trade-mark up to the time of this suit aggregate about 16,000,000 barrels; that in Michigan its sales from 1895 to 1907 aggregate about 350,000 barrels, and from 1897 to the fall of 1906 were about 125,000 barrels. Complainant's trade-mark was registered under the act of Congress on October 31, 1905.

The defendants operate a flourmill in Saginaw known as the "Star Mill." About September, 1906, they began the use of the word "Certosa" as a trade-mark for flour of their manufacture, and have since used that trade-mark or brand continuously, and sold flour thereunder in Saginaw and elsewhere in Michigan. Defendants admit the ownership and operation of the Star Mills at Saginaw for the last 15 years; that prior to May 19, 1907, the mill was operated by both defendants, but was owned solely by defendant William Callam, who died May 19, 1908. He devised the mill property to his son Frank, the codefendant herein. Defendants allege that:

"In May, 1906, they adopted the word 'Certosa' as a trade-mark for one of its best grades of flour; that defendant Frank Callam found the word 'Certosa' in an article of the Christmas 1906 number of Truth; that it is an historical Italian name for the monasteries of the Carthusian Order. One of the oldest monasteries at Florence, Italy, is known as the monastery of Certosa. That Callam believed this word singularly appropriate for the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

firm's best brand of flour because of the fact that the monks of this monastery lived almost exclusively on a cereal diet."

These are substantially the facts pleaded by the parties. Both parties pack their products for market largely in cotton or paper bags on which their respective trade-marks or brands "Ceresota" and "Certosa" are printed in large capital letters diametrically across a circular design. The complainant's flour sold at \$2 per sack. Defendants advertised and sold their product at \$1.50 per sack.

A preliminary question is made by defendants upon the death of William Callam, it being claimed that thereby the suit abated. The record shows that the defendants were partners in the milling business, and that Frank from 1893 to 1907 had the entire control and management of the business, and selected and applied the mark "Certosa" to defendants' flour. The infringements alleged are torts, for which both defendants are liable. Section 956, Rev. St. U. S. (U. S. Comp. St. 1901, p. 697), declares that in such case the action shall not abate. *Patton v. Brady*, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713; *In re Connavay, Rec'r.*, 178 U. S. 435, 20 Sup. Ct. 951, 44 L. Ed. 1134; *Estes v. Worthington (C. C.)* 30 Fed. 465.

Defendants' petition for leave to amend the answer by pleading that complainant was organized and is operating in violation of Sherman Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), and contrary to the laws of Michigan and the common law has no merit. Defendant, referring to the proofs (Brief, p. 64) that complainant consolidated five different plants, two of which were insolvent and were bought out by the other three, and that all of these corporations carried on business for years after that time, and that all of the corporations are now in existence trying to liquidate their indebtedness, admits (page 70 of his brief):

"The combination represented by complainant is not illegal in any other sense, except that the law will not lend its aid to the accomplishment of its purpose."

Under *Davis v. A. Booth & Company*, 131 Fed. 31, 37, 65 C. C. A. 269, there is nothing in the Sherman act to condemn the purchase by three corporations of the two insolvent companies nor in the conduct of business thereafter by the three purchasers especially in their efforts to liquidate the indebtedness—apparently a consolidation to that end. Further, the matters referred to in the petition of defendants have no relevancy here. The Sherman act has its own penalties for violations of any of its provisions. It contains nothing that sanctions the argument that an offender against it shall be deprived of redress for a civil injury on the plea that he has been guilty of an infraction of that act which gives a remedy to one injured in his business or property against the transgression of the law, and does not suggest that one who has taken the property, infringed the trade-mark or patent of another, or refused to pay debts because of an alleged transgression of the Sherman act by the creditors, can invoke that act as a defense to liability either in suits in tort or contract. *Independent Baking Powder Co. v. Boorman (C. C.)* 130 Fed. 726; *Connolly v. Union Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679.

The proofs further show that the defendants are guilty of unfair competition, in passing off through their agents and employés defendants' product labeled "Certosa" as and for "Ceresota" flour, in misrepresentation as to the place of manufacture of their flour as labeled, the grade or quality thereof, and that it was made from Minnesota and Turkey wheat when it was not so in fact, and also in selling and offering their "Certosa" flour as spring wheat flour, which sells at a higher price than flour made from winter wheat.

Defendants also have infringed complainant's registered trade-mark. In defendants' application for registration of "Certosa" as a trade-mark, which was denied by the Patent Office, defendants made oath August 2, 1906, that they used that brand "in commerce among the several states," and made a like admission in their answer.

Complainant is entitled to a decree protecting it against the use of the word "Certosa" as a name for defendants' flour, because the use thereof for that purpose infringes complainant's trade-mark right both at common law and under the act of Congress providing for registration of trade-marks; that defendants have been guilty of unfair competition to the injury of complainant's business and rights. Complainant is also entitled to a perpetual injunction as prayed, and an accounting of damages and profits with respect to both trade-mark infringement and unfair competition, with costs to be taxed.

Ex parte LAIR.

(District Court, D. Kansas, First Division. March 30, 1910.)

No. 1,091.

1. CRIMINAL LAW (§ 4*)—IMMIGRANTS—KEEPING FOR IMMORAL PURPOSES—POWER OF CONGRESS TO REGULATE.

Act Cong. Feb. 20, 1907, c. 1134, § 3, 34 Stat. 899 (U. S. Comp. St. Supp. 1909, p. 450), in so far as it provides for the criminal punishment of the mere keeping, maintaining, supporting, or harboring an alien woman within three years after entry for purpose of prostitution, is unconstitutional; such offense being within the police power of the state and not subject to congressional regulation.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 4*]

2. ALIENS (§ 40*)—IMPORTATION—PROSTITUTION—STATUTES—REPEAL.

Act Cong. March 3, 1903, c. 1012, § 3, 32 Stat. 1214, in so far as it placed no limitation on the length of the holding of a female alien for prostitution for which the holder might be prosecuted, was repealed by Act, Feb. 20, 1907, c. 1134, § 43, 34 Stat. 911 (U. S. Comp. St. Supp. p. 469), requiring that the offense of holding must have been committed within three years after the alien entered the United States.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 40*]

3. ALIENS (§ 59*)—HARBORING—INDICTMENT—CONSTRUCTION.

An indictment charged that petitioner, in connection with another at Chicago in the Eastern division of the Northern district of Illinois, unlawfully, etc., imported into the United States for prostitution and unlawfully, etc., did hold from January 1, 1906, until July 15, 1907, pursuant to such illegal importation, in a house of prostitution in Chicago, for the purpose of prostitution, an alien named P., then a citizen of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

France, within three years after her entry, and that she came to and entered the United States within three years prior thereto. *Held*, that such allegation charged the offense of holding and harboring a female alien for the forbidden purpose within three years after entry, and not her illegal importation for such purpose.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 59.*]

4. CRIMINAL LAW (§ 113*)—VENUE.

The offense of importing a female alien for prostitution in violation of Act Cong. Feb. 20, 1907, c. 1134, § 3, 34 Stat. 899 (U. S. Comp. St. Supp. 1909, p. 450), is committed and is complete the moment the immigrant is landed in the United States at which point the offense is triable, under Const. art. 3, § 2, cl. 3, declaring that the trial of all crimes except cases of impeachment shall be held in the state where the crime has been committed and the sixth amendment, declaring that accused shall enjoy the right to a speedy and public trial in the state and district wherein the crime has been committed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 113.*]

5. CRIMINAL LAW (§ 304*)—JUDICIAL NOTICE—DIVISION OF COUNTRY—GEOGRAPHICAL LOCATION.

United States courts take judicial notice of the territorial extent of the general government, the local divisions of the country, its geography, its natural water courses, and their boundaries, and the ports and waters of the United States in which the tide ebbs and flows and of the boundaries of the several states and judicial districts.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 304.*]

6. CRIMINAL LAW (§ 304*)—JUDICIAL NOTICE.

A federal court will take judicial notice that a seagoing vessel carrying immigrants from France to the United States did not find a port of entry within the Northern district of Illinois.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 304.*]

7. CRIMINAL LAW (§ 113*)—VENUE.

Under Const. U. S. art. 3, § 2, cl. 3, and Const. Amend. 6, requiring all crimes to be prosecuted in the state or district where committed, a federal court within the Northern district of Illinois had no jurisdiction to try accused for importing a female alien, a citizen of the Republic of France, to the United States for prostitution; the offense being complete at the Atlantic seaport where the alien first landed and entered the United States.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 113.*]

8. HABEAS CORPUS (§ 27*)—SCOPE OF WRIT—INVALID CONVICTION—JURISDICTION.

Where relator's conviction was void for the court's lack of jurisdiction over the subject-matter, habeas corpus was the proper remedy to obtain his discharge.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 22; Dec. Dig. § 27.*]

Petition for a writ of habeas corpus by Henry Lair. Writ granted. Petitioner discharged.

J. D. Brown and Marshall Woodworth, for petitioner.

J. S. West, Asst. U. S. Atty.

PHILIPS, District Judge. The petitioner was indicted in the United States District Court for the Northern District of Illinois, in December, 1908, for violating the "Act of Congress prohibiting the importation into the United States of any alien woman or girl for the

purpose of prostitution, and for holding such alien for any such purpose in pursuance of such illegal importation," etc.

The first count of the indictment charges, in substance, that the petitioner, under various aliases, in connection with one Mrs. Henry Lair, at Chicago, in the Eastern division of the Northern district of Illinois, unlawfully, willfully, and knowingly imported into the United States for the purpose of prostitution, and unlawfully, willfully, and knowingly did hold, to wit, from the 1st day of January, 1906, until the 15th day of July, 1907, in pursuance of such illegal importation, in their certain house of prostitution there situate, etc., in said city of Chicago, for the purpose of prostitution, a certain alien woman named Marie Peuroy, who was then a citizen of the Republic of France, within three years after she had entered the said United States, and that she came to and entered the said United States within three years prior thereto, against the peace and dignity, etc.

The second count charges that the petitioner in the year 1906, and from that time until the 15th day of July, 1907, at Chicago, in said district, unlawfully, knowingly, and willfully held for the purposes of prostitution, in pursuance of an illegal importation for the purpose of prostitution, in the house of prostitution at the designated street in said city, the said Marie Peuroy, who was then a citizen of the Republic of France, within three years after she had entered the said United States, and that she came to and entered said United States within three years prior thereto, etc.

The third count makes practically the same charge as the last respecting the taking and holding of said alien in the house of prostitution at Chicago; and further charges that at the time of the illegal importation and holding petitioner well knew that she was an alien woman, and a citizen of the Republic of France, and had entered the United States within three years prior thereto, etc.

The fourth count contains practically the same charge as the two preceding counts, except that it fixes the date between the 1st day of July, 1907, until the 15th day of July, 1907, and charges that they maintained, controlled, supported, and harbored in a certain house of prostitution in said city of Chicago the said Marie Peuroy, a citizen of the Republic of France, and that she came to and entered the United States within three years prior thereto, etc.

To this indictment the petitioner entered the plea of *nolo contendere*. Whereupon the court, as the minutes therein recite, heard the evidence on the part of the United States, and found the defendant guilty as charged in the indictment, and on the 1st day of February, 1909, the court imposed a general sentence upon all four of said counts of the indictment, sentencing him to two years' imprisonment in the United States penitentiary at Ft. Leavenworth, Kan. (and to pay a fine of \$2,500), where he has been confined in execution of said sentence since the 12th day of February, 1909. The petition for discharge under the writ of habeas corpus is predicated of the contention that said judgment was void, for the reasons that the act of Congress upon which the indictment was predicated is invalid under the Constitution of the United States, and because the District Court of the United States for the Northern District of Illinois had no jurisdiction over the subject-

matter. It is conceded on the part of the United States attorney, representing the government, that, in so far as the last three counts of the indictment are concerned, the judgment or sentence is invalid and void, as held by the Supreme Court in the cases of *Keller v. United States* and *Ullman v. United States*, 213 U. S. 138, 29 Sup. Ct. 470, 53 L. Ed. 737, for the reason that the offense against public morals, for holding a person in a house of prostitution, pertains to the police power of the state, and it is not within the competency of Congress to regulate or prohibit the same.

The judgment is sought to be maintained by the United States attorney on the first count of the indictment, claimed to be valid, invoking the well-recognized rule of law:

"That in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only." *Claassen v. United States*, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966.

Waiving any discussion as to whether this rule applies to the instance of joining in a single count two distinct offenses contained in separate clauses of the same section of the statute, one of which is invalid, as if never written, and the other is valid, on which only a general judgment is rendered, and when the evidence that would be sufficient to sustain the one cause would wholly fail to support the other, we will proceed to determine whether or not this judgment is absolutely void.

From the indorsement on the back of the indictment it appears that it was predicated of the act of March 3, 1903, and the act of February 20, 1907. Section 3 of the former act (Act March 3, 1903, c. 1012, 32 Stat. 1214) is as follows:

"That the importation into the United States of any woman or girl for the purposes of prostitution is hereby forbidden; and whoever shall import or attempt to import any woman or girl into the United States for the purposes of prostitution, or shall hold or attempt to hold, any woman or girl for such purposes in pursuance of such illegal importation shall be deemed guilty of a felony, and, on conviction thereof, shall be imprisoned not less than one nor more than five years and pay a fine not exceeding five thousand dollars."

The corresponding section of the act of February 20, 1907 (34 Stat. 899, c. 1134 [U. S. Comp. St. Supp. 1909, p. 450]), is as follows:

"That the importation into the United States of any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, or whoever shall hold or attempt to hold any alien woman or girl for any such purpose in pursuance of such illegal importation, or whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case, be deemed guilty of a felony, and on conviction thereof be imprisoned not more than five years and pay a fine of not more than five thousand dollars; and any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall

have entered the United States, shall be deemed to be unlawfully within the United States and shall be deported as provided by sections twenty and twenty-one of this act."

By section 43 of the latter act the act of March 3, 1903, except section 34 thereof (which might properly be designated as "alien" to the title and purposes of the act, prohibiting the sale of intoxicating liquors within the limits of the capitol building of the United States), and all acts and parts of acts, were repealed. By section 44 this act of February 20, 1907, would not take effect until from and after July 1, 1907.

One marked difference between section 3 of the respective acts is that under the act of 1903 there was no limitation placed upon the length of the holding of such person for the purpose of prostitution for which the offender might be prosecuted; whereas, under the last statute the offense of holding must have been committed within three years after the person shall have entered the United States. There is the further difference, in that the later statute provides that any such alien woman found as an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall have entered the same, shall be deemed to be unlawfully within the United States and shall be deported, etc.

As no date is alleged in the indictment when the woman in question was imported, and the act of 1903 placed no limit upon the time when the woman should be held to subject the party to prosecution, it is inconsistent with the foregoing provision of the later act of 1907, and to that extent stands repealed as in conflict with the later act. It is, therefore, quite evident that the pleader had it in mind to predicate the first count of the indictment on the act of 1907, because it charges that the defendant held the said Marie Peuroy within three years after she had entered the United States, and that she had come to the United States within three years prior thereto; that is to say, three years prior to the time of the initiation of said holding.

Looking at the first count by its four corners, it is manifest that the intendment of the pleader was to charge the petitioner with the offense of holding and harboring the said woman in Chicago for the forbidden purpose within three years after she had entered the United States.

It is hardly conceivable that it was in the mind of the pleader to charge in the one count the two distinct offenses embraced in said section 3 of the act; one for the importation into the United States, and the other for holding such person in the United States after such illegal importation. Manifestly the preceding part of the count, alleging the importation, was only coupled with the holding for immoral purposes as matter of inducement leading to the substantive charge of holding the woman in the Northern district of Illinois, which was a jurisdictional fact essential to confer jurisdiction on that court. So that in pronouncing judgment of conviction under this count it is sustainable, if at all, on the presumption that the court found the illegal holding of the woman within the jurisdiction of that court for such immoral purposes.

It is not to be imputed to the learned judge pronouncing said judgment that he undertook to exercise jurisdiction over the offense

of importing into the United States this woman, who the indictment alleges came as an immigrant from the Republic of France, and consequently over the sea to some Atlantic seaport. That offense was consummated the moment such immigrant was landed within the United States. Under article 3, cl. 3, of section 2 of the Constitution of the United States, the trial of all crimes, except in cases of impeachment, shall be by jury, and held in the state where said crime shall have been committed. In the sixth amendment of the Constitution it is declared:

"That in all criminal prosecutions the accused shall enjoy the right of a speedy and public trial by an impartial jury in the state and district wherein the crime shall have been committed."

The jurisdiction over such offense is not peripatetic, attaching to any United States court wherever such immigrant may wander after landing. Judge De Haven of the District of California, in *United States v. Giovanni Capella*, 169 Fed. 890, in opinion of March 27, 1909, a copy of which is before me, rightly held that the offense was entirely committed at the port of New York where the subject was landed in the United States. "The consequent act of the defendant in bringing the said minor within the jurisdiction of this (California) court is no part of the offense of illegally bringing her into the United States."

There are some things of which the courts will take judicial notice neither required to be proved or disproved. They will take judicial notice of the territorial extent of the general government, the local divisions of the country, its geography, its natural water courses, and of the boundaries of the same. So *Greenleaf on Evidence*, vol. 1 (16th Ed.) § 6a, says:

"The courts of the United States, moreover, take judicial notice of the ports and waters of the United States in which the tide ebbs and flows; of the boundaries of the several states and judicial districts."

Accordingly, in *United States v. La Vengeance*, 3 Dall. 297, 1 L. Ed. 610, the court took judicial notice of the geographical position of Sandy Hook.

In the case of *The Apollon*, 9 Wheat. 374 (6 L. Ed. 111), the court said:

"It has been very justly observed at the bar that the court is bound to take notice of public facts and geographical positions."

In the case of *The Steamboat Thomas Jefferson*, 10 Wheat. 428, 429, 6 L. Ed. 358, where the libellant claimed wages on a voyage from Shippingport, in the state of Kentucky, upon the Missouri river, and back again to the port of departure, the court took judicial notice of the fact that not only in the commencement or termination, but in all the intermediate progress of the boat, it was several hundred miles above the ebb and flow of the tide, and, therefore, the wages could not be considered as earned in a maritime employment.

In *The Planter* (*Peyroux v. Howard*) 7 Pet. 325, 8 L. Ed. 700, it was said:

"The court will certainly take judicial notice that the Bay of New York, for instance, is within the ebb and flow of the tide."

And also that the court will take judicial notice of the fact that the city of New Orleans is in the ebb and flow of the tide of the sea, and, therefore, the jurisdiction in admiralty would prevail there.

So here, the court will take judicial notice that a seagoing vessel carrying immigrants coming from the Republic of France to the United States did not find a port of entry within the Northern district of the state of Illinois. As well say that if this petitioner had been indicted and convicted in the District Court of Oklahoma, Colorado, Kansas, or Wyoming, for bringing to the United States this woman from the Republic of France, such court would have had jurisdiction of the subject-matter.

It has been held, furthermore, that the courts of the United States will take judicial notice of the rules and regulations prescribed by the heads of departments of the government. *Caha v. United States*, 152 U. S. 212, 14 Sup. Ct. 513, 38 L. Ed. 415. So in *Smith et al. v. City of Shakopee*, 103 Fed. 240, 44 C. C. A. 1, it is held that the courts of admiralty will take judicial notice of the regulations of the lighthouse board, prescribing the number and kinds of lights to be placed on the draws of bridges across navigable streams, although they are neither pleaded nor offered in evidence.

The act of Congress in question shows throughout that the purpose and scheme of the enactment was the prevention and suppression of the introduction into the United States of undesirable immigrants, such as lawless persons, anarchists, and felons, of prostitutes, and persons infected with loathsome and contagious diseases, lunatics, and the like; and to that end immigration bureaus were established to exercise a supervisory regulation and control to prevent the landing of such immigrants. The landing of such persons is made an offense. In order to make the law effective, immigrant stations have been created, such as Ellis Island, New York, and Charleston, S. C., New Orleans, and other recognized ports of entry on the Atlantic seacoast; and one at San Francisco to enforce the law against the importation of Chinese and other Orientals. Carrying vessels of immigrants are not allowed to land elsewhere.

It may be conceded, for the sake of argument, that the woman in question imported from France might first have entered the Dominion of Canada on the Atlantic seaboard and crossed the boundary into the United States. But how could she have reached Chicago without having theretofore entered United States territory outside of the Northern district of Illinois? If by overland, she would have traversed territory of another state. If by water, it might have been through the Mackinaw Straits, and thence on Lake Michigan to the city of Chicago. But in so coming, at Mackinaw she would have entered the United States, and been within the jurisdiction of the district of Michigan. In either contingency the offense of such importation would have been committed prior to reaching the Northern district of the state of Illinois.

When this indictment was found and the judgment of conviction was entered herein, the cases of *Keller v. United States* and *Ulman v. United States*, supra, had not been decided, holding that the regulation and prevention of the holding and keeping of a woman for the

immoral purpose of prostitution was within the exclusive police power of the respective states and was not delegated by the Constitution to Congress.

The judgment of conviction under which this petitioner is held in the United States penitentiary at Leavenworth, Kan., is, therefore, void, and he is held in restraint of his liberty without authority of law. In such situation, the writ of habeas corpus is the appropriate remedy for his enlargement. *Ex parte Parks*, 93 U. S. 18, 23 L. Ed. 787; *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405; *Nielsen*, Petitioner, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118; *In re Tyler*, Petitioner, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 639; *In re Swan*, Petitioner, 150 U. S. 637, 14 Sup. Ct. 225, 37 L. Ed. 1207. This for the reason that the want of jurisdiction over the subject-matter makes the judgment absolutely void, and affords a ground for relief by the writ of habeas corpus. 21 Cyc. 296, etc.

It results that the petitioner must be discharged from custody. It is so ordered.

HOHENLEITNER v. SOUTHERN PAC. CO.

(Circuit Court, D. Oregon. March 7, 1910.)

No. 3,575.

1. RAILROADS (§ 229*)—SAFETY APPLIANCE ACT—AUTOMATIC COUPLERS.

Safety Appliance Act Cong. March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1143), requiring railroads to use automatic couplers on interstate equipment, requires all cars regularly used on any railroad engaged in interstate commerce and all other cars used in connection therewith to couple automatically by impact, and to be coupled and uncoupled without the necessity of men going between them, whether they be loaded or empty, and though they be not actually engaged in such commerce at the time.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. § 229.*]

2. RAILROADS (§ 229*)—SAFETY APPLIANCE ACT—VIOLATION.

Safety Appliance Act Cong. March 2, 1893, as amended by Act March 2, 1903, requiring interstate railroad equipment to be fitted with automatic couplers, coupling by impact without the necessity of men going between the cars, is violated when cars are hauled or used by carrier engaged in such commerce which will not so couple, whether the failure to do so results from the character of the car, the kind of equipment used, or the fact that the tracks are so laid on a curve that the couplers will not meet without men going between the cars to adjust them.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. § 229.*]

Duty of railroad companies to furnish safe appliances, see note to *Felton v. Bullard*, 37 C. O. A. 8.]

At Law. Action by Matilda Hohenleitner as administratrix of the Estate of Bernard Hohenleitner, deceased, against the Southern Pacific Company. On demurrer to complaint. Overruled.

Henry E. McGinn, for plaintiff.

Wm. D. Fenton, R. A. Leiter, J. E. Fenton, and Ben C. Dey, for defendant.

BEAN, District Judge. The plaintiff's intestate, a brakeman of the defendant company, was killed in its yards in East Portland by going between cars alleged to be used in interstate commerce for the purpose of coupling them. There is no charge in the complaint that the cars were not provided with couplers which would couple by impact when brought together, but the averment is that the lead track in the yards, where the plaintiff's intestate was at work at the time of his death, had a curve of about 20°, so that when the couplers, in use on the cars by which he was killed, met, they passed by each other and would not couple without a person going between the cars to adjust them, and that while the deceased was between the cars for that purpose he was struck and killed.

The defendant contends that the facts stated do not bring the case within the provisions of Act Cong. March 2, 1893, and subsequent amendments, commonly known as the "Safety Appliance Act." The original act provided that on or after the 1st day of July, 1908, it shall be unlawful for any common carrier engaged in interstate commerce to haul or permit to be hauled or used on its lines "any car used in moving interstate traffic" not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the cars. 27 Stat. 731, c. 196 (U. S. Comp. St. 1901, p. 3174). By the amendment of March 2, 1903, it is declared that the provisions of the previous act relating to automatic couplers shall apply to all locomotives, tenders, cars, and similar vehicles "used on any railroad engaged in interstate commerce." 32 Stat. 943, c. 976 (U. S. Comp. St. Supp. 1909, p. 1143).

This law has been frequently before the courts for construction and application, and without referring to the adjudications in detail it is sufficient for the purposes of this case that it requires all cars regularly used on any railroad engaged in interstate commerce, and all other cars used in connection therewith, to couple automatically by impact, and to be coupled and uncoupled without the necessity of men going between them, whether they are loaded or empty, and although not actually engaged in such commerce at the time. *Johnson v. S. P.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363; *U. S. v. Gt. Nor. (D. C.)* 145 Fed. 438; *C. & St. P. v. Voelker*, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264; *U. S. v. S. Ry. (D. C.)* 135 Fed. 122; *Kelley v. Gt. Nor. (C. C.)* 152 Fed. 211; *Snead v. Cen. of Ga. (C. C.)* 151 Fed. 608; *U. S. v. St. L., I. M. & S. R. (D. C.)* 154 Fed. 516; *U. S. v. Railroad (C. C. A., 5th Circuit)* 174 Fed. 638, decided December 21, 1909. The law does not require the carriers to adopt any specific design of coupler. That matter is left to them. They may adopt any design, kind, or make which they please, provided the cars equipped therewith shall couple automatically by impact, and can be coupled and uncoupled without the necessity of persons going between them. The cars must not only be provided with couplers, but the couplers must be such that, when used, they will couple together automatically. If the cars hauled

or used by a carrier engaged in such commerce will not so couple, the law is violated, whether it is due to the character of the car, the kind of equipment used, or, in my opinion, the manner in which tracks employed are required to use in coupling or uncoupling cars or making up trains are located or built. The ultimate end sought by the law is the coupling and uncoupling of cars used in interstate traffic without the necessity of going between them. This is the test of the compliance with it. As repeatedly pointed out by the courts, especially the Supreme Court in the Johnson Case, the design is to prevent the necessity of railroad employees going between cars in order to make a coupling, and thus protect their lives and limbs. The point to be accomplished by the law is that employees of railroad companies engaged in interstate commerce shall not be required to go between the cars for the purpose of coupling or uncoupling them, and this would be circumvented if the companies are permitted to so construct and maintain their tracks in yards or depot grounds, or other places where employees are required in the course of their employment to couple or uncouple cars, in such a condition that the cars used by them will not couple automatically with the equipment provided.

I conclude, therefore, that the demurrer is not well taken, and should be overruled.

INVERKIP S. S. CO., Limited, v. LIND.

(District Court, S. D. New York. February 4, 1910.)

(Syllabus by the Judge.)

PRINCIPAL AND AGENT (§ 23*)—RELATIONSHIP—EVIDENCE.

Held, that the question has already in effect been decided adversely to the allowance of such claim by this court and by the circuit court of appeals in *Stoomvart*, etc., *Lloyd v. Lind*, 170 Fed. 918, and further that under the peculiar wording of the contracts, the respondent seems to have been acting altogether for himself and is not entitled to compensation for his services from the ship owners.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 41; Dec. Dig. § 23.*]

In Admiralty. Actions by the Inverkip Steamship Company, Limited, against Erik G. Lind, by the Falls Line Steamship Company, Limited, against the same, by the Braemont Steamship Company, Limited, against the same, and by the Earl of Carrick Steamship Company, Limited, against the same. Decrees for libellants.

Convers & Kirlin, for libellants.

Wilcox & Green, for respondent.

ADAMS, District Judge. These various actions were brought by the libellants to recover the sums alleged to be due, respectively \$240.32, \$109.23, \$78.34, \$108.97 and \$153.23, aggregating \$630.09, deducted by the respondent from the hire of the various steamships

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mentioned on claims that services were rendered in collecting large amounts from the Government for the owners. The libellants sue for the amounts on the theory that the respondent is liable to them for the same amount that he collected from the Government. The claims are based on the proposition that the charter parties on which the suits are brought were made by the libellants as owners of the vessels with the respondent as charterer, not as agent of the Government, and that the respondent did not act as agent for the libellants in collecting the money for the reason that the libellants had no contract with, and therefore had no claim against, the Government.

The contention on the part of the respondent is expressed in the answer in the first above entitled action as follows:

"Seventh: Further answering, respondent alleges that as appears by inspection thereof, respondent executed the charter party mentioned in the libel as contractor thereunder for the Bureau of Equipment of the Navy Department of the United States; that the cargo was provided by the U. S. Government for the use of the Navy, and the detention mentioned in the libel was wholly due to the U. S. Government and its officers; that such detention was within the contemplation and expectation of the parties when the charter was made, and by the charter it was provided as follows: 'Demurrage, general average and all other claims against the cargo to be settled by the Government at Washington;' that it was agreed between libellant and respondent that the detention mentioned in the libel constituted demurrage to be settled at Washington by the Government under said quoted clause, and that libellant would look to the U. S. Government for payment thereof, and not to respondent; that in consideration thereof, and at the request of libellant, and acting on behalf of libellant, respondent presented and submitted to the U. S. Government libellant's claim of damages for said detention, and thereafter procured the allowance thereof by the U. S. Government at the sum of \$9612.76, and collected said amount from the U. S. Government; that in so acting, respondent, by agreement and understanding with libellant, acted as libellant's agent, and thereafter in accounting to libellant for said collection, deducted the sum of \$240.32 as a commission for his said services; and that said deduction was in accordance with settled and established usage and custom well known to libellant."

The other answers, with the necessary changes, were practically the same.

The question to be determined therefore is, was the respondent entitled to anything from the libellants for his services in collecting the amounts for them from the Government. It is conceded by the libellants that some services were rendered but it is contended that the charters on which the libellants sue were charters between the libellants and the respondent to which the Government was not a party but that the respondent was the charterer and not an agent for the Government, and it is further urged that the respondent cannot successfully maintain his claim, because the contention of the libellants has been established by a decision of the circuit court of appeals for this circuit in the case of *Stoomvart Maatschappij Nederlandsche Lloyd v. Lind*, 170 Fed. 918, 96 C. C. A. 134.

Some distinctions between the contracts here and those in the *Stoomvart Case* are claimed. In the latter, the demurrage was to be paid by Lind, while here it was provided: "13. Demurrage * * * to be settled by the Government at Washington" but in view of the language

of Judge Hough in deciding the *Stoomvart* Case, affirmed on appeal, except with regard to the amount of damage, which was increased, there seems to be no appreciable difference. He said:

"It cannot be doubted that this action is brought against the proper party respondent. The form of the *Nederland's* charter party declares that the vessel was hired 'for account of the United States Government,' and the depositions show that her owners were inclined to the opinion that their contract was with the Navy Department of the Government. But the facts are too plain for speculation or inference.

"Lind & Co. were themselves not agents of the Navy Department, but contractors with that Department.

"They had personally engaged to furnish transportation for certain coal belonging to the Navy, at a certain price per ton, and they hired the *Nederland* to effect a part of that transportation at a less price per ton. It is difficult to imagine how agency can exist under such circumstances, yet if it does, and the charter in suit is a contract with the Government, an action must lie upon it (*inter alia*) for the charter monies, and against the United States. I think the statement of this proposition its own refutation.

"It is further urged for the defense that even if the contract in suit be with Lind & Co. alone, the terms thereof forbid any action for demurrage because it was agreed in effect that all demurrage claims were to be 'settled in Washington,' which phrase is asserted to mean that they were to be submitted to the judgment of some Naval Official, and to none other.

"I can see no force in this contention unless it be held that the contract itself is with the Government. If that were the case it might be reasonable considering the general immunity of the Sovereign from legal pursuit, to stipulate for an arbitrator; but if as I believe that the charter party is with Lind & Co. only, then that partnership must pay what demurrage has accrued under the terms of contract, and the stipulation regarding 'settlement in Washington' amounts to no more than an arbitration agreement,—far less strongly worded than the one usually found in the charters, which has been repeatedly held not to oust the courts of their accustomed jurisdiction."

I think the decision cited governs this case. Under the peculiar wording of the contracts, the respondent seems to have been acting altogether for himself and cannot in any respect be deemed entitled to compensation from the libellants for collecting the money.

Decrees for the libellants for the amounts specified, with interest.

UNITED STATES V. ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Sixth Circuit. April 5, 1910.)

No. 2,000.

1. STATUTES (§ 241*)—RULES OF CONSTRUCTION—PENAL STATUTES.

Although penal laws and statutes in derogation of the common law are to be construed strictly, and not extended beyond their plain meaning, yet the intention of the Legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the Legislature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 322; Dec. Dig. § 241.*]

2. RAILROADS (§ 229*)—SAFETY APPLIANCE ACT—CONSTRUCTION—USE OF CARS NOT COUPLING AUTOMATICALLY.

A car duly equipped with automatic coupling and uncoupling apparatus, but which apparatus is rendered wholly inoperative because the car is loaded with lumber projecting over the uncoupling lever, so as to prevent its operation in the movement of interstate traffic, cannot be held to be a car equipped in compliance with the federal safety appliance act (Act March 2, 1893, c. 196, § 2, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), which makes it unlawful to use any car in such traffic not equipped "with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars."

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 229.*]

Duties of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

In Error to the District Court of the United States for the Western District of Tennessee.

Action by the United States against the Illinois Central Railroad Company. Judgment for defendant, and the United States brings error. Reversed.

George Randolph, for the United States.

C. N. Burch, for defendant in error.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

KNAPPEN, Circuit Judge. This suit was brought for the recovery of the penalty of \$100 provided by section 6 of the safety appliance act of March 2, 1893 (27 Stat. 532, c. 196), as amended April 1, 1896 (29 Stat. 85, c. 87 [U. S. Comp. St. 1901, p. 3175]), and further amended March 2, 1903 (32 Stat. 943, c. 976 [U. S. Comp. St. Supp. 1909, p. 1143]), on account of an alleged violation of section 2 of that act, which makes it unlawful for any common carrier engaged in interstate commerce by railroad "to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." The specific violation charged in the declaration is that the car in question was hauled in interstate traffic "*when the coupling and un-*

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

coupling apparatus on the 'A' end of said car was inoperative, the said lumber on said car, M., J. & K. C. No. 242, being loaded thereon so as to project out over the uncoupling lever on said end of said car, and prevented the operation of the uncoupling lever of said coupler, thus necessitating a man or men going between the ends of the said car 242 and the car adjacent to couple or uncouple them, and when said car 242 as above described was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by section 2 of the safety appliance act," etc. The clause following the italicized portion of the allegation quoted from the declaration is not relied upon by the government as a substantive charge, but was inserted rather by way of conclusion or statement of result, there being no claim on the part of the government that the coupling and uncoupling apparatus was inherently defective, the charge being simply that the coupling and uncoupling apparatus was rendered wholly inoperative by reason of the method of loading the lumber on the car.

The defendant demurred to the declaration for the reasons, first, that it "does not charge or state that the coupling apparatus was defective or out of repair, the charge being that the car was loaded with lumber which projected over the uncoupling lever;" and, second, "because the declaration does not charge any facts showing a violation of the safety appliance act referred to." Other grounds of demurrer were assigned, but they are not material upon this review. The court below sustained the demurrer on the grounds above set out, and dismissed the suit. To review this action the United States brings error.

The specific question thus presented is whether a car duly equipped with automatic coupling and uncoupling apparatus, but which apparatus is rendered wholly inoperative by reason of the manner in which the car is loaded while being hauled in the movement of interstate traffic, is within the provisions of the safety appliance act. For the purposes of this hearing we may dismiss from consideration the contention of defendant that the declaration fails to state a case, in that it does not charge that the lumber was willfully or negligently loaded by the defendant company so as to prevent the operation of the lever. *St. Louis, I. M. & S. Ry. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; *United States v. Illinois Central R. R. Co.*, 170 Fed. 542, 95 C. C. A. 628. In the *Taylor* Case it was held by the Supreme Court, upon the case there presented, that the safety appliance act has supplanted the common-law rule of reasonable care on the part of the employer as to providing the appliances defined and specified therein, and imposes upon interstate carriers an absolute duty to maintain the appliances in conformity with the requirements of the act. In *United States v. Illinois Central R. R. Co.*, supra, this court, distinguishing, as was thought, the case before it from the *Taylor* Case, and speaking through Judge Severens, said:

"We are of opinion that, when the government has proved that a car laden for interstate traffic and with defective couplings has been hauled upon its tracks, the railroad company is bound to prove exculpatory facts, such as

that it has used all reasonably possible endeavor to perform its duty to discover and correct the fault."

Therefore, whether liability for failure to maintain safety appliances in conformity with the act is absolute, or is dependent upon negligence, the defendant must equally be regarded, for the purposes of this hearing upon demurrer, as in default, provided its safety appliance equipment shall be held not to conform to the requirements of the act. The precise question presented by this record has not, so far as we have discovered, been passed upon by the courts.

The crucial question whether a car, whose coupling and uncoupling apparatus is by the fault of the carrier rendered wholly inoperative (so far as concerns automatic operation and the dispensing with the necessity of men going between the cars for the purposes of coupling and uncoupling), because so loaded with lumber projecting over the uncoupling lever as to prevent its operation, shall be held to be a car "not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars," depends for its answer upon the degree of strictness with which the safety appliance act shall be construed in the respect here involved. The general rule is well settled that although penal laws and statutes in derogation of the common law are to be construed strictly, and not extended beyond their plain meaning, yet the intention of the Legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the Legislature. *United States v. Lacher*, 134 U. S. 624, 10 Sup. Ct. 625, 33 L. Ed. 1080; *United States v. Dillin* (Sixth Circuit) 168 Fed. 813, 817, 818, 94 C. C. A. 337. See, also, *Frank Unnewehr Co. v. Standard Life & Acc. Ins. Co.* (decided by this court December 7, 1909) 176 Fed. 16.

The rule of interpretation we have just referred to has been authoritatively held to apply to the construction of this act in a case involving the effectiveness of the coupling apparatus. See *Johnson v. Southern Pacific Ry. Co.*, 196 U. S. 1, 17, 25 Sup. Ct. 158, 49 L. Ed. 363 (in which an engine was held to be a car within the meaning of the act in question), where it was held that although the coupler there in question would couple automatically with couplers of their own kind, they did not comply with the act unless they could be coupled together automatically by impact by means of the couplers actually used on the respective cars to be coupled. There is no doubt that the requirements of the safety appliance act extend to cars originally equipped with the prescribed coupling apparatus, but which through the default of the railroad company have been used when inoperative by reason of being worn out or out of repair. *St. Louis & S. F. R. R. Co. v. Delk* (Sixth Circuit) 158 Fed. 931, 86 C. C. A. 95; *United States v. Illinois Central R. R. Co.*, supra; *Voelker v. Chicago, M. & St. P. Ry. Co.* (C. C.) 116 Fed. 867, 875; *Chicago, M. & St. P. Ry. Co. v. Voelker* (Eighth Circuit) 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264.

In *Philadelphia & R. Ry. Co. v. Winkler*, 4 Pennewill (Del.) 387, 56 Atl. 112, it was held that even if the engine tender (which was held to be a car within the meaning of the act) was equipped with

automatic couplers, but was so connected with the "bull-nose" coupler that the coupling with other cars was not made automatically by impact, but so as to make it necessary for men to go between the ends of the cars to couple and uncouple them, the apparatus did not comply with the act of Congress.

We can see no substantial difference in principle, so far as concerns the question here involved, between the case of a coupler temporarily inoperative by reason of being out of repair and one rendered equally inoperative because of the loading of the car in such way that the act of uncoupling could not be accomplished without the necessity of a man going between the cars. The latter case, which is presented here, is equally within the mischief which the statute is designed to prevent.

It is unnecessary to consider the case, suggested by defendant's counsel, of two cars loaded with materials of such length as to rest upon both cars and to extend wholly across the space between; no coupling or uncoupling being intended during transit. The record presents no such case.

We are not impressed by the contention of defendant that the facts stated in the declaration do not make it appear that it was necessary to go between the cars to effect an uncoupling, from the fact that such act could be accomplished by getting on top of the car and removing the lumber from over the lever. So long as the lumber was so loaded "as to project out over the uncoupling lever," and so as to "prevent the operation of the uncoupling lever, * * * thus necessitating a man or men going between the ends of said car * * * and the car adjacent to couple or uncouple them," the automatic apparatus was wholly inoperative, and the situation during the existence of that state of facts was as much fraught with danger to the employé, and as much within the mischief the statute was intended to prevent, as if the car were not equipped with automatic devices.

The judgment of the District Court must accordingly be reversed.

NORTHERN PAC. RY. CO. et al. v. BOYD.

(Circuit Court of Appeals, Ninth Circuit. March 9, 1910.)

No. 1,729.

1. RAILROADS (§ 134*)—CONVERSION BY LESSEE OF ASSETS OF LESSOR—LIABILITY TO CREDITORS OF LESSOR.

The president of a railroad company, who controlled a majority of its stock, contracted to lease its property to another company for 999 years, to sell to the lessee its supplies and material on hand, and to deliver to it 51 per cent. of the stock of the lessor. By the agreement the lessor company was to make an issue of mortgage bonds, a portion of which were to be retained by the trustee to take up a prior issue. The agreement was carried out, and the remaining bonds so issued by the lessor, which constituted the greater part, were delivered to the president of the lessor, and, as appeared from the evidence, were retained by him and his associates in payment for the stock they transferred to the lessee, which was valuable. *Held*, that such appropriation of the bonds of the lessor which would otherwise have been available for the payment of its debts was a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fraudulent diversion of its property as against its creditors and rendered the lessee which received the benefit of such diversion liable for a debt of the lessor which was less than the value of the property converted, from which it was not relieved by the fact that it afterward expended a larger sum in betterments and extensions of the leased road.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 134.*]

2. RAILROADS (§ 30*)—REORGANIZATION—PARTICIPATION OF STOCKHOLDERS—LIABILITY OF NEW COMPANY FOR DEBTS OF OLD COMPANY.

A reorganization of an insolvent railroad company, by which both its mortgage bondholders and its stockholders, in exchange for their bonds and stocks, are given an interest in the new company, which purchases the property of the old company at a foreclosure sale made pursuant to such plan of reorganization and by consent of the old company and its stockholders, is fraudulent in law as to unsecured creditors of the old company whose claims are left unpaid, and renders the new company liable for the claims of such creditors, who are not, under such circumstances, represented in the foreclosure suit by the mortgagor nor precluded by the decree therein from showing in equity the fraud and collusion by which it was obtained, and the property of their debtor placed beyond their reach by legal process.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 30.*]

3. EQUITY (§ 339*)—ANSWER UNDER OATH—EFFECT AS EVIDENCE.

While a sworn answer in equity, where oath is not waived, becomes evidence of the facts well pleaded therein, allegations which are not of the facts themselves, but rather of the construction placed on such facts by the pleader, do not preclude the court from resorting to such facts and placing its own construction thereon.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 339.*]

4. JUDGMENT (§ 515*)—COLLATERAL ATTACK—GROUNDS—FRAUD AND COLLUSION.

A judgment which has been procured by the fraudulent contrivance of the debtor or the collusion of both parties is subject to collateral attack by any one a stranger to the judgment who has been injuriously affected thereby.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 957; Dec. Dig. § 515.*]

5. LIS PENDENS (§ 26*)—PURCHASE OF PROPERTY—RIGHT OF CREDITORS TO IMPEACH JUDGMENT FOR FRAUD OR COLLUSION.

The fact that a creditor of a mortgagor acquired his rights pending a suit to foreclose the mortgage does not preclude him from attacking the validity of the decree in such suit in equity on the ground that it was fraudulent and collusive.

[Ed. Note.—For other cases, see Lis Pendens, Dec. Dig. § 26.*]

6. JUDGMENT (§ 678*)—PERSONS CONCLUDED—PRIVITY—SEVERAL CREDITORS OF DEFENDANT.

There is in general no such privity between several creditors of the same debtor that proceedings taken by one against the fund, the estate, or specific property to which all must look for satisfaction, will raise an estoppel against the others.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1197; Dec. Dig. § 678.*]

7. EQUITY (§ 67*)—LACHES—NATURE AND ELEMENTS.

The doctrine of laches rests upon equitable principles which are neither arbitrary nor technical, and what amounts to laches depends largely upon the circumstances of each particular case; the ultimate inquiry be-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing as to on which side would fall the balance of justice in sustaining or denying the defense.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 191–196; Dec. Dig. § 67.*]

8. EQUITY (§ 80*)—LACHES—ESTOPPEL TO INVOKE DEFENSE.

Where the party interposing a defense of laches has caused or contributed to the delay, he cannot take advantage of it.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 237; Dec. Dig. § 80.*]

9. EQUITY (§ 82*)—LACHES—FACTS CONSIDERED.

Where the claim upon which the judgment of a complainant in a creditors' suit is based was in almost continuous litigation for many years in various suits and proceedings, during most of which time it was being contested by defendant or its predecessor in interest with which it is in privity, the complainant *held* not chargeable with laches which would defeat the suit because of the delay which did not in any manner prejudice the defendant.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 236; Dec. Dig. § 82.*]

Appeal from the Circuit Court of the United States for the Eastern Division of the Eastern District of Washington.

Suit in equity by Joseph H. Boyd against the Northern Pacific Railway Company and the Northern Pacific Railroad Company. Decree for complainant (170 Fed. 779), and defendants appeal. Affirmed.

The Cœur d'Alene Railway & Navigation Company was organized under the laws of the territory of Montana in July, 1886, with authority to build and operate railroads in the territories of Montana and Idaho. Before the end of that year it became indebted to William N. Spalding in the sum of \$23,675.85 for work done and materials furnished in the construction of its narrow gauge railroad in the territory of Idaho, and on March 27, 1887, Spalding began an action in a court of Idaho against the company to recover that amount. On April 25, 1896, he obtained judgment for \$36,584.95. On an appeal to the Supreme Court of the state of Idaho, the judgment was affirmed on November 26, 1897. 5 Idaho, 528, 51 Pac. 408. In December, 1898, the appellee herein, Joseph H. Boyd, brought an action against Spalding in a state court of Idaho alleging that he (Boyd) was the rightful owner of the judgment. The cause was removed by Spalding to the United States Circuit Court for the Northern District of Idaho. On May 21, 1901, the appellee obtained a decree in that court adjudging that he was the rightful owner of the judgment. In September, 1903, to prevent the expiration of the judgment obtained on April 25, 1896, and subsequently affirmed, the appellee caused summons to be issued in an action brought against the Cœur d'Alene Company to revive the same. The Cœur d'Alene Company caused the action to be removed to the United States Circuit Court for the District of Idaho. On October 23, 1905, judgment was rendered in favor of the appellee for \$71,278.20, the amount of the original indebtedness with accumulated interest and costs. A writ of error was sued out to review that judgment in the Circuit Court of Appeals for this circuit. It was afterwards dismissed by stipulation. The present suit was brought on September 20, 1906, by the appellee against the appellants to recover judgment against the Northern Pacific Railroad Company for \$71,278.20 and to have the judgment declared a lien on the property of the Northern Pacific Railway Company. For convenience, the corporations will be designated as they are in the briefs of counsel. The Cœur d'Alene Railway & Navigation Company will be called the "Cœur d'Alene Company," the Northern Pacific Railroad Company, the "railroad company," and the Northern Pacific Railway Company, the "railway company." By the decree of the court below it was adjudged that the railroad company was indebted to the appellee in the amount sued for, with interest and costs, that the in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

debtedness was a lien upon the property of the railway company, and that, on the failure of that company to pay it within 30 days, the appellee might apply to the court for the appointment of a receiver. From that decree the present appeal is taken.

In March, 1887, when Spalding began his action against the Cœur d'Alene Company, that company's property consisted of a narrow gauge railway 33 miles long, together with a steamboat line in the then territory of Idaho. A mortgage, called in the record herein the "first mortgage," had, in the year 1886, been placed upon the property to secure bonds to the amount of \$360,000, which had been issued and sold to the public. D. C. Corbin, the president of the Cœur d'Alene Company, owned or controlled the majority of its capital stock of \$500,000. On August 1, 1888, Corbin entered into a contract with the railroad company, by the terms of which the property of the Cœur d'Alene Company was to be leased to the railroad company for a period of 999 years. The railroad company was to pay as rental, under the lease, the interest on bonds to be issued by the Cœur d'Alene Company, to the amount of \$25,000 per mile of the road as it was then constructed, and as it was thereafter to be constructed, making a total issue of \$825,000 on account of the 33 miles of road then built. \$360,000 of these bonds were to be retained by the trustee, to retire, at their maturity, the bonds of that amount already outstanding under the first mortgage. The railroad company was to pay the Cœur d'Alene Company \$20,500 on account of expenses incurred in making surveys, etc., and was to purchase from the Cœur d'Alene Company all construction and operating materials and supplies on hand at the cash value thereof. Corbin agreed to cause to be transferred to the railroad company at least 51 per cent. of the capital stock of the Cœur d'Alene Company, "full paid and nonassessable." The railroad company was to further covenant in the lease to provide a sinking fund for the redemption of the whole of the new issue of the bonds at maturity; the payments into that fund to begin 10 years from the date of the lease. Pursuant to that agreement, the Cœur d'Alene Company on September 1, 1888, executed its general first mortgage to secure the issue of bonds as provided for therein. The bonds were guaranteed by the railroad company in accordance with the agreement. \$360,000 of them were reserved by the trustee and \$465,000 of them were delivered to the president of the Cœur d'Alene Company as provided in the mortgage.

On September 14, 1888, the Cœur d'Alene Company executed to the railroad company the lease of its property. Four days later, there were transferred to the railroad company by Corbin and other holders thereof 5,100 of the shares of the capital stock of the Cœur d'Alene Company, and on October 1, 1888, the railroad company went into possession under the lease. By the terms of the lease, the net earnings of the leased property, after the payment of operating expenses, taxes, interest, and sinking fund charges, was to be paid as part of the rental by the railroad company directly to the stockholders of the Cœur d'Alene Company. On December 17, 1889, the railroad company acquired from Corbin 4,400 additional shares of stock of the Cœur d'Alene Company, for which it paid \$220,000, and a week later it acquired the remaining 500 shares from another stockholder, paying therefor \$30,000. It thus became the sole stockholder of the Cœur d'Alene Company. From October 1, 1888, to August 15, 1893, the railroad company operated the Cœur d'Alene Company's property under the lease. By June 30, 1889, its net earnings were \$130,269.01. The next year they were \$46,000.59. The year following there was a deficit of \$36,381.19. The next year the deficit was \$116,704.43, and the year ending June, 1893, it was \$84,049.65. During the years 1889 and 1891, the road was rebuilt upon a standard gauge, and an extension of 16½ miles in length was made by the railroad company. By the terms of the general first mortgage, the railroad company was permitted to issue bonds to the extent of \$25,000 per mile for each additional mile constructed. \$413,000 of the general first mortgage bonds of the Cœur d'Alene Company were accordingly issued, and were delivered by the trustee to the railroad company to pay for the new construction. For these bonds the railroad company received in cash \$411,507.50. Its expense in constructing the new road was \$720,572.18, and in changing the narrow gauge road already built to a standard gauge, \$151,696.90, for surveys \$11,768.04, and for equipment, \$23,459.61.

making a total of \$495,989.23 more than the sum it received from the sale of the bonds, and the total bonded indebtedness of the Cœur d'Alene Company was then \$1,238,000 held by the public.

On August 15, 1893, the railroad company became insolvent, and on that date certain of its stockholders filed a creditors' bill in the Circuit Court of the United States for the Eastern District of Wisconsin, and in that suit receivers were appointed, who took possession of the railroad, its franchises, and assets, and the receivership was extended to other suits, brought in other districts, in which the company's property was situated. There were then outstanding upon the company's property six mortgages. In October, 1893, there was default in the interest on certain of these mortgages, and thereupon the trustee, the Farmers' Loan & Trust Company, filed its bill for foreclosure thereon in the United States Circuit Court for the Eastern District of Wisconsin. The receivership was extended to the foreclosure suit, and that and the suit upon the creditors' bill were consolidated. Similar bills for foreclosure were filed by the trustee in other jurisdictions in which the property was situated, and similar orders were taken in those jurisdictions. On September 1, 1893, the receivers, under an order of court paid the semiannual interest on the bonds of the Cœur d'Alene Company. On October 10, 1893, the trustee under the first mortgage and the general first mortgage of the Cœur d'Alene Company, together with H. H. Trowbridge, as co-complainant, commenced a suit to marshal the assets of that company. On the same day receivers were appointed. On August 24, 1895, the trustee commenced a suit in the same court for the foreclosure of the general first mortgage of September 1, 1888, and on May 25, 1896, it commenced suit in the same court for the foreclosure of the first mortgage. The three suits were subsequently consolidated.

The receivers of the railroad company who took charge of its property in 1893 found that the annual fixed charges exceeded the net income of the property. A committee of the holders of the mortgage bonds, which had been formed in 1893, formulated a plan of reorganization. It was proposed to form a syndicate to furnish the cash required to carry out the plan, by the sale of stock in a new company. The syndicate agreed to furnish the amount of money required for the purpose of carrying out the plan, in consideration of the issuance to them of 187,678 shares of the preferred stock, and 775,000 shares of the common stock, and certain mortgage bonds of the new company. It was the expectation that the stock in the new company would be taken by the stockholders of the railroad company. The plan for the reorganization received the assent of the holders of nearly all the general second, general third, and the consolidated mortgage bonds, of more than 75 per cent. of the preferred stock, and a large majority of the common stock of the railroad company. Holders of preferred stock were required to pay \$10 on each share deposited by them, for which they were to receive, upon the completion of the organization, \$50 in preferred stock trust certificates, and \$50 in common stock trust certificates of the new company. The holders of common stock were required to pay \$15 upon each share upon which they were to receive \$100 of common stock trust certificates of the new company.

The Superior & St. Croix Railroad Company, a corporation of Wisconsin, was acquired, and the name of the corporation was changed to the "Northern Pacific Railway Company," and its capital stock was increased to \$155,000,000. This company was the new company contemplated in the plan of reorganization. In April, 1896, the consolidated cause for the administration of the assets of the railroad company and the foreclosure of its mortgages came on to be heard in the Circuit Court of the United States for the Eastern District of Wisconsin, upon bill and answer, and decrees were entered that the railroad lands and properties subject to the lien thereof be sold. Similar decrees were rendered in other courts, in which ancillary bills had been filed. Under these decrees the railroad lands and property of the railroad company covered by the mortgages were sold, by a special master, to the railway company. On July 27, 1896, the sale of the railroad property was confirmed, and on August 8, 1896, the sale of the lands was confirmed. By the terms of the agreement of July 13, 1896, the railway company became entitled to be invested with stock, bonds, and other property representing the system of the

railroad company, so far as the same should have been acquired by the reorganization managers, and with any balance of cash received by the reorganization managers for the purpose of carrying out the plans and agreement, which stock, bonds, and other property were to be transferred to the railway company as consideration for the issuance to the reorganization managers of all the shares of the capital stock of the railway company, and of mortgage bonds of the railway company as provided in the contract. The lands of the railroad company in Wisconsin, and North Dakota east of the Missouri river, were not covered by the mortgages which were foreclosed.

On May 25, 1896, the Farmers' Loan & Trust Company filed a supplemental bill in the United States Circuit Court for the Eastern District of Wisconsin, alleging that claims in the sum of several million dollars had been filed against the railroad company, and that judgments for more than \$3,000,000 were outstanding against it unpaid, and prayed that the said lands and other unmortgaged assets of the railroad company be sequestrated and sold to pay the creditors. A decree was rendered on this bill, and the unmortgaged assets were sold at public sale by the special master to the railway company. Notice had been published in the leading newspapers of the various states through which the railroad extended, including the states of Idaho and Washington, notifying creditors to file their claims. The sale was confirmed September 16, 1899. At that time the railway company had become the owner of more than \$100,000,000 of the total \$102,046,316.58 of claims approved and allowed by the special master in that suit. On October 27, 1899, the court ordered the payment to the railway company of \$1,200,000 out of the proceeds of the unmortgaged assets on account of such claims. On October 16, 1896, a decree was rendered in the consolidated cause pending against the Cœur d'Alene Company in the United States Circuit Court for the District of Idaho, foreclosing both of the mortgages. On January 11, 1897, the property of the Cœur d'Alene Company was sold to the railway company pursuant to the decree. The railway company bid therefor the sum of \$220,000. The sale was confirmed on January 23, 1897. The railway company had previously acquired 359,000 of the 360,000 first mortgage bonds, paying therefor at par in cash, and had acquired the entire issue of 878,000 of the general second mortgage bonds, paying for each \$1,000 thereof \$1,000 in its own fully paid and nonassessable preferred stock. The indebtedness due upon the general first mortgage bonds of the Cœur d'Alene Company, amounting to \$1,082,469.94, had been presented and allowed as a claim against the railroad company in the creditors' suit above referred to. As the owner of this indebtedness, the railway company received, pursuant to the decree of October 27, 1899, in the Circuit Court for the Eastern District of Wisconsin, the sum of \$108,246.98.

The appellee in the present suit sought a decree declaring his judgment to be a liability of the railroad company, and a lien upon the property of that company from the time when it acquired the property of the Cœur d'Alene Company; that the decree of foreclosure through which the railway company acquired the properties of the railroad company be declared to have been fraudulent and void as to him; that it be decreed that the dividend of \$108,246.98 paid to the railway company on the distribution of the proceeds of the unmortgaged assets of the railroad company was an unlawful and inequitable diversion of the assets of that company; and that the money so obtained be treated as a trust fund in the hands of the railway company to be charged with the payment of the appellee's judgment. And under his prayer for general relief the appellee sought to hold the railway company liable also for the further sum of \$1,200,000, which it received from the unmortgaged assets. Upon the issues presented, and the evidence adduced, the trial court sustained the bill and decreed that the appellee have a lien for the satisfaction of his judgment on the property formerly belonging to the railroad company, and now vested in the railway company by virtue of the foreclosure and sale hereinabove referred to, subject to the subsisting mortgages made by the railway company thereon, and that he is also entitled to have satisfaction of his judgment from the sums received as dividends by the railway company from the unmortgaged assets of the railroad company.

Francis Lynde Stetson, Charles W. Bunn, Charles Donnelly, and Edward J. Cannon, for appellants.

George Turner and R. L. Edmiston, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The first question, to be considered is whether or not the railroad company ever became liable for the payment of the Cœur d'Alene Company's debt to the appellee. The appellee presents several grounds on which it is asserted that liability exists. One of them is that the lease constituted a diversion and appropriation by the railroad company to its own use of the assets of the Cœur d'Alene Company, such as to make it liable to the creditors of the latter company to the extent of the assets so diverted and appropriated. It was on this ground that the court below held that the railroad company became chargeable with the debt. Upon a careful consideration of the question, we are not convinced that there was error in that conclusion. On August 1, 1888, an agreement was entered into between the railroad company and Daniel C. Corbin, who was then the president of the Cœur d'Alene Company, and who owned and controlled a majority of its capital stock. He signed the agreement in his individual capacity, and not as president of the company. The agreement provided that Corbin should cause a lease to be executed to the railroad company of the property and franchises of the Cœur d'Alene Company for a period of 999 years; that the rental therefor should be the payment by the railroad company of the interest on an issue of \$825,000 of bonds, \$360,000 of which were to be retained by the trustee to provide for the redemption of an issue of an equal amount of bonds then outstanding against the property; that, in addition thereto, the railroad company should pay to the Cœur d'Alene Company \$20,500, the expenses incurred by that company in making surveys, contesting the right of way, and in work done on a line between Wallace and the summit of the Bitter Root Range, and should also purchase from the navigation company all construction and operating materials and supplies on hand, at their cash cost; and that Corbin should cause to be transferred to the railroad company at least 51 per cent. of its capital stock, "full paid and nonassessable." There was no provision whatever in the agreement as to the disposition of the remainder of the bonds.

On September 8, 1888, the board of directors of the Cœur d'Alene Company had a meeting, at which a resolution was adopted in which it was recited that, whereas, the issue of stock and bonds of the company had been found insufficient properly to construct, complete, and equip the line of its railroad and its boats and vessels, there should be issued a series of general first mortgage bonds of the company to the amount of \$825,000, of which \$360,000 were to be used to retire the bonds already outstanding, and the remainder "for the purpose of making good the deficiency above set forth," and that a mortgage should be executed to secure said bonds. On September 14, 1888, the lease was executed. It recites that the board of directors of the Cœur

d'Alene Company, for the purpose of repaying money owing by it, and used in the construction of its railroad, has authorized the issuance of bonds, \$360,000 thereof to be retained by the trustees to retire the outstanding bonds of that amount, \$465,000 thereof having been first certified by the trustee, to be, with the coupons thereto belonging, by it redelivered to the company. The lease provides that the annual rental received shall consist of the entire net earnings of the property after paying all expenses of operating the same, and carrying on the business thereof, including all taxes and assessments, payments on incumbrances, interest and sinking fund, all mortgage bonds, and the expenses of repairing and replacing the railroad and premises. It also provides that the lessee shall pay all cost and expense of operating, maintaining, and transacting the business of the demised property, or in any manner connected with, arising out of, or appertaining to the business and the operation or management thereof, and shall indemnify the lessor from and against any and all charges, cost, expenses, suits, damages, demands, and claims of any and all kinds whatsoever, arising out of or in any manner appertaining to or connected with the maintenance, operation, or management of said demised property during the existence of the lease.

The appellant contends that the \$465,000 of bonds were issued, certified, and delivered to the Cœur d'Alene Company to be used in the payment of its debts. The appellee contends that they were issued and delivered to Daniel C. Corbin for and on behalf of himself and his associates as the consideration for the 5,100 shares of stock which he delivered to the railroad company. This is a crucial question in the case, and one upon which the evidence is not altogether clear. It is shown from the books of the trustee that on October 29, \$200,000 of the bonds, and on the following day \$265,000 thereof, were delivered to D. C. Corbin, "president of the Cœur d'Alene Company." Corbin was called as a witness for the appellee. He was then 70 years of age, and his memory as to transactions which occurred 23 years before was uncertain. He testified, however:

"I think the agreement was that the Northern Pacific undertook to pay, if there was any indebtedness. We certainly did not. I made the sale, and it was, so to speak, I turned over the stocks to the Northern Pacific Railway Company, and got the price that was to be paid for it. After that I had nothing to do with it. I immediately left the company, and I do not remember that I had anything to do with it except when I was in New York." (This must have been at the time when he received the bonds.)

He further testified, in answer to the question whether he or his associates received any benefit from the general first mortgage:

"No, I should think not. I presume it was used, probably to pay us, I presume. I know we got our money."

Again he testified:

"I do not think we received any bonds unless possibly we might have received bonds with an agreement for somebody to take them off our hands and pay us the money, because I never had any bonds. * * * If they ever came into my hands, they just passed through my hands. I never had any, I am quite sure of that."

M P. Martin, formerly assistant general auditor of the railroad company, in answer to the question, "Where did these \$465,000 bonds go; who got them?" said:

"I suppose the promoters of that enterprise did. Q. That is, Mr. Corbin and his associates? A. Yes, sir. His rights and so on were worth something. Q. He did get that when he sold out as part of the consideration for the sale of the road? A. He and his associates certainly ought to get it. There were some other things. He had some surveys, I believe, that the Northern Pacific (paid) for, and also some stock of material that the Northern Pacific paid for."

The testimony so far, it is to be admitted, leaves it uncertain whether the bonds were turned over to the company to be used in payment of its debts, or were delivered to Corbin and his associates in payment for their 5,100 shares of stock. But it seems clear that, unless the railroad company paid for the stock in the manner so indicated, it never paid for it at all. Counsel for the appellant contends that the consideration for the stock was the guaranty of the railroad company to pay the bonds and the interest thereon. But this does not impress us as an adequate explanation of the transaction. In the agreement between Corbin and the railroad company, it was stipulated that the payment of the interest and principal of the bonds by the railroad company was to be the rental for the use of the demised property, and there is nothing in the testimony or in any of the instruments to show that the railroad company's guaranty was to be the consideration for anything other than for the use of the property. At the time when the lease was made, the Cœur d'Alene Company owned and was in possession of a property, the value of which evidently largely exceeded the company's indebtedness. Before and at that time the property was producing net earnings of 8 per centum upon \$1,000,000 of capital stock. During the first 21 months of the term of the lease, the net earnings were \$176,000. The cost of the property is not definitely shown, but it would seem from the testimony of Corbin that it was something above the amount realized on the first mortgage bonds of \$360,000. Corbin was unable to state whether the total cost was less or more than \$400,000, and we may assume that it was approximately that sum. The 5,100 shares of stock transferred to the railroad company were valuable, therefore, and it is not conceivable that the owners thereof would have parted with them without receiving in return a substantial equivalent. That the stock was valuable is further shown by the fact that the railroad company, after it had acquired the majority thereof, purchased the remainder at a cost of \$250,000. After the lease the Cœur d'Alene Company possessed nothing subject to execution, save its interest in the rental reserved. By April 3, 1889, all of the directors and officers of the Cœur d'Alene Company had resigned, and their places had been filled by officers and employés of the railroad company. The president of the railroad company became the president of the Cœur d'Alene Company. On May 29, 1889, the directors of the Cœur d'Alene Company declared a dividend of 6 per cent. to its stockholders. More than one-half of this was payable to the railroad company as the principal stockholder. From and after that date, although for a few months there were net earnings of the leased

property, there is no evidence that any dividend was ever declared, or that any meeting of the directors of the Cœur d'Alene Company was ever held. It would seem that there was no occasion for further meetings, for the whole of that company's possessions and the majority of its stock had been transferred, and the remainder of its stock was soon thereafter transferred to the railroad company.

It is a significant fact that, about a month after the lease was made, the railroad company, which then had the control of the Cœur d'Alene Company, permitted Corbin to receive the bonds, and that, so far as the evidence shows, neither the Cœur d'Alene Company nor the railroad company ever took any interest in or supervised or even considered the question of the disposition thereof. If, as contended by the appellant, those bonds were to be used in paying the debts of the Cœur d'Alene Company, it behooved the railroad company to see that they were so used, in order that such debts might not thereafter be enforced against the rental which the railroad company had covenanted to pay, rental that was nominally to be paid to the Cœur d'Alene Company, but of which in reality more than one-half was then payable, and eventually all was to be paid to the railroad company as the sole stockholder. Although there were special meetings of the directors of the Cœur d'Alene Company after the execution of the lease, in none of them was any mention made of the \$465,000 in bonds which were delivered to Corbin. It seems clear that no portion of those bonds was in fact used to pay debts of the Cœur d'Alene Company. All these considerations tend to the conclusion that the understanding was that the bonds were to be delivered to Corbin in consideration of the transfer of the property and of the control of the stock, and for the individual use of Corbin and his associates, and not for the benefit of the Cœur d'Alene Company.

In brief, viewing the whole transaction, and looking through the form to the substance thereof, we are of the opinion that the evidence sustains the conclusion that the mortgage, although it was authorized and executed by the Cœur d'Alene Company, was procured by the railroad company, with the intention to use a portion of the proceeds thereof to buy the stock of the mortgaging company. In other words, by agreement with, and with the consent of Corbin and his associates, the railroad company used a portion of the assets of the Cœur d'Alene Company for its own purposes, and the Cœur d'Alene Company never received the same or the benefit thereof. The fact that Corbin and his associates participated in the transaction and in the diversion of the assets of their company does not relieve the railroad company, which was the beneficiary, and which in this indirect way obtained the proceeds of a portion of the bonds, from its liability to answer as for a diversion of the assets. To this state of facts, the doctrine of the decision in *Chicago, etc., Railway Co. v. Chicago Bank*, 134 U. S. 276, 10 Sup. Ct. 550, 33 L. Ed. 900, is applicable. In that case the court said:

"The properties of a corporation constitute a trust fund for the payment of its debts; and, where there is a misappropriation of the funds of a corporation, equity, on behalf of the creditors of such corporation, will follow the funds so diverted. The Milwaukee Company from securities on the property

of the Pacific Company received nearly \$3,000,000. Part it used for the benefit of the lessor company, and part it appropriated to its own benefit. Can it do this and let the lessor company's debt go unpaid? Equity answers this question in the negative."

Nor is the appellant relieved from the application of that doctrine by the fact that, after taking possession under the lease, the railroad company spent for betterments and extension of the Cœur d'Alene Railroad a sum of money in excess of the amount of the bonds so diverted. Answering a similar proposition in the case above cited, the court said:

"The misappropriation gave to the bank at the time at which it was made the right to pursue the misappropriated proceeds into the hands of the Milwaukee Company. That right the Milwaukee Company could not thereafter defeat by spending money on the property of the Pacific Company; and it was unnecessary to enter into any inquiry as to the reasons for this subsequent expenditure, or as to how far the necessities of its own business on the through line from Chicago to Omaha compelled further improvements on that portion of the line east of the Mississippi river."

Having reached the conclusion that the sum due the appellee became a debt of the railroad company, the question arises whether the railway company has succeeded to the obligation to pay it. One of the grounds on which it is asserted that the obligation rests is that the foreclosure proceedings by and through which the railway company acquired the property of the railroad company were in equity fraudulent as to the appellee because consummated pursuant to a previous collusive agreement between the bondholders and the stockholders of the railroad company, whereby the latter were permitted to retain an interest in the property acquired by the railway company on the foreclosure. In *Louisville Trust Co. v. Louisville, etc., Ry.*, 174 U. S. 674, 19 Sup. Ct. 827, 43 L. Ed. 1130, the court said:

"Assuming that foreclosure proceedings may be carried on, to some extent at least, in the interests and for the benefit of both mortgagee and mortgagor (that is, bondholder and stockholder), we observe that no such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests not merely of the mortgagee, but of every creditor of the corporation. In other words, if the bondholder wishes to foreclose and exclude inferior lienholders or general unsecured creditors and stockholders, he may do so; but a foreclosure which attempts to preserve any interest or right in the mortgagor in the property after the sale must necessarily secure and preserve the prior rights of general creditors thereof. This is based upon the familiar rule that the stockholder's interest in the property is subordinate to the rights of creditors; first of secured, and then of unsecured, creditors. And any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation."

Does the evidence show that the foreclosure proceedings were had under an understanding or agreement, whereby there was to be and was recognized and preserved any interest in the stockholders of the railroad company in the property? There is no question but that the foreclosure decree was entered upon the consent of all the parties to the suit. The suit had been commenced on October 18, 1893. It had rested upon the demurrer of the railroad company since April 2, 1894. On April 27, 1896, the date of the decree, the railroad company filed

its answer admitting the allegations of the bill of complaint and setting forth the facts necessary to permit a decree without reference to a master. The interveners allied with the railroad company did the same thing, and on the same date. Up to that time there had been resistance to the foreclosure on the part of the railroad company. In 1893, after the railroad company had gone into the hands of receivers, and a new board of directors had been elected, the company filed a petition for the removal of the receivers, alleging that it was through the mismanagement of the former executive officers of the railroad company, who subsequently had been appointed receivers, that the company had become involved in financial difficulties. In January, 1894, the directors issued to the stockholders a printed circular reiterating such charges of mismanagement, calling upon the stockholders to protect their interests, advising them that, if properly protected, they "can secure equitable terms in any reorganization," and stating that the directors "propose to secure justice for the stock," by bringing suits for the recovery of large sums of money improperly spent, and diverted, and suggesting that stockholders contribute \$12.50 per hundred shares to support the measures thus indicated. The general and harmonious assent to the foreclosure decree was the result of the reorganization scheme promulgated March 16, 1896, whereby the railroad was to be bought at foreclosure by a new company, which was to retire the old bonds with new ones and retire the stock of the railroad company by issuing in exchange therefor shares in the new company. As consideration for shares of the new company, holders of preferred stock of the old company were to pay \$10 per share for new preferred and common stock, and holders of the common stock were required to pay \$15 per share for common stock in the new company, and stockholders were allowed stock in the new company upon these terms, only on condition that they surrendered their stock in the old. The reorganization scheme was an agreement made by the reorganization committee as party of the first part; the Mercantile Trust Company, party of the second part; J. P. Morgan & Co., party of the third part; the holders of mortgage bonds of the railroad company, holders of certificates of the Mercantile Trust Company for general second, general third, and consolidated mortgage bonds, holders of collateral trust notes and dividend certificates of the railroad company and the mortgage bonds of various branch railroads of the railroad company, and holders of the preferred and common stock of the railroad company, "who shall become parties to this agreement," parties of the fourth part; the Deutsche Bank of Berlin, as depositary, party of the fifth part; and a committee, on behalf of various interests in the railroad company, called the Protective Committee, "in evidence of their active support of the reorganization thereof, according to the plan provided herein," parties of the sixth part.

It is evident that the scheme was inspired by the desire to maintain the integrity of the railroad system. There were many difficulties in the way of accomplishing this. There were 15 subsidiary roads controlled by as many different corporations and subject to liens of different ranks, which were held by numerous bondholders. There were holders of first mortgage bonds on distinct portions of the system and

holders of general mortgage bonds upon the whole system and numerous stockholders whom it was desired to protect and whom, on account of the complication of the situation, it was decided to protect by allowing them a substantial interest in the reorganized company. Counsel for the appellant admit that only by the plan adopted or one substantially similar could the property have been placed upon a sound financial basis.

It is shown that the agreement was carried out according to its terms, that the new company was acquired and its name was changed to Northern Pacific Railway Company, that it became the purchaser of the property at the foreclosure sale, that it paid therefor the old bonds which had been vested in it under the reorganization, and issued its own stock for delivery to the stockholders who complied with the terms of the reorganization scheme. After the foreclosure decree, and in July, 1896, an agreement was made between the railway company and J. P. Morgan & Co., whereby the former was to issue and deliver to the latter \$75,000,000 in preferred stock, \$80,000,000 in common stock, \$130,000,000 in prior lien bonds, and \$60,000,000 in general lien bonds, amounting in all to \$345,000,000. The agreement stipulated that the said securities were of that value, and it provided that the securities and properties theretofore or thereafter received by J. P. Morgan & Co. pursuant to the agreement should be vested in the railway company, and it declared that it was the intention of the agreement and of the parties thereto that the railway company should become and be the suitable agency contemplated in said plan and agreement for the ownership and operation of the properties acquired and to be acquired pursuant to said plan and agreement. The evidence shows that this plan also was fully carried out. In brief, the bondholders received new bonds secured by the same property and permitted their old bonds to be used for the purpose of foreclosure, and to enable the stockholders to buy the property for their own use, the same to be held by a new company, composed of the stockholders of the old.

But it is urged that the appellant's answer denies, and that the evidence fails to show any fraudulent intent on the part of those who were engaged in the reorganization scheme, and the transactions which attended and followed it, that the reorganization agreement required stockholders of the railroad company as a condition to the issuance to them of stock in the new company to pay on the exchange of preferred stock \$10 per share, and on the exchange of common stock \$15 per share, and that this was as much as the new stock was worth, and that the transaction was in effect a purchase of the new stock at no less than its actual value. So far as the intent is concerned, it may be conceded that there is absence of evidence of actual fraudulent intention. But where the effect of such a transaction is to exclude creditors from recourse to property which should have been subject to their claims, the law will hold it fraudulent as to them, no matter what may have been the actual purpose thereof. Nor are we convinced that the transaction whereby the new stock was issued was in effect a subscription to and a payment for new stock at its full value. It is not in evidence that any outsiders were allowed to take stock in

the new company at those figures, and it is a significant fact that preferred stockholders were given the right to exchange on the payment of the \$10 per share, while the common stockholders were required to pay \$15. The evidence is that the preferred shares were at all times of twice the value of the common. In the agreement of July, 1896, it was stipulated that the value of the property transferred to the new company was \$311,000,000. It is not disputed that the railroad company's property had cost, up to August 31, 1896, \$241,067,769.91. Its bonded indebtedness, principal and interest, was \$152,334,450.50. The first trial balance of the receivers shows that the stocks and bonds and securities of other companies owned by the railroad company at the time it went into the hands of the receivers was \$128,609,536.30, and that the contingent liabilities for branch roads was \$45,144,000.

Again, it is to be observed that the railway company bid the property in for \$12,500,000, subject to liens of mortgages superior to those on which the foreclosure was had, aggregating about the sum of \$44,000,000, and subject to receiver's certificates and costs of about \$5,000,000, making the total cost to the railway company about \$61,500,000. In addition to this, it acquired the \$3,500,000 cash which was turned over to it. By the cancellation of the \$12,500,000 of mortgage bonds used in payment for the property at the foreclosure sale, there was left in the hands of the reorganization committee about \$87,000,000 in uncanceled bonds which were afterwards turned over to the railway company. They formed the principal portion of the claim which the railway company presented against the unmortgaged assets of the railroad company. From these figures it will be seen that, if the cost of the company's property represented its full value, it had an excess of assets over liabilities of \$88,733,319.41. We are of the opinion that the market price of the stock at that time, owing to the attendant conditions, should not be taken as the measure of its value. The first year after the reorganization the railway company earned a surplus of \$489,828.90. Out of the earnings of the second year, dividends of \$3,000,000 were paid, \$811,709.35 were spent in betterments on the road, and a surplus of \$2,897,847.60 was set aside. From that time the earnings of the road were greatly increased. These facts, together with the evident solicitude of the Protective Committee to protect the stock, and the fact that the stockholders deemed it to their advantage to avail themselves of the protection, lead to the conclusion that by the foreclosure, the reorganization, and the transfer of the property to the railway company, a substantial benefit was secured to the stockholders of the railroad company. In the circular of January, 1894, it was said:

"If properly protected, stockholders can secure equitable terms in any reorganization. Let the law and the terms of the bonds be what they may, the fact is that an actual foreclosure of the consolidated mortgage and the sale of the road would involve so much time and trouble as to make it practically impossible. The question as to the land grant, the claims of holders of preferred stock and others of equal importance, make it essential that the rights of the stockholders be not ignored. * * * While recognizing the superior claims of the bonds, the directors propose to secure justice for the stock."

From a consideration of the proceedings in the foreclosure suit, whereby was evidenced the general assent of all parties in interest to

a decree of foreclosure, and the antecedent, concurrent, and subsequent documents and agreements, the conclusion seems inevitable that the parties to the agreement aimed to and did avoid the "actual foreclosure" which was deprecated in the circular, and that the foreclosure which was had was a foreclosure in form and not in substance, that it was but the means adopted for reorganization, to take the road and the property out of the hands of the receivers, to protect the lienholders, to relieve the property of the burden of the unsecured indebtedness, and also to protect the stockholders, and that it did in fact produce all these results.

But the appellant contends that no agreement of any kind for sale of the stock of the railway company or any part thereof to the stockholders of the railroad company was proposed or made until after the publication of the plan and until after the syndicate subscribers by their contract had become bound to purchase the stock. We think this statement is not altogether sustained by the record. It is true that the appellant so alleged the facts in its answer to the bill, and, inasmuch as by the bill an answer under oath was not waived, the answer which was made under oath became evidence of the facts well pleaded therein. But the answer as to this particular matter may be regarded, not as a statement of the facts, but as the construction which the appellant placed thereon. We are not precluded from resorting to the agreement of reorganization and other papers to determine what is their purport and effect. We find nothing therein to indicate that the syndicate subscribers ever by contract became bound to purchase the stock. In the plan of March 16, 1896, it is recited that a syndicate has been formed to provide the cash estimated to be necessary to carry out the terms of the plan of reorganization, and to furnish the new company with cash for working capital in the further sum of \$5,000,000 for the use and betterment of its property; but the instrument is silent as to the method by which such funds were to be obtained, and it clearly contemplates the issuance of new stock to the holders of the old, and by various provisions recognizes the rights of the stockholders of the old company, and makes provision for their protection.

But assuming it to be true that the syndicate subscribers did become bound to purchase the stock, that fact does not materially alter the complexion of the transaction. If they became so bound, theirs was a contingent liability only—a liability which, in view of the value of the contemplated holdings of the new company, they might safely incur. The important fact is that the syndicate did not in fact purchase the new stock, and that the right of the stockholders of the old company to acquire the same was recognized from the first. The stockholders were represented by the Protective Committee in the reorganization scheme. They came into the scheme, and they became the owners of the new stock in pursuance thereof. In brief, by the reorganization the property of the old company was transferred to the new, and the stockholders of the old company became the stockholders of the new, having at all times retained an interest as stockholders. Under this state of facts, the appellee has the right to look to the new company for the payment of his judgment. In *Railroad Company v. Howard*, 7 Wall. 392, it was held that a sale under foreclosure of

mortgage of an insolvent railroad company, expedited and made advantageous by an arrangement between the mortgagees and the stockholders, whereby, after payment to the mortgagees of a percentage of the debts due them, the stockholders of the company were to receive the residue of the proceeds, was fraudulent as against the general unsecured creditors, notwithstanding that the road was mortgaged far above its value and on a sale in the open market did not bring enough to pay the mortgage debts, so that in fact if there had been an ordinary foreclosure, without arrangement between the mortgagees and the stockholders, the whole proceeds of the sale would have belonged to the mortgagees. Said the court:

"Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it into whosoever possession it may be transferred, unless it has passed into the hands of a bona fide purchaser, and the rule is well settled that stockholders are not entitled to any share of the capital stock, nor to any dividend of the profits until all the debts of the corporation are paid."

In addition to the right of recourse against the railway company on the theory that its stockholders retained an interest in the property transferred upon the reorganization, the court below sustained the right of the appellee to resort to the sums received by the railway company out of the proceeds of the unmortgaged property of the railroad company, to wit, the \$1,200,000 received by the railway company on its holdings of the uncanceled bonds of the railroad company, and the dividend of \$108,000 received by it on the uncanceled bonds of the Cœur d'Alene Company. The unmortgaged property of the railroad company was administered under the supplemental bill filed on May 25, 1896, by the Farmers' Loan & Trust Company, in which, as trustee, it alleged that there were certain lands of the railroad company not included in the mortgages, and that the trust company was a judgment creditor of the railroad company, and it prayed that the court administer and distribute the unmortgaged assets. The railroad company and all parties to the original bill answered the supplemental bill on the day on which it was filed, admitting the truth of all the allegations thereof. Thereupon followed an order for the sale of the unmortgaged land, a sale of the same to the railway company, a decree by consent confirming the sale, a report by the master of the allowance of claims, and an order distributing the fund in accordance therewith. The debts proven before the master aggregated \$98,032,928.53, of which \$197,020.42 were allowed to outside parties in small amounts, and the remainder was allowed to the railway company on the bonds held by it, and on other indebtedness which it had acquired as part of the reorganization scheme. Upon these proofs of debt it received the dividend of \$1,200,000. The dividend of \$108,246.98 was paid on a claim of \$1,082,469.84 based on the following facts. On January 11, 1897, the property formerly belonging to the Cœur d'Alene Company was sold on foreclosure to the railway company for \$220,000. The railway company at that time had acquired \$359,000 of the \$360,000 of the first mortgage bonds and the entire issue of \$878,000 of the second mortgage bonds; the former having been paid for in cash at par, and the latter by the nonassessable preferred stock of the railway com-

pany. The difference between the total amount of the bonds so held by the railway company and the sum which it bid on the property was presented by the railway company as a claim against the railroad company. We find it unnecessary to enter into a discussion of the numerous questions involved in this branch of the controversy for the reason that in our judgment the decree of the Circuit Court is sustainable on the ground already indicated.

So far as it concerns the right of the appellee to pursue the property transferred to the new company by the reorganization, the relief which the appellee seeks may be accorded under the doctrine of the decision in *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. 619, 28 L. Ed. 547, which is thus expressed:

"In such cases the court does not act as a court of review, nor does it inquire into any irregularity or errors of proceeding in any other court; but it will scrutinize the conduct of the parties, and, if it finds that they have been guilty of fraud in obtaining a judgment or decree, it would deprive them of the benefit of it, and of any inequitable advantage which they have derived under it."

The purpose of the present suit is to deprive one of the parties to the foreclosure suit of a benefit which it derived under the decree therein. It is to require the railway company, which obtained the property as the result of the decree and the agreement and understanding of the parties whereon it was based, to devote a portion of the property so obtained to the payment of the claim of one who was equitably entitled to receive the same out of the property so transferred. It is true that a decree of foreclosure is conclusive and binding as to all questions properly in issue between the mortgagor and the mortgagee, and that a creditor of the mortgagor is in privity with him as to all such issues, so that he, as well as the mortgagor, is bound by the decree, for the reason that his claim upon the mortgagor's property is derived through the mortgagor and is subject to all previous liens or preferences or conveyances made in good faith. But where the mortgagor by agreement with the mortgagee assumes an attitude hostile to that of the creditor, whereby the creditor is deprived of his rights, the latter is no longer represented by the mortgagor, nor is he precluded thereafter from advancing the charge of fraud against one who thus inequitably obtained an advantage by the decree. *Moran v. Hagerman*, 12 C. C. A. 239, 64 Fed. 499.

In *Black on Judgments*, § 605, it is said:

"It is now well settled upon high authority that, where no fraud or collusion has been shown in the recovery of a judgment, such judgment is conclusive of the fact and the amount of indebtedness of the judgment debtor, and it cannot be collaterally impeached by third persons in a subsequent suit where such indebtedness is called in question."

In support of that proposition, the text-writer cites the leading case of *Candee v. Lord*, 2 N. Y. 269, 51 Am. Dec. 294, in which the court said:

"In creating debts, or establishing the relation of debtor and creditor, the debtor is accountable to no one unless he acts mala fide. A judgment, therefore, obtained against the latter without collusion, is conclusive evidence of the relation of debtor and creditor against others. * * * Where, however, fraud is established, the creditor does not claim through the debtor but

adversely to him, and by a title paramount, which overreaches and annuls the fraudulent conveyance or judgment by which the latter himself would be estopped."

The doctrine is well established that a judgment which has been procured by the fraudulent contrivance of the debtor or the collusion of both parties is subject to collateral attack by any one a stranger to the judgment who has been injuriously affected thereby. *Black on Judgments*, § 293; *Pacific Railroad of Missouri v. Missouri Pac. Ry. Co.*, 111 U. S. 504, 4 Sup. Ct. 583, 28 L. Ed. 498; *Michaels v. Post*, 21 Wall. 398, 426, 22 L. Ed. 520; *Guardian Trust Co. v. Kansas City So. R. Co.*, 146 Fed. 337, 76 C. C. A. 615. The appellant contends that the appellee is precluded by the decree for the reason that he acquired his rights *pendente lite* and is therefore bound by the decree as fully as if he had been made a party to the foreclosure suit, and it cites *Stout v. Lye*, 103 U. S. 66, 26 L. Ed. 428; *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 385, 14 Sup. Ct. 127, 37 L. Ed. 1113; *Herring v. Railway Co.*, 105 N. Y. 340, 12 N. E. 763; and other cases. In *Stout v. Lye*, the bill was brought by a lien creditor, who at the time of the commencement of the foreclosure suit against the debtor was but a contract creditor. He sought to reopen the foreclosure decree and to show that the mortgage was illegal for want of power in the mortgagee to take it, and to have certain payments of usurious interest credited upon the debt. The court held that, having secured his lien *pendente lite*, he was not a necessary party, and that he was bound by the doctrine of *lis pendens*, and that as a simple contract creditor he could not question the validity of the mortgage or the amount due upon it, but was bound as to such matters as a privy of the judgment debtor. But there was in that case no allegation of *mala fides* in the defense which the judgment debtor made to the foreclosure suit. In brief, in none of the cases cited by the appellant is involved the effect of the want of good faith in the defense made by the judgment debtor. In *Herring v. Railway Co.*, the court, speaking of the creditors, said:

"They were represented therein by the people through the Attorney General and by the receiver, and by the defendant the Erie Railway Company. They could undoubtedly have been permitted to intervene, or to appeal from the judgment or any of the orders, if any ground of appeal existed. But they had no right to attack the same collaterally unless for fraud sufficient, within the rules applicable to such cases, to sustain an action to set aside a fraudulent judgment."

The appellant contends that the court in which the foreclosure proceedings were had having found that there was no such participation by stockholders in the reorganization as to invalidate those proceedings, its judgment, rendered after a consideration of the specific objections here relied on, is binding upon the appellee. The judgment so referred to was rendered upon intervention proceedings brought by certain unsecured creditors of the railroad company, in the court in which the foreclosure proceedings were pending and before they had been consummated by a sale. The judgment roll is not in the record, in this case, but from the opinion of the court (*Paton v. Northern Pac. [C. C.]* 85 Fed. 838) it appears that the intervening complainants set forth the plan of reorganization of the railroad company, al-

leged that thereunder the stockholders were to retain an interest in the property, the retention of which was a fraud upon the general creditors, and they asked that the sale of the property be enjoined. The court, upon a consideration of these objections, held their bill to be without equity and refused to enjoin the sale. But that decision is not *res judicata* as to the present suit, for the appellee was not party to or represented in that suit. "There is in general no such privity between several creditors of the same debtor that proceedings taken by one against the fund, the estate or specific property to which all must look for satisfaction, will raise an estoppel against the others." 23 Cyc. 1255, and cases there cited. Nor is the decision in that case a precedent for our guidance in the present suit, for we think its doctrine runs counter to the opinion of the Supreme Court in *Louisville Trust Co. v. Louisville, etc., Ry. Co.*, *supra*.

The appellant earnestly contends that upon principles as old as equity jurisprudence the delay of the appellee in commencing this suit and in prosecuting the proceedings preliminary thereto is fatal to his success herein. Much may be said both for and against the defense of laches as applicable to this case. The action which was begun by Spalding in the District Court of Idaho Territory in March, 1887, was defended by the railroad company. It was not brought to trial until the year 1890. The judge before whom the case was tried rendered an opinion in favor of Spalding, but before he could prepare findings and enter judgment he died. At this time, as the cause of further delay, there intervened the forming of the state government of Idaho, and the transfer of causes from the territorial courts to the state courts. Spalding's attorney was elected to Congress, and during much of the following two years he was out of the state. During that interval the cause was continued more than once by stipulation at the request of the railroad company's counsel. At the end of his term in Congress, Spalding's attorney was elected to the bench to preside over the court in which the action was pending. His disqualification to try the case caused still further delay. Finally, in April, 1896, the cause was tried, and Spalding obtained his judgment. The railway company by its attorneys and at its own expense appealed the cause to the Supreme Court of Idaho, where the judgment was affirmed in November, 1897. 5 Idaho, 528, 51 Pac. 408. The remittitur from that court did not reach the lower court until December, 1897. Early in 1898 Spalding caused execution to issue on the judgment, but no property could be found. On May 3, 1898, he commenced an action in the nature of supplemental proceedings and prayed for a receiver of the property of the Cœur d'Alene Company, making that company, the railroad company, and the railway company, parties defendant. The railway company removed the cause to the Circuit Court of the United States for the District of Idaho. That court remanded it to the state court. The railway company appealed the order to remand to this court, where the ruling of the Circuit Court was affirmed. 93 Fed. 286, 35 C. C. A. 295. The railway company then presented its petition for a writ of certiorari to the Supreme Court of the United States. The petition was denied May 1, 1899. 174 U. S. 801, 19 Sup. Ct. 884, 43 L. Ed. 1187. The state court of Idaho then ap-

pointed a receiver. The railway company appealed to the Supreme Court of Idaho. 6 Idaho, 638, 59 Pac. 426. That court reversed the order of the lower court and directed that the case be dismissed for want of jurisdiction.

The appellee, having ascertained that Spalding was denying his right to the judgment, commenced an action against Spalding on December 20, 1898, in the Circuit Court of the United States for the District of Idaho to establish his title to the judgment. Defense was made to the action, but on May 21, 1901, the appellee obtained his judgment affirming his title to the judgment, with the sole power to enforce it. Spalding gave notice of appeal to this court. The appeal was not dismissed until January, 1902. About this time there was correspondence between the appellee's attorneys and the railway company looking to a settlement of the judgment. In January, 1903, the appellee's attorneys advised the appellee, in view of the fact that the statute of limitations had nearly run on the judgment, that it was inadvisable to proceed further in the effort to collect the judgment until they had revived it under the laws of Idaho. Suit to revive the judgment was commenced. The railway company removed the suit to the Circuit Court of the United States, and vigorously contested the same, so that the judgment was not obtained until October 23, 1905. The railway company then appealed from the judgment of revivor to this court, and the appeal was still pending when the present suit was commenced. The review of these facts indicates that the appellee, with the exception of the interval between January, 1902, and January, 1903, had been endeavoring to establish his rights in the judgment and to compel its enforcement, and that in all such litigation except that which was directed against Spalding he had been opposed by the railway company, and that from time to time he notified that company of his rights and warned it to pay the judgment to no one but himself. He gave such notice before bringing his action against Spalding, and later, August 3, 1899, he gave notice of the pendency of his action against Spalding, and when he established his right to the judgment in that action he notified the railway company of that fact.

The doctrine of laches rests upon equitable principles which are neither arbitrary nor technical, and what amounts to laches depends largely upon the circumstances of each particular case. The ultimate inquiry is on which side would fall the balance of justice in sustaining or denying the defense. The important elements to be considered are the length of time which has elapsed, the nature of the acts which have been done in the meanwhile, the knowledge which the complainant had of the fraud which he charges, and the time when he acquired that knowledge and the change in the situation during neglectful repose either as to the loss of evidence which would have been available to the defendant or the advance in value of the property which may be the subject of the suit. Said the court, in *Gallihier v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738:

"Laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting a claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."

And in *Wilson v. Wilson*, 41 Or. 459, 69 Pac. 923, Judge Wolverton said:

"If * * * it clearly appears that lapse of time has not in fact changed the conditions and relative position of the parties, and that they are not materially impaired, and there are peculiar circumstances entitled to consideration as excusing the delay, the court will not deny the appropriate relief although a strict and unqualified application of the rule would seem to require it. Every case is governed chiefly by its own circumstances."

It cannot be said in this case that the appellant has been prejudiced by the delay, in that it has thereby lost the evidence or means of proving the facts and circumstances on which its defense on the merits depends; nor is the case complicated by an increase in value of the subject of the litigation. The railroad properties, it is true, have greatly advanced in value since the time of their transfer to the appellant; but the appellee is not here seeking to obtain specific property. He is seeking but the satisfaction of a judgment for money, and his right thereto is in no way affected by an increase in the value of the property which is alleged to be subject to the payment of the same.

It is impossible to escape the conviction that the delay was not prejudicial to the appellant but was to its advantage, and that it was largely caused by its own acts. As successor to the Cœur d'Alene Company, the railroad company actively opposed all efforts of Spalding to obtain a judgment and to enforce his claim, and as successor to the railroad company the appellant strenuously continued the opposition. Those companies were aware, of course, that the ultimate purpose of the litigation was to obtain satisfaction of the appellee's claim out of the property of the railroad company or of the railway company, and they knew that it was a claim for labor and materials which had not been paid for and which went into the construction of property which they acquired and owned. There was a time, it is true, between the years 1890 and 1896, when Spalding appears to have slumbered on his rights; but even in that period the delay was partly caused by the acts of the railroad company's attorneys, and it was a delay that occurred before the time when the appellant acquired the property which it now owns. Where the party interposing a defense of laches has contributed to or caused the delay, he cannot take advantage of it. 5 Pomeroy's Eq. Jur. § 35.

The appellee and his attorney both testified that until shortly before commencing this suit they had no knowledge of the facts which they now rely upon as invalidating the foreclosure decree. According to their testimony, they had knowledge only of the fact that the suit was pending at Milwaukee to foreclose the mortgages, and that a decree to foreclose was rendered and the property was acquired by the appellee; but they had no knowledge of the facts upon which they now seek relief.

In view of all the evidence and the equitable rules applicable thereto, we are not convinced that the court below erred in rejecting the defense of laches.

The decree is affirmed.

EXPLORATION MERCANTILE CO. V. PACIFIC HARDWARE & STEEL CO. et al.†

(Circuit Court of Appeals, Ninth Circuit. February 14, 1910.)

No. 1,745.

1. COURTS (§ 356*)—PROCEEDINGS FOR REMOVAL OF CAUSE—NOTICE—FEDERAL PRACTICE.

In proceedings in error in the federal courts, the citation signed by the judge of the court to which the writ is addressed or any judge or justice of the appellate court is the notice required by Rev. St. § 998 (U. S. Comp. St. 1901, p. 712).

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 356.*]

2. CONTEMPT (§ 80*)—DENIAL OF PRIVILEGES AS LITIGANT—RIGHT TO APPEAL—PARTY IN CONTEMPT.

The fact that proceedings for contempt are pending against a party does not debar him from the right to prosecute proceedings for review of the judgment or order which he is charged with violating.

[Ed. Note.—For other cases, see Contempt, Dec. Dig. § 80.*]

3. BANKRUPTCY (§ 451*)—APPELLATE PROCEEDINGS—MATTERS REVIEWABLE.

The question whether a petition in involuntary bankruptcy alleges an act of bankruptcy does not go to the jurisdiction of the court, and is reviewable by the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 451.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

4. BANKRUPTCY (§ 81*)—INVOLUNTARY PETITION—SUFFICIENCY.

A petition in bankruptcy against a corporation which alleges that its entire capital stock is owned by three persons who compose its officers and directors, that within four months and when the corporation was insolvent, pursuant to a conspiracy between them to hinder, delay, and defraud its creditors, one of the stockholders commenced a suit against it asking for the appointment of a receiver, that the other stockholders accepted service, appeared, and joined in asking the appointment of one of them as receiver, which was made, is sufficient to sustain a verdict finding that the corporation "being insolvent applied for a receiver" for its property which constitutes an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3a (4), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1309).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 81.*]

5. BANKRUPTCY (§ 60*)—ACTS OF BANKRUPTCY—APPLICATION FOR RECEIVER.

The fact that an application by an insolvent corporation to a state court for the appointment of a receiver for its property was not authorized by the laws of the state does not prevent such application from constituting an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3a (4), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1309).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*]

6. BANKRUPTCY (§ 60*)—"ACT OF BANKRUPTCY"—APPLICATION FOR RECEIVER.

To constitute an act of bankruptcy under the provision of Bankr. Act July 1, 1898, c. 541, § 3a (4), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1309), that it shall be an act of bankruptcy if a person "being insolvent applied for a receiver or trustee for his property," it is not essential that the application should be made on the ground of insolvency,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied March 7, 1910.

at least where the application is by a corporation for the purpose of winding up its affairs and liquidating its indebtedness.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*

For other definitions, see Words and Phrases, vol. 1, p. 118; vol. 8, p. 7562.]

In Error to the District Court of the United States for the District of Nevada.

Petition in involuntary bankruptcy on the part of certain creditors of the Exploration Mercantile Company, a corporation organized under the laws of and doing business in the state of Nevada, to have said corporation adjudged a bankrupt on the grounds that more than four months prior to the filing of the petition in bankruptcy the corporation had been insolvent, and during that time had committed an act of bankruptcy in applying to the district court of the state of Nevada for a receiver of its property. From an adjudication as a bankrupt. it brings error. Affirmed.

The opinion of Farrington, District Judge, in the court below, is as follows:

A jury having found that the Exploration Mercantile Company committed an act of bankruptcy by applying for a receiver while it was insolvent, a motion is now made in arrest of adjudication because of the alleged insufficiency of the creditors' petition. It is averred in the amended petition that "at the date of filing the original petition herein, to wit, September 12, 1908, for more than four months continuously next prior thereto and ever since said time, the aggregate of said Exploration Mercantile Company's property, at a fair valuation, amounted to less than the sum of \$60,000, and that at all the said times its debts were in excess of \$74,000." This is a sufficient allegation that the Exploration Mercantile Company was insolvent August 6, 1908, when an application was made to the state court for appointment of a receiver for the property of the company. It is next alleged that the entire capital stock of the company consists of 50,000 shares of the par value of \$1 each, of which W. C. Stone owns 48,000 shares, F. G. Hobbs, 1,000 shares, and C. E. Wylie, 1,000 shares; that these three persons not only owned all the capital stock, but they constitute the entire board of directors of said corporation, Stone being its president, Wylie its vice president, and Hobbs its secretary and treasurer; that these three persons conspired and agreed to evade the provisions of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) and to prevent creditors from obtaining a knowledge of the company's affairs, and from participating in the choice of a trustee; to hinder, delay, and defraud the creditors of the company, and to force them to accept less than the full amount of their claims; "that in pursuance of said conspiracy and agreement said directors and officers, acting for and on behalf, and as the act and deed, of said corporation, which was then and there insolvent as aforesaid, on the 6th day of August, A. D. 1908, caused to be filed in the district court of the First judicial district of the state of Nevada, in and for the county of Esmeralda, an application praying for the appointment of a receiver with a view to the dissolution of said corporation." The petition so caused to be filed was presented by the said W. C. Stone. It was averred therein that the assets of the company amounted to \$95,000, while its liabilities were but \$65,000; that owing to depressed conditions in business and the difficulty of making collections, the assets of the company were in danger of being wasted through attachment or litigation; that the plaintiff Stone is the holder of more than one-tenth of the capital stock of the corporation, and "that said corporation should be dissolved, and that a receiver should be appointed to take charge of the business and affairs of said corporation, that its property may be preserved, its creditors paid, and its assets cared for." The prayer,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in substance, was that a receiver be appointed to manage the affairs of the company with a view to its dissolution. The creditors' petition also alleges that on the same day, August 6, 1908, the above-mentioned petition was filed, summons was issued, on which said Wylie in pursuance of said conspiracy, and as the act of said corporation, indorsed an admission of service; that on the same day the said directors and officers, as the act of said corporation, caused to be filed in said court and cause an appearance and application for the appointment of a receiver of the property of said company. Said appearance reads in part as follows: "W. C. Stone, Plaintiff, vs. Exploration Mercantile Company, a corporation, Defendant. Now comes C. E. Wylie, manager and one of the directors of the above-named defendant, and enters the appearance of the said defendant in the above-entitled cause, and asks the above-entitled court to appoint as receiver of said defendant, C. E. Wylie, the undersigned, one of the directors of said corporation. C. E. Wylie, Manager and Director of the Exploration Mercantile Company."

It is further alleged in the creditors' petition that on the same day "the directors and officers of said Exploration Mercantile Company, a corporation, acting for and on behalf, and as the act and deed, of said corporation, which was then and there insolvent as aforesaid, moved the said state court upon the said pleadings as above set forth, for an order, and said state court, on said day made its order, appointing said C. E. Wylie receiver," etc. On the following day said Wylie entered upon the duties of his office as such receiver; that on September 8, 1908, and at other times, said Stone in pursuance of said conspiracy, and as the act of said corporation, sought to settle claims against it for 60 cents on the dollar; that ever since August 6, 1908, said directors and officers have refused and still refuse petitioners access to the books of the company, and at all times have refused to permit petitioners' representatives to take or assist in taking an inventory of the property of the corporation. Near the end of the creditors' petition is this statement: "Ever since said 6th day of August, A. D. 1908, said Exploration Mercantile Company, a corporation, and each and all of said directors and officers have acquiesced in, upheld, ratified and confirmed the said proceedings and application for, and appointment of, said receiver as aforesaid; and said Frank G. Hobbs has ratified and confirmed the same and has since been continuously in the employ of said receiver." The petition concludes with a prayer that the Exploration Mercantile Company be adjudged bankrupt.

This petition having been filed, within due time thereafter the alleged bankrupt filed its answer, demanding a trial by jury. By consent of both parties the following issues in the form here set out were submitted to the jury: "Whether on the 6th day of August, 1908, the date of the appointment of C. E. Wylie as receiver of the Exploration Mercantile Company by the district court of the First judicial district of the state of Nevada in the case of W. C. Stone v. Exploration Mercantile Company, the aggregate of the property of the said Exploration Mercantile Company was, at a fair valuation, sufficient in amount to pay its debts. Whether on the 12th day of September, 1908, the date of the filing of the petition in bankruptcy in these proceedings, the aggregate of the property of said Exploration Mercantile Company was, at a fair valuation, sufficient in amount to pay its debts. Whether on the 6th day of August, A. D. 1908, the Exploration Mercantile Company, being insolvent, applied for a receiver for its property." The jury, after having heard the evidence and listened to the instructions of the court, returned a negative answer to the first and second interrogatories, and an affirmative answer to the third.

Among the grounds urged in arrest of judgment and of the order of adjudication, there is no intimation that the verdict is not sustained by the evidence. The several grounds may be resolved into one comprehensive objection: The creditors' petition failed to show that defendant was guilty of an act of bankruptcy in this, that it fails to show that defendant applied for a receiver for its property. It is contended that the petition not only fails to show that the corporation applied for a receiver, but under the Nevada statute it was and is impossible for any Nevada corporation to make such an application.

Section 7 of the General Incorporation Law of Nevada (St. 1903, p. 121) provides that every corporation created under the provisions of this act shall have power "to wind up and dissolve itself, or to be wound up and dissolved

in the manner hereinafter mentioned." The power granted is the power "to wind up and dissolve itself or to be wound up and dissolved in the manner hereinafter mentioned." It is the winding up and dissolution of the corporation which is provided for. There is no attempt to circumscribe or limit the power to ask the appointment of a receiver. Receivers are frequently asked and appointed for corporations when there is no thought of dissolution.

Section 89 of the act provides a method of dissolution by voluntary action of the stockholders, officers and creditors.

Section 94, under which the proceedings in this case were had, provides for winding up a corporation by the court, and reads as follows:

"Receiverships and Dissolution by the Court.

"Sec. 94. Whenever a corporation has in ten successive years failed to pay dividends amounting in all to five per cent. of its entire outstanding capital, or has willfully violated its charter, or its trustees or directors have been guilty of fraud or collusion or gross mismanagement in the conduct or control of its affairs, or its assets are in danger of waste through attachment, litigation, or otherwise, or said corporation has abandoned its business and has not proceeded diligently to wind up its affairs, or to distribute its assets in a reasonable time, or has become insolvent and is not about to resume its business with safety to the public, any holder or holders of one-tenth of the capital stock may apply to the district court, held in the district where the corporation has its principal place of business, for an order dissolving the corporation and appointing a receiver to wind up its affairs, and may by injunction restrain the corporation from exercising any of its powers or doing any business whatsoever, except by and through a receiver appointed by the court. Such court may, if good cause exist therefor, appoint one or more receivers for such purpose, but in all cases directors or trustees who have been guilty of no negligence nor active breach of duty shall have the right to be preferred in making such appointment, and such court may at any time for sufficient cause make a decree dissolving said corporation and terminating its existence."

Subsequent sections provide for notice to creditors, presentation of claims to the receiver within a limited time, the barring of claims not so presented, the sale of property, and the distribution of assets. Although the act does not provide for the discharge of the debtor, and is not so entitled, it is essentially an insolvency act. The winding up of the corporation discharges its debts. "An insolvent law is a law for the relief of creditors by an equal distribution among them of the assets of the debtor, but does not necessarily involve the discharge of the debtor." *Harbaugh, Assignee, v. Costello*, 184 Ill. 110, 56 N. E. 363, 75 Am. St. Rep. 147; *In re Merchants' Ins. Co.*, 17 Fed. Cas. No. 9,441; *Moody v. Development Co.*, 102 Me. 365, 66 Atl. 967; *In re Salmon & Salmon* (D. C.) 143 Fed. 395. "In so far as the person and the subject-matter falls within the jurisdiction of the bankrupt act and is within the jurisdiction of the bankrupt court, the state insolvency law is superseded and cannot be invoked." *Littlefield v. Gay*, 96 Me. 423, 52 Atl. 925; *Westcott & Co. v. Berry*, 69 N. H. 505, 45 Atl. 352; *In re Curtis* (D. C.) 91 Fed. 737. In the absence of statutory authority courts of equity have no power to wind up the affairs of a corporation. *Beach on Receivers*, § 86. But when from any cause the property of a corporation is in imminent danger of waste or destruction and a receivership is necessary and there is no other adequate relief, a court of equity has inherent power to appoint a receiver to take charge of the corporate assets and affairs; but this power is to preserve and not to dissolve a corporation, and as soon as the necessity for such supervision ceases, the court must lift its hands and retire. *Beach on Receivers*, § 421. The doctrine that a receiver cannot be appointed for corporate property on application of the corporation itself applies quite as strongly to persons as to corporations. 17 *Ency. Pl. & Pr.* p. 687.

If the rule not only forbids the appointment, but also renders it impossible for a debtor to apply for the appointment of a receiver over his own property, why did Congress declare it an act of bankruptcy for a person being insolvent to apply for a receiver? It is unreasonable to suppose that Congress would prescribe an act which no one can commit. There is a difference between asking and receiving; between the application for and the granting of a receivership. A corporation through its officers may apply for relief which a court

may properly and justly refuse, or which it has no power to grant. When a person who is actually insolvent applies for a receiver for his property, the act of bankruptcy is committed, and this is so irrespective of any action which may be had in the court to which the application is made. The application is in itself an admission that the debtor's affairs require supervision.

The fact that certain powers are conferred by statute upon corporations does not mean that a corporation is unable to perform any act beyond the scope of such enumerated powers. The statute restricts the authority of the corporation, and fixes the limits beyond which its acts are unlawful and in excess of the powers conferred. If it were otherwise a corporation could not be guilty of an ultra vires act, a tort, or a misdemeanor. Corporations commit wrongful, unlawful and even criminal acts, and they are held responsible therefor even though the act is not the formal act of the corporation. *United States v. MacAndrews & Forbes Co.* (C. C.) 149 Fed. 823, 835; *Clark on Corp.* § 63. "There may be actual corporate conduct," says the court in *People v. North River Sugar-Refining Co.*, 121 N. Y. 582, 619, 24 N. E. 838 (9 L. R. A. 33, 18 Am. St. Rep. 843) "which is not formal corporate action; and where that conduct is directed or produced by the whole body, both of officers and stockholders, by every living instrumentality which can possess and wield the corporate franchise, that conduct is of a corporate character, and, if illegal and injurious, may deserve and receive the penalty of dissolution."

A corporation is an association of natural persons united as one body, and endowed by law with the capacity to act in many respects as an individual, as a separate and distinct entity, but a corporation can only act or think or purpose through its officers, directors or stockholders. It is inconceivable that a corporation should form or carry into effect any design which is contrary to the wishes of its directors, officers, and stockholders; it exists to carry out their purposes and their plans. The conception that a corporation is a legal entity existing separate, apart and distinct from the natural persons who compose it is a fiction which has been introduced for convenience in making contracts, acquiring property, suing and being sued, and to secure limited liability on the part of stockholders. "It is a certain rule," says Lord Mansfield, C. J., "that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted." *Johnson v. Smith*, 2 Burr. 962; *Wood v. Ferguson*, 7 Ohio St. 288; *Clark on Corp.* p. 9. The fiction of a corporate entity was never invented to promote injustice or defraud, and when it is used for such a purpose it should be disregarded, and the actual fact should be ascertained. In *re Rieger, Kapner & Altman* (D. C.) 157 Fed. 609, 613; *Bank v. Trebein*, 59 Ohio St. 316, 52 N. E. 834; *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 153, 34 Am. St. Rep. 541; *People v. N. R. S. R. Co.*, 121 N. Y. 582, 613, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843; *United States v. Milwaukee, etc., Co.* (C. C.) 142 Fed. 247, 252; *Holbrook, Cabot & Rollins Corp. v. Perkins*, 147 Fed. 166, 169, 77 C. C. A. 462; *Cawthra v. Stewart*, 59 Misc. Rep. 38, 109 N. Y. Supp. 770; *U. S. & Mexican Trust Co. v. Delaware, etc., Co.* (Tex. Civ. App.) 112 S. W. 447, 460; *Southern E. S. Co. v. State*, 91 Miss. 195, 44 South. 785, 790, 124 Am. St. Rep. 638; 7 Am. & Eng. Ency. L. 633, 634; 1 Cook on Corp. (5th Ed.) p. 27. "For certain purposes the law will recognize the corporation as an entity distinct from the individual stockholders; but that fiction is only resorted to for the purpose of working out the lawful objects of the corporation. It is never resorted to when it would work an injury to any one, or allow the corporation to perpetrate a fraud upon anybody." *Sportsman Shot Co. v. American S. & L. Co.*, 30 Wkly. Law Bul. 87.

In *United States v. Milwaukee Refrigerator Transit Co. et al.* (C. C.) 142 Fed. 247, 255, it was charged that the transit company was a dummy corporation organized, owned and operated by the stockholders of the brewing company as a device to cover the receipt of rebates on interstate shipments of beer. After an exhaustive examination of the authorities, the court stated the principle thus: "If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the motion of legal entity is used to defeat public convenience, justify wrong, pro-

test fraud, or defend crime, the law will regard the corporation as an association of persons."

In *Re Rieger et al.* (D. C.) 157 Fed. 609, a proceeding in bankruptcy, the bankrupts were copartners; in the course of their business they had bought 99 per cent. of the outstanding stock of a corporation, the remaining shares being held by relatives of one of the copartners. Receivers having been appointed for the partnership assets, an application was made to extend the receivership to the property of the corporation. It was charged that the bankrupts having abandoned the partnership business, were still in control of the business and property of the corporation, and if permitted to remain in control they would remove and dispose of it. The court held that all the property of the corporation belonged to the copartners, and entirely ignored the fact that the property belonged to a corporation. The court said: "The fiction of legal corporate entity cannot be so applied by the partners as to work a fraud on a part of their creditors, or hinder and delay them in the collection of their claims, and thus defeat the provisions of the bankruptcy act. The doctrine of corporate entity is not so sacred that a court of equity, looking through forms to the substance of things, may not in a proper case ignore it to preserve the rights of innocent parties or to circumvent fraud."

In *Bank v. Trebein Co.*, 59 Ohio St. 316, 326, 52 N. E. 834, a failing debtor formed a corporation composed of himself and certain members of his family, to which he transferred all his property in exchange for stock of which he received substantially all. He immediately placed all his stock, except one share, with certain of his creditors as security for their claims, and then as president and general manager of the corporation, retained the control and management of the property and business which he had before the corporation was formed. The court declared the corporation, in substance, another Trebein, saying: "The fiction by which an ideal legal entity is attributed to a duly formed incorporated company, existing separate and apart from the individuals composing it is of such general utility and application, as frequently to induce the belief that it must be universal, and be, in all cases adhered to, although the greatest frauds may thereby be perpetrated under the fiction as a shield. But modern cases, sustained by the best text-writers, confine the fiction to the purposes for which it was adopted—convenience in the transaction of business and in suing and being sued in its corporate name, and the continuance of its rights and liabilities, unaffected by changes in its corporate members; and have repudiated it in all cases where it has been insisted on as a protection to fraud or any other illegal transaction."

In *Cawthra v. Stewart*, 59 Misc. Rep. 38, 109 N. Y. Supp. 770, Stewart owned 98 shares of the capital stock of a corporation known as L. C. Stewart & Co., and controlled the other two shares. Cawthra, induced by false representations made by Stewart, who was then a director of the company and its president, invested \$3,000 in the corporate business and received half the stock. Suit was brought against Stewart and the company to rescind the stock contract and recover the amount paid. The corporation demurred that it was a distinct, definite entity, and not liable for any acts of Stewart which it had not authorized. The court said: "Strictly speaking, such terms as 'authority' and 'ratification' and others which imply separate personalities are inappropriate. We do not have a case of agency, but of identity. It cannot properly be said that the corporation could clothe Stewart with authority any more than that Stewart could clothe himself with authority. He was the corporation, and it was only another form of him. Whatever he did with respect to the matters he was handling under the guise of a corporation was the act of the corporation."

In the case of *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541, it appears that the stockholders in various corporations and a number of copartnerships interested in the oil business agreed to transfer their interests in their several properties, and all their corporate stock, to certain trustees; they were to receive in lieu thereof trust certificates equal in par value to the stock which they surrendered. There was no act on the part of the corporation, no formal act, it was simply the act of the stockholders of these various corporations, and of course that meant all the officers and the directors. It was held that this action of the stockholders was, un-

der the circumstances, to be regarded as the act of the corporation. The following extract is from the opinion: "Applying, then, the principle that a corporation is simply an association of natural persons, united in one body under a special denomination, and vested by the policy of the law with the capacity of acting in several respects as an individual, and disregarding the mere fiction of a separate legal entity, since to regard it in an inquiry like the one before us would be subversive of the purpose for which it was invented, is there, upon an analysis of the agreement, room for doubt that the act of all the stockholders, officers and directors of the company in signing it should be imputed to them as an act done in their capacity as a corporation? We think not, since thereby all the property and business of the company is, and was intended to be, virtually transferred to the Standard Oil Trust, and is controlled through its trustees, as effectually as if a formal transfer had been made by the directors of the company. On a question of this kind, the fact must constantly be kept in view that the metaphysical entity has no thought or will of its own; that every act ascribed to it emanates from and is the act of the individuals personated by it; and that it can no more do an act, or refrain from doing it, contrary to the will of these natural persons, than a house could be said to act independently of the will of its owner; and, where an act is ascribed to it, it must be understood to be the act of the persons associated as a corporation, and, whether done in their capacity as corporators or as individuals must be determined by the nature and tendency of the act. It therefore follows, as we think, from the discussion we have given the subject, that where all, or a majority, of the stockholders comprising a corporation do an act which is designed to affect the property and business of the company, and which, through the control their numbers give them over the selection and conduct of the corporate agencies, does affect the property and business of the company, in the same manner as if it had been a formal resolution of its board of directors, and the act so done is ultra vires of the corporation and against public policy, and was done by them in their individual capacity for the purpose of concealing their real purpose and object, the act should be regarded as the act of the corporation; and, to prevent the abuse of corporate power, may be challenged as such by the state in a proceeding in quo warranto."

While the motion now under consideration rests upon the alleged insufficiency of the creditors' petition, it may not be amiss to consider how completely certain allegations of the petition are supported and illustrated by the evidence. The creditors were refused access to the books. Even after proceedings in the state court were commenced the books were withheld and the creditors informed if they wished to see the accounts they must procure an order from that court. Mr. Ruhl was directed by the state court to expert the books, but even he, armed with this authority, was not permitted to examine all of them; the accounts of Mr. Stone were withheld, and but a semblance of full exhibition was had. An order to produce books and papers was required in this court in addition to the subpoena duces tecum. A number of leaves were torn from the journal by Mr. Stone, and either lost or destroyed. Mr. Stone gives as an excuse for such mutilation of the journal that the agent of Bradstreet insisted on seeing the books. In the merchandise account only those purchases of merchandise were recorded for which cash payments had been made. Credit purchases of merchandise were not shown by that account, and could be ascertained only by examination of the various statements which accompanied each purchase. Obviously books kept in such a manner do not show liabilities; they conceal the real conditions.

An auto account, an account with Mr. Pryor, and a very active stock and commission account show frequent and considerable investments of Exploration Mercantile Company money. These, the bookkeeper, Mr. Hobbs, stated were really accounts of Mr. Stone. The transfers into Mr. Stone's personal account were shown, if at all, on the destroyed journal leaves. The detached ledger leaves showing Mr. Stone's personal account were withheld from examination until an order for production of books and papers was made in this court during the progress of the trial. An entry made December 31, 1907, credits Mr. Stone with wages. \$36,000, and rent \$12,000; total \$48,000. In reference to these matters Mr. Hobbs testifies as follows:

"(By Mr. Carney.) Q. I will ask you to examine petitioners' Exhibit No. 9, being the journal, on page 31, under the head of 'Profit and Loss,' and 'Rent.' What was the amount of rent for that store building during the year 1906? A. \$3,000. Q. That is at the rate of \$300 per month? A. Yes, sir. Q. That entry was made by yourself? A. It was. Q. As the treasurer of the corporation? A. Yes, sir. Q. I will ask you to examine this sheet known as 'Account Walter C. Stone,' on December 31, 1907 (hands to witness), for \$12,000; when was that \$12,000 placed thereon, the figures? A. When was it placed there? Q. Yes. A. On December 31, 1907. Q. 1907? A. Yes. Q. I will ask you to examine an item known as 'Sundries' on December 31, 1907, being an amount of \$55,-801.50. A. Yes, sir. Q. What does that include? A. I could not tell unless I had the journal page for that, journal 50, or I could get it from the ledger with time, it will take a little time to figure these things. Q. This is the journal, is it not? (Hands book to witness.) A. Yes, sir; that page is missing. Q. That has reference to the page that is missing, has it? A. Yes, sir. Q. And those pages that are missing included these items of account? A. The journal entries. Q. Have you any idea what that fifty-five thousand odd dollars is for? A. I have an idea, but I could not give it to you unless I could look over the ledger records, I could get it from that. Q. I will ask you to look at the item of December 31st, 'Wages to date, \$36,000.' A. Yes, sir. Q. When was that entry made? A. December 31, 1907. Q. \$36,000? A. Yes, sir. Q. I wish you would examine that paper and see if that was not \$12,000? A. It has been changed, or the journal record was changed at that particular time, at that same time. Q. It had been changed at that time? A. Yes, it was changed at that time. Q. There has been considerable diligence on your part, on Mr. Stone's part, and on Mr. Wylie's part since the filing of this petition in bankruptcy to show by the books that this institution was solvent on the 6th day of August, 1908, has there not? A. Yes, sir. Q. I will ask you to look at the footings of \$87,439.89, and ask you whether or not those footings have not been changed? A. The book records were changed at that particular time. Q. They were changed from \$12,000 to \$36,000? A. I don't know what the changes were; I would not state what the change was, but I remember of making that change myself; I made it. The Court: When did you say that change was made? A. At the time of entry. Q. (Mr. Carney.) When was the entry made? A. December 31, 1907. Q. Do you know what wages Mr. Stone received? A. The wages, no, unless I could figure it up. Q. What was his salary as the president of the corporation? A. I could not tell unless I figured it up from the ledger. Q. You have no recollection as to what Mr. Stone drew as an officer of that corporation for a salary? A. It went in as a lump sum, I believe, at that particular time. Q. As a matter of fact, Mr. Stone never received more than \$300 per month, did he, during 1906, as wages? A. I don't remember, I could not tell. Q. Did you ever have any meeting as to what wages Mr. Stone should receive as an officer of this corporation? A. Yes, sir. Q. When was that meeting? A. At the time this entry was made, I think, some time around there. Q. Are there any records of it in the minute book of the Exploration Mercantile Company? A. I think so. Q. Will you kindly produce them. A. I am not absolutely certain, I think there was. Q. I hand you the minute book of the corporation (hands to witness), do you find any memorandum there? A. It says, 'Meeting of the board of directors of the Exploration Mercantile Company. This meeting of the board of directors held on the 2d day of January, 1908, in the office of the company, present W. C. Stone, Frank G. Hobbs, C. E. Wylie. At this meeting the board examined the books of the corporation kept by its secretary, Frank G. Hobbs, and the balances struck by him, and on motion it was resolved that the said accounts are correct, and the balances are true, and that the same be and are hereby adopted and affirmed.' Q. Those are minutes placed there by typewriting? A. Yes, sir; these are typewritten minutes. Q. Where were they prepared? A. I don't know."

The reasons why Messrs. Stone, Wylie, and Hobbs objected to an examination of the books are obvious. There is some testimony to the effect that Mr. Hobbs and Mr. Wylie objected to the petition presented by Mr. Stone in the state court, but in the light of their conduct I am satisfied their objections were not serious. The refusal to permit examination of the books, and the

adoption and use of a method of bookkeeping which tended to conceal the real condition of the business, were calculated to hinder and delay creditors. In this Messrs. Stone, Wylie, and Hobbs participated. The conduct of each of them indicates that he knew there was something to be concealed from the creditors, and also that he knew the concern was insolvent. They seem to have agreed upon Mr. Stone's salary after the services had been rendered. The term of service could not have exceeded two years, for which they fixed a salary of \$18,000 per year. During a portion of these two years Mr. Stone was traveling in Europe and China. Is it reasonable to suppose that a concern having a total capital stock of \$50,000, paying its president a salary of \$18,000 per year and a rent of \$12,000 per year, can be operated at a profit? The evidence is very conclusive that each of the three men knew the business was running behind, and wished to conceal that fact. When the creditors were about to commence attachment suits, Mr. Stone, who had received the \$48,000 credit, who had mutilated the journal, who had withheld his own account from examination, who was then the actual owner of 96 per cent. of the stock of the concern, filed in the state court a petition asking that court to wind up the corporation, and place its property in the hands of a receiver because litigation was threatened and the assets were likely to be wasted. Mr. Wylie, general manager of the corporation, immediately appeared in court and filed an admission of service for the corporation, and a request that he himself be appointed receiver. This proceeding in the state court was certainly in harmony with the previous and subsequent conduct of the three men; it was but a part of a scheme to hinder and delay and therefore to defraud the creditors of the Exploration Mercantile Company, and the scheme was participated in, and consistently pushed and carried out by all the officers of the corporation, by its president, secretary and treasurer, general manager, and directors, and by all its stockholders.

It is alleged, and the testimony shows, that all the directors, officers, and stockholders of the Exploration Mercantile Company, as the act and deed of the corporation, caused the Stone petition to be filed and a receiver to be asked for, and later that they, in behalf of said corporation, as its act and deed, moved the court for an order appointing Wylie receiver. It is also averred that the corporation ratified the act. It is also alleged, and amply proven by the testimony, that this was all done to hinder, delay, and defraud its creditors; and it is clear from the testimony that these persons, Stone, Wylie, and Hobbs, knew the corporation was insolvent at the time the receiver was applied for. Under the shelter of a receivership, which tied the hands of the creditors, they proposed themselves to control its business and conceal its actual condition. Inasmuch as all the stockholders, all the officers and all the directors of this corporation, without exception, are using the distinction between themselves and the corporate entity for the purpose of hindering, delaying and defrauding creditors, that distinction should be disregarded, and the act of applying for a receiver should be imputed to the corporation itself.

The motion in arrest of judgment is denied, and the usual adjudication of bankruptcy will be entered.

Thompson, Morehouse & Thompson, for plaintiff in error.

J. L. Kennedy, for defendants in error.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

MORROW, Circuit Judge. The defendants in error have moved to dismiss the writ of error, first, on the ground that no notice of the petition for the writ of error or of the hearing thereof was given as provided by law. The defendants in error were duly served with a citation signed by the District Judge to appear in this court and show cause why the judgment mentioned in the writ of error should not be corrected. In proceedings on error the citation signed by the judge of the court to which the writ is addressed or any judge or jus-

tice of the appellate court is the notice required by section 998 of the Revised Statutes (U. S. Comp. St. 1901, p. 712) for the removal of any cause to the appellate court. Foster's Federal Practice (4th Ed.) § 507.

The second ground of the motion is that the proceedings for contempt have been brought against the officers and attorneys of the Exploration Mercantile Company, and pending such proceedings they are not entitled to any relief other than such as may result from a showing in clearing the parties of the charge of contempt. Beach on Modern Equity Practice states the rule as follows:

"The general rule is that one who is in contempt is never to be heard by motion or otherwise until he has cleared his contempt and paid the costs. But the rule applies to matters of favor, and a party, although adjudged in contempt, may be heard on matters of strict right."

In support of the rule thus stated the author cites a large number of English and American cases, among others the case of Brinkley v. Brinkley, 47 N. Y. 40, where Judge Folger, discussing the subject at length and after citing cases, says:

"The conclusion to be drawn from them is this: That a party in contempt and until he is purged of it will not be permitted to ask for the favor of the court, nor to take any aggressive proceedings against his adversary; but that it is his right to take measures to protect himself, and to make any motion designed to show that the order adjudging him in contempt was erroneous. He may move to discharge the order though in contempt for not obeying it. * * * And if a party may move to set aside or discharge the order as erroneous, to rid himself of a contempt, he may, it must follow, take any other course which the law allows to a party to establish that it is erroneous; and an appeal from it, and a review of it in an appellate court, is such other course."

See, also, Kaehler v. Dobberpuhl, 56 Wis. 497, 501, 14 N. W. 631, 633.

The third ground of the motion is that this court has no jurisdiction, for the reason that the only alleged error which can be considered by a reviewing court is the claim made that the District Court had no jurisdiction of the subject-matter of the controversy; and the only court which can review that question is the Supreme Court of the United States. The jurisdictional question involved in this case is not of the class of jurisdictional questions over which the Supreme Court takes jurisdiction. The District Court has jurisdiction of all bankruptcy proceedings. The question whether the petition in this case alleged an act of bankruptcy against the Exploration Mercantile Company does not go to the jurisdiction of the bankruptcy court. In that respect it is like the question whether the alleged bankrupt is one who may be proceeded against in involuntary bankruptcy under the act. *Denver First Nat. Bank v. Klug*, 186 U. S. 202, 22 Sup. Ct. 899, 46 L. Ed. 1127; *Schweer v. Brown*, 195 U. S. 171, 25 Sup. Ct. 15, 49 L. Ed. 144; *Lucius v. Cawthon-Coleman Co.*, 196 U. S. 149, 25 Sup. Ct. 214, 49 L. Ed. 425; *Columbia Iron Works Co. v. National Lead Co.*, 127 Fed. 99, 62 C. C. A. 99, 64 L. R. A. 645. The motion to dismiss the writ of error is overruled.

The original petition praying that the plaintiff in error be adjudged a bankrupt was filed by certain creditors in the United States District

Court for the district of Nevada on September 12, 1908. To this petition a demurrer was interposed by the plaintiff in error which was sustained, with leave to the petitioning creditors to file an amended petition. An amended petition was accordingly filed on October 24, 1908, alleging, in substance, that for the greater portion of six months next preceding the time of filing the original petition and ever since said time plaintiff in error had its principal place of business at Goldfield, county of Esmeralda, state of Nevada, and at all of said times it had been and was then engaged principally in trading and mercantile pursuits; and at the time of filing the original petition owed debts to the amount of \$1,000, and had continued to owe debts in that amount; that at the date of filing the original petition on September 12, 1908, and for four months continuously next prior thereto, and ever since that time the plaintiff in error had been and was then insolvent; that at the date of filing the original petition on September 12, 1908, and for more than four months continuously next prior thereto and ever since that time the property of the plaintiff in error at a fair valuation amounted to less than the sum of \$60,000, and that all the said times its debts were in excess of \$74,000; and that within four months next preceding the date of the filing of the original petition the plaintiff in error had committed an act of bankruptcy in that on or about the 6th day of August, 1908, it being insolvent had applied for a receiver for its property; that is to say: It is alleged that the plaintiff in error was organized on the 14th day of February, 1906, by W. C. Stone, C. E. Wylie, and Frank G. Hobbs; that the amount of the capital stock was then and ever since had been \$50,000, divided into 50,000 shares of the par value of \$1 each; that W. C. Stone owned 48,000 shares, C. E. Wylie, 1,000 shares, and Frank G. Hobbs, 1,000 shares; that the persons mentioned had continued to own all the stock in the corporation; that, although the articles of incorporation of the plaintiff in error provided that the board of directors should be five, there never had been more than three directors, and the persons named as stockholders had ever since the organization of such corporation continued to be and were such directors; that W. C. Stone had been and was president, C. E. Wylie, vice president, and Frank G. Hobbs, secretary and treasurer of the corporation; that on and prior to the 6th day of August, 1908, certain creditors of the plaintiff in error which was then and there insolvent were demanding payment of their just claims against the corporation; that Stone, Wylie, and Hobbs, the directors and officers of the corporation, then and there conspired and agreed together and ever since had conspired and agreed together to take such measures and do such acts as would hinder, delay, and defraud the creditors of the corporation, and would compel the creditors to accept less than the full payment of their just claims, and thereby obtain for such directors and officers a large part of the property of the corporation and prevent said creditors from obtaining a knowledge of its true condition and of the affairs of the corporation, and from having or participating in the choice of a person or persons to act as trustee of such corporation or its property; that in pursuance of said conspiracy and agreement said directors and officers acting for and on behalf, and as the act and deed, of said corporation on the 6th day of August,

1908, caused to be filed in the district court of the First judicial district of the state of Nevada in and for the county of Esmeralda an application praying for the appointment of a receiver with a view to the dissolution of the corporation. In this petition to the state court W. C. Stone was plaintiff and the plaintiff in error was the defendant.

The petition in the state court recited that the plaintiff Stone was president, Wylie, vice president, and Hobbs, secretary and treasurer of the corporation; that the corporation had liabilities in the sum of about \$65,000, and its assets exceeded \$95,000; that owing to the depressed condition in business, and the inability of the defendant corporation at that time to collect the amounts owing to it, the said corporation was in danger of its assets being wasted through attachment or litigation, as the claims mentioned and other claims were due, and the corporation was at any time liable to be attached and therefore would be unable to carry on and continue its business, or to be put to very large and useless expense by way of litigation, and the assets of the property be wasted thereby; that the plaintiff, Stone, was the holder of more than one-tenth of the capital stock of the corporation, and that by reason of the facts stated the corporation should be dissolved and a receiver appointed to take charge of the business and affairs of the corporation that its property might be preserved, its creditors paid, and its assets cared for. The prayer of the petition was that the court should appoint a receiver to take charge of the affairs of the corporation and conduct and manage the same with a view of its dissolution under the orders and direction of the court; that the corporation and its directors and each of them be enjoined and restrained from exercising any of its powers or doing any business except through, by, and under said receiver. The creditors' amended petition alleges, further, that on the 6th day of August, 1908, when said petition was filed in the state court, summons was issued and delivered to C. E. Wylie as manager and director of the plaintiff in error who accepted service of the same, and thereupon said directors and officers, acting for and on behalf and as the act and deed of the corporation, caused to be filed with the clerk of the court thereof an appearance and application for the appointment of a receiver for the property of the plaintiff in error as follows:

"Now comes C. E. Wylie, manager and one of the directors of the above-named defendant, and enters the appearance of the said defendant in the above-entitled cause, and asks the above-entitled court to appoint as receiver of said defendant, C. E. Wylie, the undersigned, one of the directors of said corporation."

This appearance and application is signed by C. E. Wylie, manager and director of the corporation.

It is further alleged in the creditors' amended petition that on the 6th day of August, 1908, the directors and officers of the plaintiff in error acting for and on behalf and as the act and deed of said corporation moved the said court upon the said petition for an order appointing said C. E. Wylie receiver of the property of the plaintiff in error, with the full power to take charge of the assets and control the business of said company; that said C. E. Wylie was thereupon appointed receiver and filed his bond as such, and took the oath of of-

fice on the 7th day of August, 1908, taking possession of the business property and effects of said corporation as such receiver; that on September 8, 1908, and at other times in further pursuance of said conspiracy and agreement the said W. C. Stone, acting for and on behalf and as the act and deed of said corporation, sought to bring about a settlement of the claims of said creditors of said corporation whereby said creditors would obtain not to exceed 60 per centum of their claims; that said Stone said to the creditors that by making such settlement the creditors would obtain a greater sum of money than they would if they litigated their claims, or if the affairs of said corporation were administered in bankruptcy by the United States court; that by making such settlement the directors and officers would make something for themselves; that the directors and officers of said corporation in pursuance of said conspiracy and agreement had ever since the 6th day of August, 1908, refused petitioners access to the books of the corporation and at all times had refused to permit the agent and representative of the petitioners to take or assist in taking an inventory of the property of the corporation, although such access and opportunity were requested; that ever since the 6th day of August, 1908, the plaintiff in error and each and all the said directors had acquiesced in, upheld, ratified, and confirmed the said proceedings and application for, and appointment of said receiver; that said Hobbs had ratified and confirmed the same and had since been continuously in the employ of said receiver. The petition prayed that the plaintiff in error should be adjudged a bankrupt.

To this amended creditors' petition the plaintiff in error filed its answer and demanded a jury trial. The answer and demand for a jury trial was signed by Frank G. Hobbs, secretary. In its answer plaintiff in error alleged, among other things, that the proceeding in the state court was taken against it and was not the act of the plaintiff in error; that the plaintiff in error was not insolvent; that its property at a fair valuation was more than sufficient to pay its debts. It denied the conspiracy charged against its officers and directors; denied that they conspired or agreed to measures or acts to hinder, delay, and defraud creditors or to compel such creditors to accept less than the full payment of their just claims. Admitted that Stone did by way of compromise make a proposition to the petitioning creditors to adjust their claims upon a basis approximately at 60 per centum. Denied that this proposition of compromise was made in furtherance of any conspiracy. Asserted the jurisdiction of the state court over the subject-matter and the person of the plaintiff in error and of the receiver. Denied the jurisdiction of the United States District Court in the premises and demanded that the matter be inquired into by jury. A jury trial was had and resulted in a verdict answering the following interrogatories submitted by the court:

"Interrogatory No. 1. Whether on the 6th day of August, 1908, the date of the appointment of C. E. Wylie as receiver of the Exploration Mercantile Company by the district court of the First judicial district of the state of Nevada, in the case of W. C. Stone v. Exploration Mercantile Company, the aggregate of the property of the said Exploration Mercantile Company was at a fair valuation, sufficient in amount to pay its debts? Answer: No.

"Interrogatory No. 2. Whether on the 12th day of September, 1908, the date of the filing of the petition in bankruptcy in these proceedings, the aggregate of the property of said Exploration Mercantile Company was, at a fair valuation, sufficient in amount to pay its debts? Answer: No.

"Interrogatory No. 3. Whether on the 6th day of August, A. D. 1908, the Exploration Mercantile Company being insolvent applied for a receiver for its property? Answer: Yes."

The plaintiff in error thereupon moved the court in arrest of judgment because of the insufficiency of the creditors' amended petition. This motion being denied by the court, the plaintiff in error was adjudged a bankrupt.

The case is here upon a writ of error with an assignment of errors, but as no exceptions were taken, and there is therefore no bill of exceptions in the record, the main question to be determined is the sufficiency of the creditors' amended petition in bankruptcy. Section 3 of the Bankruptcy Act of July 1, 1898, 30 Stat. 544, 546 (U. S. Comp. St. 1901, p. 3422), provided as follows:

"a. Acts of bankruptcy shall consist of his having * * * (4) made a general assignment for the benefit of his creditors."

The amendatory act of February 5, 1903, c. 487, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1309), added the following provision:

"Or being insolvent applied for a receiver or trustee for his property, or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States."

The objection made by the plaintiff in error by its motion in arrest of judgment that the creditors' petition was insufficient in law could have been raised by demurrer. It took the alternative procedure of interposing an answer denying that on the 6th day of August, 1908, application was made to the state court for the appointment of a receiver for its property; denied that it was insolvent, but it averred that, on the contrary, its property at a fair valuation was more than sufficient to pay its debts. It denied that it had committed an act of bankruptcy as alleged in the creditors' petition, but averred on the contrary that the proceedings taken in the state court for the appointment of a receiver were taken against it, and was not its act. For the determination of these issues it demanded a jury trial, that is to say, it demanded that these issues should be tried and determined as questions of fact. A jury trial was had, and resulted in a verdict and judgment in which these issues were found and adjudged against the plaintiff in error. No error is alleged to have been committed by the court in the course of the trial, and no exceptions were taken either to the admission or rejection of evidence or to the instructions to the jury. It was therefore found and determined as a fact that the plaintiff in error was insolvent when application was made to the state court for the appointment of a receiver for its property. It was further found and determined as a fact that the plaintiff in error being insolvent applied to the state court for the appointment of a receiver of its property. To enable the jury to find and determine these issues it will be presumed that the court instructed the jury correctly as to the law of insolvency, and the acts that would under the bank-

ruptcy act constitute an application on the part of a corporation to the state court for the appointment of a receiver of its property.

The charge in the creditors' petition that the plaintiff in error being insolvent applied for a receiver for its property is followed by the direct allegation that the corporation was "then and there insolvent." This is a sufficient allegation that the plaintiff in error was insolvent when the application for a receiver was made.

With respect to the other question as to whether the charge that the plaintiff in error had committed an act of bankruptcy in applying for a receiver of its property, the objection is made that the facts stated in the creditors' petition do not show that the plaintiff in error applied for the appointment of a receiver for its property; on the contrary, that the application was made by a stockholder. Without imputing to the plaintiff in error a waiver of this question as a question of law it is obvious that upon a motion in arrest of judgment the question is reduced to narrow limits. We cannot for example consider the objection that it is not alleged that there was a stockholders' meeting of the corporation, or a meeting of the board of directors, or that there was no resolution of any kind by the corporation and no allegation of corporate authority granted or given to any agent or person to apply for the appointment of a receiver.

We are not here dealing with the lawful act of the plaintiff in error acting in a lawful corporate capacity, but with the acts of certain individuals holding all the stock of the corporation and constituting its officers and directors, who, it is alleged, have "conspired and agreed together to take such measures and do such acts as would hinder, delay, and defraud the creditors of said corporation * * * and would evade the provisions of the laws of the United States in reference to bankruptcy, and prevent such creditors from obtaining a knowledge of the true condition of said corporation's affairs, and from having or participating in the choice of a person or persons to act as trustee of said corporation or its property." With respect to the acts of these parties it is alleged:

"That in pursuance of said conspiracy and agreement said directors and officers acting for and on behalf and as the act and deed of said corporation, which was then and there insolvent as aforesaid, on the 6th day of August, 1908, caused to be filed in the district court of the First judicial district of the state of Nevada, in and for the county of Esmeralda, an application praying for the appointment of a receiver with a view to the dissolution of said corporation."

The application for a receiver in the name of the stockholder as set forth in the petition is charged to be the act and deed of the corporation; and it is further charged that the directors and officers of the corporation acting for and on behalf and as the act and deed of the corporation accepted the service issued in the case, and thereupon caused to be filed with the court an appearance and application for the appointment of a receiver. We think these allegations are sufficient and charge the corporation with having committed an act of bankruptcy in applying for a receiver of its property. The corporate entity cannot be so disguised that it can successfully masquerade in the name of a stockholder, and, evading the searching eyes of a court of

equity, hinder, delay, and defraud its creditors and defeat the provisions of the bankruptcy act. A court of equity looks through forms to the substance of things, thus preserving the rights of innocent parties against all forms of deception and fraud.

It is further objected that the laws of the state of Nevada do not permit or authorize a corporation to apply for the appointment of a receiver; that the state court did not have jurisdiction over such an application, and that the application for a receiver for a corporation to be an act of bankruptcy under the bankruptcy act must be an application made under the laws of the state, that is to say, it must in every respect be a lawful application conforming to the laws of the state. This is not the language of the bankruptcy act; nor do we think it was the purpose of Congress to make the act of bankruptcy dependent upon the pretended regularity of the proceedings of the state court. That court may be imposed upon and its jurisdiction invoked to defeat the jurisdiction of the bankruptcy court as charged in this case. It is sufficient that the corporation is insolvent, and, being insolvent, has applied for a receiver whereby the property of the corporation is to be taken possession of and administered and distributed by the state court. It is against such proceedings that the bankruptcy act confers exclusive jurisdiction on the bankruptcy court. "The operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under state statutes. The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive." *In re Watts and Sachs*, 190 U. S. 1, 27, 23 Sup. Ct. 718, 724, 47 L. Ed. 933.

It is further contended that the application for the appointment of a receiver did not constitute an act of bankruptcy for the reason that it did not appear on the face of the proceeding in the state court that the application was made to that court on the ground of insolvency; that unless the proceeding in the state court is based on insolvency it is not an act of bankruptcy; and that the question of solvency or insolvency as related to the application for a receiver is not an issue to be tried in the bankruptcy court but must be found on the facts appearing on the record in the state court. The act of February 5, 1903 (32 Stat. 797), amending the bankruptcy act of July 1, 1898, added two provisions to the section providing two additional acts of bankruptcy, viz.: (1) Being insolvent applied for a receiver or trustee for his property. (2) Because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States.

Under the second provision it has been held that where the creditors' petition charges a single act of bankruptcy, viz., "because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state," the act of bankruptcy is dependent upon the state of facts disclosed upon the record in the case before the court making the appointment of a receiver. *In re Douglas Coal & Coke Co.* (D. C.) 12 Am. Bankr. Rep. 539, 131 Fed. 769; *In re Spalding*,

14 Am. Bankr. Rep. 129, 139 Fed. 244, 71 C. C. A. 370. But our attention has not been called to any case that holds that under the first provision of the statute where the creditors' petition charges a single act of bankruptcy, viz., "being insolvent applied for a receiver or trustee for his property," the act of bankruptcy is dependent upon the record in the court to which the application for a receiver is made; that is to say, we do not find any case holding that unless the petition to the court for a receiver states that the application is based upon the insolvency no act of bankruptcy has been committed. The charge of "being a bankrupt" in the first provision of the statute is an issue to be tried and determined in the bankruptcy court, and upon the determination of that court rests the question as to whether the bankrupt was insolvent when the application for a receiver was made.

With respect to the application for a receiver it may be conceded that if it appears from the record and is established by proof that the application is made under some statutory authority or general equity jurisdiction having no relation to insolvency, then the act of applying for a receiver is not an act of bankruptcy. But when it appears that the application for a receiver has relation to insolvency, and that the purpose of the proceeding is to have the corporation managed with a view to its dissolution and the distribution of its assets among the creditors of the insolvent, then the application for a receiver is clearly an act of bankruptcy.

Turning now to the application that was made to the state court for the appointment of a receiver in this case we find that it was alleged:

"That, owing to the depressed condition in business and the inability of said defendant corporation at the present time to collect the amounts owing to it, the said corporation is in danger of its assets being wasted through attachment or litigation, as the aforesaid claims and other claims are due, and the said corporation is liable at any time to be attached and therefore be unable to carry on and continue its business or to be put to very large and useless expense by way of litigation, and the assets of the property be wasted thereby;" and "that by reason of the facts aforesaid the said corporation should be dissolved, and that a receiver should be appointed to take charge of the business and affairs of said corporation, that its property may be preserved, its creditors paid, and its assets cared for."

In our opinion these facts appearing upon the face of the record in the state court coupled with the fact of insolvency charged in the creditors' petition are sufficient to constitute an act of bankruptcy under the first clause of the amendment of February 5, 1903.

It follows that the creditors' amended petition states facts sufficient to constitute a cause of action in bankruptcy, and the decree of the District Court must be affirmed; and it is so ordered.

NEW YORK LIFE INS. CO. v. SLOCUM.

(Circuit Court of Appeals, Third Circuit. February 15, 1910.)

No. 1,263.

1. INSURANCE (§ 349*)—LIFE INSURANCE—NONFORFEITABLE POLICY—PREMIUMS—FAILURE TO PAY—TERMINATION.

A nonforfeitable policy provided that, if insured was indebted to the company, and any premium on the policy or interest on a loan was not duly paid, and a request for paid-up insurance was made, the policy would be indorsed for such amount as any excess of the reserve held by the company over such indebtedness would purchase according to the company's published table of single premiums, and that, if there was no request for paid-up insurance, then the net amount that would have been payable as a death claim on the date to which the premiums were duly paid would automatically continue as term insurance from such date for such time as the excess of the reserve would purchase according to the company's present published table of single premiums for term insurance and no longer. *Held*, that where the excess of reserve over a loan granted on a policy was practically nothing, amounting at most to only \$5.80, which would have purchased term insurance for not more than eight days after the annual premium date, a failure to pay a current premium until after the expiration of such time precluded a recovery on the policy in case of insured's death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 891; Dec. Dig. § 349.*]

2. INSURANCE (§ 349*)—PREMIUMS—NONPAYMENT—LOANS.

A premium note, executed to continue a policy, provided that no part of the premium had been paid, but that the insurance should continue in force until midnight of the due date of the note, and, if the note was paid on or before the date when due, the payment, together with the cash received, would be accepted in payment of the premium. The agent accepting the note informed insured's wife that the amount of cash received at the time the note was executed would extend the policy until May 27, 1908, which was after insured died, if the note signed by insured was delivered prior to the expiration of the days of grace. Insured, however, was too ill to sign the note, and it was not signed or delivered until after the expiration of such grace. *Held*, that the policy was terminated.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 897; Dec. Dig. § 349.*]

3. ESTOPPEL (§ 55*)—ESTOPPEL IN PARS—RELiance.

An estoppel in pars is not created except by conduct which the person pleading the estoppel has a right to rely on and does rely on in fact.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 136-141; Dec. Dig. § 55.*]

Buffington, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Action by Lillian F. Slocum, as executrix of Alexander W. Slocum, deceased, against the New York Life Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with instructions.

George B. Gordon and James H. McIntosh, for plaintiff in error.

George E. Shaw, for defendant in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LANNING, Circuit Judge. This is an action on a life insurance policy for \$20,000. The jury rendered a verdict for the plaintiff below, the defendant in error here, for the sum of \$18,224.02, which they ascertained by the following calculation:

Amount of policy.....	\$20,000 00
Loan deducted.....	\$2,360 00
Note deducted.....	434 00
	<hr/>
	2,794 00
	<hr/>
	\$17,206 00
Interest added from Jan. 17, 1908.....	1,018 02
	<hr/>
	\$18,224 02
	<hr/>

We think the errors assigned may all be disposed of by considering the single question whether, under the terms of the policy and the evidence, it was legally possible for the jury to find that the policy was, at the date of the death of the insured, a valid subsisting contract of insurance for any sum whatever.

The policy was dated January 16, 1900. It provided for the payment by the insured of a premium of \$579.60 on the 27th day of November in each year during its continuance. It also contained the following provisions:

"This policy is automatically nonforfeitable from date of issue as follows:
 * * * Second. If any premium or interest is not duly paid, and if there is an indebtedness to the company, this policy will be indorsed for such amount of paid-up insurance as any excess of the reserve held by the company over such indebtedness will purchase according to the company's present published table of single premiums, on written request therefor within six months from the date to which premiums were duly paid. If no such request for paid-up insurance is made, the net amount that would have been payable as a death claim on the date to which premiums were duly paid will automatically continue as term insurance from such date for such time as said excess of the reserve will purchase according to the company's present published table of single premiums for term insurance, and no longer."

"Grace in Payment of Premiums.—A grace of one month, during which the policy remains in force, will be allowed in payment of all premiums except the first, subject to an interest charge at the rate of five per cent. per annum."

"General Provisions.—(1) Only the president, a vice president, the actuary or the secretary has power in behalf of the company to make or modify this or any contract of insurance, or to extend the time for paying any premium, and the company shall not be bound by any promise or representation heretofore or hereafter given by any person other than the above. (2) Premiums are due and payable at the home office, unless otherwise agreed in writing, but may be paid to an agent producing receipts signed by one of the above-named officers and countersigned by the agent. If any premium is not paid on or before the day when due, or within the month of grace, the liability shall be only as hereinbefore provided for such case."

At the date of the issuance of the policy, the insured, Alexander W. Slocum, was a resident of Pittsburgh, and the policy was delivered to him by the insurance company's Pittsburgh agent. The premiums from 1900 to 1906, inclusive, were paid at the company's Pittsburgh office to the company's Pittsburgh agent. In May, 1906, Mr. Slocum took up his residence temporarily, for business purposes, in Houston, Tex. His wife remained, except during a part of the winter of 1906-07, in Pittsburgh. On December 1, 1906, she, acting for her husband,

went to the company's Pittsburgh office and there obtained from the company for her husband a loan of \$2,360, out of which the premium due the preceding November 27th was paid. She thereupon delivered to the company a "policy loan agreement," signed by her husband, by which he admitted that he had that day, December 1st, received such loan in cash, and that he had pledged his policy with the company as collateral security therefor. It was stipulated by the agreement that interest on the loan at the rate of 5 per centum per annum should be annually paid in advance, and that the loan should become due and payable (inter alia) if any premium on the policy or interest on the loan should not be paid when due, in which event the pledge should be foreclosed by satisfying the loan in the manner provided in the policy.

The insured died December 31, 1907. His wife claims that on December 27, 1907—that is, on the last day of the month of grace succeeding November 27, 1907—she, acting for her husband, paid to the company's Pittsburgh agent the sum of \$264.20 on an agreement hereafter referred to. It is conceded that nothing more was paid to the company during the lifetime of the insured. Passing, for the moment, the consideration of the alleged agreement under which the insured's wife claims to have paid the \$264.20, it is clear that if nothing had been paid, and the case should be determined strictly in accordance with the terms of the policy and of the "policy loan agreement," there would be nothing whatever due on the policy. It is provided in the policy, as shown in the above quotations from it, that if the insured be indebted to the company, and any premium on the policy or interest on a loan is not duly paid, and a request for paid-up insurance is made, the policy will be indorsed for such amount of paid-up insurance as any excess of reserve held by the company over such indebtedness will purchase according to the company's published table of single premiums, and that, if there be no request for paid-up insurance, then "the net amount that would have been payable as a death claim on the date to which premiums were duly paid will automatically continue as term insurance from such date for such time as said excess of the reserve will purchase according to the company's present published table of single premiums for term insurance, and no longer."

In the case at bar, the excess of reserve over the loan of \$2,360 was practically nothing. The reserve, on the American 3 per cent. basis, would have been \$118.29 per \$1,000, or \$2,365.80 on the policy of \$20,000. The company estimated the reserve at \$118 per \$1,000, or \$2,360 on the policy of \$20,000. It had loaned to the insured the whole of this estimated reserve. Giving to the insured, however, the benefit of a reserve of \$118.29 per \$1,000, the excess of reserve over the amount of the loan, \$5.80, would have purchased term insurance for an extended period of not more than eight days after November 27, 1907. Such is the undisputed testimony in the case. If there had been no payment of any part of the premium which became due on November 27, 1907, and no loan against the policy by the company to the insured on that date, the reserve would have carried the policy for the sum of \$4,000, according to one of its provisions not quoted, for a period of seven years and seven months beyond November 27, 1907. As there was a loan of \$2,360 against it, and that loan exhausted the reserve,

except as to the sum of \$5.80, the policy, unless saved by the agreement presently to be considered, expired by force of its own provisions on December 27, 1907, since that was the last grace day and the excess of reserve (\$5.80) would not have carried the policy beyond that day.

It is contended, however, by the counsel for Mrs. Slocum, that she paid the \$264.20 to the Pittsburgh agent under an agreement that, by the payment of that sum, the policy should be continued in force until May 27, 1908. There is a dispute as to whether the \$264.20 was paid by Mrs. Slocum to the company's agent at Pittsburgh or mailed by her to the company's agent at St. Louis, and also as to the conversation between her and the Pittsburgh agent at the Pittsburgh office in the latter part of November and the latter part of December, 1907. We shall assume, as in view of the trial court's charge to the jury we think we must do, that the jury found the facts to be as stated by Mrs. Slocum. Her statement, in substance, is that on November 26, 1907, her husband then being returned to Pittsburgh from Houston, Tex., and being ill, she called at the office of the company's Pittsburgh agent, and was there given by the same person to whom she had in previous years paid the premiums for her husband a memorandum showing that upon the payment by the insured of \$264.20 in cash, and the giving of a note for \$434.90 payable May 27, 1908, the cash payment would carry the policy until May 27, 1908, and the note would carry it for the balance of the year; and that she took the memorandum to her home, and on December 27, 1907, returned to the office, gave the agent a check for \$264.20, and received from him a blank note to be signed by her husband. This part of the transaction she states in the following language:

"I gave him the check for \$264.20, and he handed me the blue note and another paper in an envelope, and he said that the note must be signed and I must return it. I told him Mr. Slocum was ill, and it might be several days before I could send it back, and he said that would be all right. 'Mail it as soon as you can.'"

The note was one of the form of notes prescribed by the company, called "blue notes," and was drawn for \$435, payable on or before May 27, 1908, without grace and without demand or notice, with interest at the rate of 5 per centum per annum. It contained a recital that it was accepted at the request of the maker, together with \$145.60 in cash, which, with the \$435 for which the note was drawn, amounted, it will be observed, to \$1 more than the premium due. The note contained, also, this provision:

"That although no part of the premium due on the 27th day of November, 1907, under policy No. 3,011,158, issued by said company on the life of A. W. Slocum has been paid, the insurance thereunder shall be continued in force until midnight of the due date of said note; that if this note is paid on or before the date when it becomes due, such payment, together with said cash, will then be accepted by said company as payment of said premium, and all rights under said policy shall thereupon be the same as if said premium had been paid when due; that if this note is not paid on or before the day it becomes due it shall thereupon automatically cease to be a claim against the maker, and said company shall retain said cash as part compensation for the rights and privileges hereby granted, and all rights under said policy, shall be the same as if said cash had not been paid nor this agreement made."

It will be observed, further, that, after deducting from the check of \$264.20 the cash item of \$145.60 mentioned in the note, there remained \$118.60, being 60 cents in excess of the interest on the loan of \$2,360 for one year at 5 per centum.

Having made the payment of \$264.20 and received the blank note, Mrs. Slocum went to her home, but found her husband too ill to sign the note. He died, as already stated, on December 31, 1907, without having signed it.

Similar notes for part of the premiums due had been given in previous years and delivered to the Pittsburgh agent; but, so far as the case shows, they had always been signed by Mr. Slocum and delivered to the company's agent before the expiration of the grace periods of one month after the due dates of the premiums. While the company would doubtless have been estopped from denying the right of the Pittsburgh agent to extend the policy until May 27, 1908, if the note, duly signed by Mr. Slocum, as well as the check, had been delivered to the Pittsburgh agent on December 27, 1907, notwithstanding the provision of the policy that only the president, a vice president, the actuary, or the secretary of the company had the power to extend the time for paying any premium, since such extensions had been made in previous years without objection on the part of the company, no estoppel in pais can be created except by conduct which the person setting up the estoppel has the right to rely upon and does in fact rely and act upon. *Bloomfield v. Charter Oak Bank*, 121 U. S. 135, 7 Sup. Ct. 865, 30 L. Ed. 923.

In the present case, the contract between the company and the insured provided that only the company's president, or one of its vice presidents, or its actuary, or its secretary, should have power to extend the time for paying a premium. In former years, that provision had been disregarded to the extent of allowing an agent of the company to grant additional time for paying a premium provided the additional time was actually granted within the grace period of one month. An attempt was made to show that the Pittsburgh agent had extended the time for the payment of a premium on a policy of Mr. Slocum's brother more than two months after the premium became due. It was shown, however, that the agent acted in that case after notification from the home office of the company in New York that the policy had been reinstated. Furthermore, it must be borne in mind that Mrs. Slocum, according to her own testimony, was told by the Pittsburgh agent on December 27, 1907, when he handed the blank note to her, that it must be signed by Mr. Slocum and returned to the agent. The contract between her and the company's agent, even on her own showing, was never completed. It remained executory. It was not a divisible, but an indivisible, contract. If she should get the note signed by her husband, and mail it to the agent as soon as she could, then, assuming the power of the agent to enter into such an arrangement, the \$264.20 would carry the policy until May 27, 1908, and the note would carry it for the rest of the year.

It will be observed, further, that according to the terms of the blank note given to Mrs. Slocum the \$145.60 paid on December 27, 1907, was not received as part of the premium due on November 27th pre-

ceding, for the note declares that no part of the premium had been paid. The note itself was the thing that embodied the only contract that, so far as the record shows, the agent had the power to make. It declares that, if the note should be paid at its maturity, the amount of it, with the \$145.60 paid in cash on December 27, 1907, would then be accepted as payment of the premium, and that, if the note should not be paid at maturity, the cash payment of \$145.60 should be retained by the company as part compensation for the rights and privileges thereby granted. If the note had been signed and delivered on December 27, 1907, it, with the cash payment of \$145.60, would have continued the policy until May 27, 1908, notwithstanding the provision of the policy that no one but the president, a vice president, the actuary, or the secretary, could extend the time for paying the premium, for the reason that extensions made on such terms in previous years had been ratified and authorized by the company. The note would then have been a good contract supported by a good consideration. But the acceptance by the Pittsburgh agent, on December 27, 1907, of \$264.20 (\$118.60 of which was for interest and the remaining \$145.60 for the purpose above stated), without any note whatever, was an unprecedented transaction. The company does not claim the money, and it tendered it back to Mrs. Slocum before her action was commenced. Mrs. Slocum could not rightfully infer from any previous transactions with the Pittsburgh agent or with the company that any agent other than the president, a vice president, the actuary, or the secretary had power to make any contract with her for the continuance of the policy from November 27, 1907, to May 27, 1908, on the mere payment of a part of the premium due on the former date.

In *Hudson v. Knickerbocker Life Ins. Co.*, 28 N. J. Eq. 167, it appears that the plaintiff sought to collect the amount alleged to be due on a policy of insurance issued by the defendant to the plaintiff on the life of her husband. A little more than one-half of the premium due on May 28, 1871, was paid in cash. "It is insisted," says Vice Chancellor Van Fleet, "that the acceptance of this sum operated to keep the policy alive for such proportion of the ensuing year as the sum paid bore to the premium for the whole year; in other words, a payment of just half the annual premium would continue the life of the policy for six months. The policy requires the payment, on a day certain, of a specific sum; its payment on the day designated is a condition precedent to the continuance of the policy, and it is expressly provided that a failure to make it destroys the policy. The parties have agreed upon this condition, and the court has no power to modify it, or dispense with it. It is not stipulated a partial payment shall keep the policy alive for such fractional part of a year as the payment bears to the whole premium, and in the absence of such an agreement a partial payment is no better than no payment."

In *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789, in the two suits on life insurance policies then before the Supreme Court, Mr. Justice Bradley said:

"All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that

they are enabled to offer assurance at the favorable rates they do. Forfeiture for nonpayment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion. It is like the forfeiture of shares in mining enterprises, and all other hazardous undertakings. There must be power to cut off unprofitable members, or the success of the whole scheme is endangered. The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all; for out of the coexistence of many risks arises the law of average, which underlies the whole business. An essential feature of this scheme is the mathematical calculations referred to, on which the premiums and amounts assured are based. And these calculations, again, are based on the assumption of average mortality, and of prompt payments and compound interest thereon. Delinquency cannot be tolerated nor redeemed, except at the option of the company. This has always been the understanding and the practice in this department of business. Some companies, it is true, accord a grace of 30 days, or other fixed period, within which the premium in arrear may be paid, on certain conditions of continued good health, etc. But this is a matter of stipulation, or of discretion, on the part of the particular company. When no stipulation exists, it is the general understanding that time is material, and that the forfeiture is absolute if the premium be not paid. The extraordinary and even desperate efforts sometimes made, when an insured person is in extremis, to meet a premium coming due, demonstrates the common view of this matter."

While forfeiture is not favored in the law, and while we do not adopt the view pressed upon us by the learned counsel for the plaintiff in error that the policy now in suit was in all respects "automatically nonforfeitable," yet we cannot hold the insurance company to have waived a provision of its contract, by reason of an act of one of its agents, when that contract expressly declares that the agent had no authority to do the thing he has done, and there is absolutely no evidence that the company by any of its authorized officers has ever ratified, approved, or acquiesced in the act.

We cannot find in this case any evidence from which the jury could have properly found that the company waived the provisions of the policy except to the extent of allowing its agent at Pittsburgh to grant additional time for paying a premium on receiving from the insured, within the grace period of one month, some cash, and a note for the full amount of the premium less the cash paid, and, consequently, we find no evidence in support of the alleged estoppel.

The views above expressed are in accord, we think, with what has been said on the binding character of the provisions of an insurance policy, and on forfeiture, waiver, and estoppel, in *Assurance Co. v. Building Association*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213; *Ætna Life Ins. Co. v. Frierson*, 114 Fed. 56, 51 C. C. A. 424; *Modern Woodmen of America v. Tevis*, 117 Fed. 369, 54 C. C. A. 293; *Supreme Council of Royal Arcanum v. Taylor*, 121 Fed. 66, 57 C. C. A. 406; *Murray v. State Life Ins. Co. (C. C.)* 151 Fed. 540, s. c. affirmed, 159 Fed. 408, 86 C. C. A. 344. While in the last of these cases this court held that forfeitures of policies of insurance are not favored in the law, and that "any agreement, declaration, or course of action, on the part of the insurance company, which leads a party honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon a forfeiture, though

it might be claimed under the express letter of the contract," there was, in the case at bar, no agreement, declaration, or course of action, on the part of the insurance company, which justified the insured in assuming that the time for the settlement of his premium due on November 27, 1907, was extended beyond December 27, 1907.

We conclude that there was error in not entering judgment for the defendant non obstante veredicto.

The judgment entered by the Circuit Court is therefore reversed. The record will be remanded, with instructions to enter judgment for the defendant notwithstanding the verdict.

BUFFINGTON, Circuit Judge (dissenting). The policy here in suit provided:

"If any premium is not paid on or before the day when due, or within the month of grace, the liability shall only be as heretofore provided."

And—

"Only the president, a vice president, the actuary, or a secretary has power in behalf of the company to make or modify this or any contract of insurance, or to extend the time of paying any premium."

As the insured had borrowed on the policy to its full capacity, its automatically nonforfeitable clause, referred to above as "heretofore provided," did not apply. Consequently the case turned wholly on forfeiture by reason of nonpayment of the annual premium.

The disputed facts in support of the alleged waiver of forfeiture, as testified to by the insured's wife, were sustained by the verdict, and are therefore accepted as true. This court, in its opinion, holds there was no evidence from which a jury could infer waiver of forfeiture. From that conclusion I differ, and the importance of insistence on the legal principles applicable to waivers of forfeiture and to the right of a jury alone to determine the fact of waiver, in my judgment, warrants me in recording this dissent.

The policy in question was for the whole life of the insured. Upon it he had paid some eight annual premiums, of \$579.60 each. The insurance company's right to terminate the contract for nonpayment of premiums was a forfeiture. *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789, where it was said:

This "is an entire contract of assurance for life, subject to discontinuance and forfeiture for nonpayment of any of the stipulated premiums. * * * Each installment is, in fact, part consideration of the entire insurance for life. It is the same thing, where the annual premiums are spread over the whole life."

But such forfeitures may not only be waived, but the company—and this it seems to me is the crux of the present case—may by its conduct estop itself from setting up a stipulated ground of forfeiture. In *Insurance Company v. Eggleston*, 96 U. S. 572, 24 L. Ed. 841, Mr. Justice Bradley said:

"We have recently, in the case of *Insurance Company v. Norton*, 96 U. S. 234 [24 L. Ed. 689], shown that forfeitures are not favored in the law, and that courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party has relied and acted. Any agreement, declaration, or course of action on the

part of an insurance company which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing a forfeiture. The representations, declarations, or acts of an agent, contrary to the terms of the policy, of course, would not be sufficient, unless sanctioned by the company itself. *Insurance Company v. Mowry*, 96 U. S. 544 [24 L. Ed. 674]. But where the latter has, by its course of action, ratified such declarations, representations, or acts, the case is very different."

The case then turns on the question: Are there in this case any facts, acts, conduct, or circumstances in evidence which "indicate an election to waive a forfeiture"? For, if there are, the courts, as said by Justice Bradley, "are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party has relied and acted."

Now, in the present case, the policy provided for the payment of the whole annual premium of \$579.60, which matured November 27, 1907, on the extended grace day of December 27, 1907. Nonpayment of such entire amount on the latter day was a ground of forfeiture, and the question was whether the company by its conduct so misled the insured in reference to that premium by accepting a part of the premium that it could not set up nonpayment of the other part as a ground of forfeiture. What are the facts and circumstances of this case bearing on the dividing of this premium and accepting a proportionate part? This company had originated, and in Mr. Slocum's case had in three previous annual premium payments followed, a mode of dividing annual premiums and accepting proportionate parts through the use of what were called blue notes. This system was in general use, and these blue notes were furnished to agencies as the regular printed blanks of the company. Indeed, it was shown by proof on the part of the company that this method of settlement was one which the company authorized its agents to make. To that extent, and especially by its use in three settlements made previously on this particular policy, it impliedly modified or impliedly waived the express provisions of the policy quoted above, which made omission to pay the whole annual premium on the annual due day an unqualified ground of forfeiture, which could only be waived by certain officers. Now, when these so-called blue notes are examined, it will be seen, strange as it may appear, that while ostensibly contracts for the payment of money, they absolutely impose no liability whatever on the maker and confer no right on the payee. Their terms are:

"If this note is not paid on or before the date it becomes due, it shall thereupon automatically cease to be a claim against the maker."

An examination of the whole note discloses its purpose, and that purpose is the important, fundamental fact in this case. Under the terms of the policy, a failure of the insured to pay the whole of his annual premium, which in Mr. Slocum's case amounted to \$579.60, on the grace day, forfeited his policy. But the insured might, as was the case with Mr. Slocum, in three previous blue note settlements, be unable to pay more than a proportionate part, say, for example, one-

half the premium, or six months' insurance. But the company could not unconditionally accept such part premium payment, since payment thereof left both insured and insurer in a debatable position. It was unfair to the company, because the insured might contend that such part premium payment was an extension of credit for the nonpaid premium part. On the other hand, it was unfair to the insured, because the company might insist—just, by the way, as it is doing in this case—that the nonpaid part of the premium forfeited the six months' insurance which the part paid premium had actually paid. Now, although the insured could not pay the entire premium, both parties, from the standpoint of their own interests, wanted the policy kept alive—the insurance company to get future premiums, and the insured to get future insurance. In order, therefore, to allow the insured to pay for a part of the year, to carry his insurance for such paid part, and permit him, at the expiration of such paid period, to pay for the insurance for the unpaid rest of the year, if he so selected, but imposing no liability if he did not, this blue note system was devised. Such intent is clearly outlined in the note in these provisions:

"On or before May 27th, after date, without grace, and without demand or notice, I promise to pay to the order of the New York Life Insurance Company four hundred and thirty-four dollars, at the Citizens' Central National Bank of New York, value received, with interest at the rate of five per cent. per annum. This note is accepted by said company at the request of the maker, together with one hundred forty-five and $\frac{60}{100}$ dollars in cash, on the following express agreement: That although no part of the premium due on the 27th day of November, 1907, under policy No. 3011158, issued by said company on the life of Alexander W. Slocum, has been paid, the insurance thereunder shall be continued in force until midnight of the due date of said note; that, if this note is paid on or before the date it becomes due, such payment, together with said cash, will then be accepted by said company as payment of said premium, and all rights under said policy shall thereupon be the same as if said premium had been paid when due; that, if this note is not paid on or before the day it becomes due, it shall thereupon automatically cease to be a claim against the maker, and said company shall retain said cash as part compensation for the rights and privileges hereby granted, and all rights under said policy shall be the same as if said cash had not been paid nor this agreement made."

Now it is clear that the insurance company, by establishing such a system and intrusting the carrying out thereof to its agents, as it did by furnishing them with its notes, either meant to empower the agent in proper cases to waive payment of the entire premium as a requirement to prevent forfeiture, or else was guilty, which, of course, is not the case, of an intent to mislead insurers. It follows, therefore, that, the agent being empowered to use this blue note system, the case resolves itself, not into a question of law as to the existence of a power in the agent to waive forfeiture, but into one of fact, viz., whether the agent used such conceded power in a way to mislead the insured. The existence of a power is usually a question of law, on which a court will give binding instructions; but whether an agent used it, and by its use affected his principal, is as clearly a fact for a jury's determination. In other words, the jury had a right, from the course of conduct of this company, to infer from the creation of this

blue note system that the postponement of part of the premium was intrusted to their agents; and, such being the case, the question whether the agent had exercised that power in a way to mislead the insured was not a question of law for the court, but purely of fact, and therefore for the jury.

Now, the decedent, Slocum, having used this blue note system of settlement for the three preceding annual payments through his wife, she went to the Pittsburgh agency, as she had previously done, a few days before November 27, 1907, as she testified, or before December 27th, as the agent said, and discussed with him as to the payment of the coming annual premium. He suggested, for the determination of herself and her husband, the latter being then ill, two different plans, one of which was the blue note method, which was for the payment in cash of \$264.20, which was \$118.60 for interest at 5 per cent. in advance for six months from November 27, 1907, on a loan to Mr. Slocum on his policy of \$2,360, and \$145.60, for the proportional part of the premium for six months. Mrs. Slocum testified the agent said:

"That if I paid \$264.20, and gave a note for the balance, which was \$434, to be paid on the 27th day of May, 1908, that that would carry it; the \$264.20 would carry it until May, and the other would carry it for the rest of the year."

At about 11 o'clock of the morning of December 27, 1907, which was the last due day of the premium, Mrs. Slocum again called at the office, told the same agent that they had decided to adopt the blue note plan, and then actually paid him \$264.20, agreed upon, by a check of that date of John F. Scott, a family friend, made to the order of Mrs. Slocum, and by her indorsed to the company. No receipt was given her for the money she paid; but the company proceeded to indorse and collect the check, which in itself evidenced her payment. Mrs. Slocum then says:

"I gave him the check for \$264.20, and he handed me the blue note, and another paper in an envelope, and he said that the note must be signed, and I must return it. I told him Mr. Slocum was ill, and it might be several days before I could send it back, and he said that would be all right; 'mail it as soon as you can.' * * * I took it home, and before taking off my coat or hat I went upstairs to my room, and Mr. Slocum was lying on the bed. I told him that the insurance had been fixed, and that I had a note for him to sign, and he didn't answer me. He was lying on the bed with his eyes closed, and I repeated it. He opened his eyes, and looked at me, and closed them again. He tried to answer, but he couldn't; and it seemed too brutal, I couldn't talk to him about it. Q. Did he die? A. He died on the 31st. Q. And without signing the note? A. Yes, sir."

Under such facts and circumstances, it seems to me the court below was warranted in charging the jury as it did:

"If by any agreement, declaration, or course of action by and on the part of the representatives of the company with whom this plaintiff was in the habit of dealing, the plaintiff was led honestly to believe that she could settle the premium in the manner claimed by her, and thereupon acted upon this theory and belief, and paid part of the premium due on the policy, as testified to by her, and agreed to return the note as directed by the defendant's representative, that under such conditions, and the facts and circumstances of this case, the defendant should not justly be allowed to interpose the defense of

forfeiture of the policy, nor should the plaintiff thereby be prevented from recovering."

The majority opinion gives no effect to the fact that the premium for six months was actually paid; that the company collected the money, and the transaction was closed, with the understanding that the noncontractual note was to be signed. It treats this case as though it were based on a contract of December 27th, and which was only to come into existence when the blue note was signed. If Mrs. Slocum had paid no money that day, or if the insurance company had simply held the check, and said the closing of the transaction would await the signing of the blue note, there would be ground for giving such effect to such an inchoate arrangement; but we are not dealing with such a state of facts, but with a question of conduct evidencing a waiver of forfeiture founded on money paid by the insurer and collected by the insured, and not with a situation where no consideration had actually passed. The insurance company cashed her check, collected the money, which paid interest it had not earned and insurance for six months. The payment of the apportioned premium by the insured, and its acceptance by the company, were the substantial matters evidencing an intent to waive forfeiture, and not the signing of the blue note, which, as we have seen, imposed absolutely no liability on the insured, and conferred absolutely no right on the insurer. That was a mere matter of formality, and under the circumstances the jury was warranted in finding that both parties regarded it as such. The transaction took place in the city of Pittsburgh near noon on the last permissible day. The policy shows the deceased lived at Bellevue, some miles away from the city. The agent was told Mr. Slocum was ill, and it might be several days before the note could be returned, and to this he said:

"That will be all right; mail it as soon as you can."

Mrs. Slocum omitted nothing she was called on to do. She took the paper to her husband at once, but his condition was such as to preclude him from signing it. No one contemplated it being signed that day, or that its signature was a prerequisite to either party enjoying the benefits of the arrangement, viz., the company getting the premium by cashing the check, and the insured getting the insurance he had paid for. If the omission to sign this noncontractual note is the missing link in the chain of events showing a waiver of forfeiture, then we have an effect given to it which neither the company nor Mrs. Slocum contemplated, else why, if the company regarded the arrangement as incomplete, did it cash the check? The vital question in the case is the fact of forfeiture, and evidence of that is intent. That the company, by the adoption of this blue note system, authorized its agent to accept proportional premiums, cannot be gainsaid.

It follows, therefore, that whether the agent did accept the proportional payment as a pro tanto waiver of forfeiture was a question of fact, depending, just as a question of negligence would, on inferences from conduct, facts, and circumstances, and one, therefore, peculiarly within the province of a jury.

PROVIDENT LIFE & TRUST CO. OF PHILADELPHIA v. CAMDEN & T.
RY. CO. et al.

(Circuit Court of Appeals, Third Circuit. January 12, 1910.)

No. 95 (1,316).

1. APPEAL AND ERROR (§ 324*)—RIGHT TO APPEAL—JOINT DEFENDANT.

In the absence of an application to the court for a summons and severance, or any equivalent thereof, a joint defendant in an equity suit to foreclose a street railway mortgage was not entitled to appeal from the decree of foreclosure and sale against all parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1806-1809; Dec. Dig. § 324.*]

2. EQUITY (§ 420*)—DECREE PRO CONFESSO—NOTICE.

Where a decree pro confesso had been entered against a defendant, he was not entitled to notice and to a hearing on the settlement of the final decree.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 970; Dec. Dig. § 420.*]

3. STREET RAILROADS (§ 55*)—MORTGAGES—FORECLOSURE—DECREE.

Where a decree for the foreclosure and sale of property under street railway mortgages directed that all the property described in the mortgages be sold, it sufficiently ascertained and defined the property to be sold.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 55.*]

4. APPEAL AND ERROR (§ 173*)—QUESTIONS NOT RAISED AT TRIAL.

Appellant could not object for the first time on appeal from a decree for the foreclosure and sale of property under street railway mortgages that the principal sums evidenced by the bonds were not due.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1120; Dec. Dig. § 173.*]

5. EQUITY (§ 420*)—DECREE PRO CONFESSO—RIGHT TO FURTHER HEARING.

Where a defendant after decree pro confesso against him was permitted to be heard on objection to the decree, such hearing was mere matter of favor, and hence he could not complain that he had not been heard as fully as he desired.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 420.*]

6. STREET RAILROADS (§ 55*)—MORTGAGES—FORECLOSURE—REDEMPTION.

Where a bill to foreclose certain street railway mortgages was not filed for strict foreclosure, and the decree for sale of the property was authorized by the general prayer for relief, the fact that the decree did not fix a time within which the mortgagor might redeem was immaterial; the mortgagors being entitled to redeem at any time before consummation of the sale.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 55.*]

7. STREET RAILROADS (§ 55*)—FORECLOSURE—REDEMPTION.

A holder of bonds secured by a street railway mortgage has no right to redeem from a foreclosure sale, as such right exists solely in the mortgagor.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 55.*]

8. APPEAL AND ERROR (§ 1019*)—REVIEW—FINDINGS OF MASTER.

Findings of a master on conflicting evidence are presumed correct, and will not be disturbed unless obvious error or mistake appears.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4008-4010; Dec. Dig. § 1019.*]

9. STREET RAILROADS (§ 55*)—MORTGAGES—FORECLOSURE—PRIORITY OF CLAIMS.

Where after the appointment of a receiver for a street railroad by a state court mortgage foreclosure proceedings were instituted in a federal court by the trustee for the bondholders, and permission was granted to make the receiver a party to the suit on condition that such permission should not interfere with the receiver's control, management, or administration of the estate, and the receiver's administration was beneficial to the bondholders, a provision of the foreclosure decree making the receiver's compensation payable prior to the mortgage debts, so far as the moneys in the receiver's hands should be insufficient to pay them, was proper.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 55.*]

10. STREET RAILROADS (§ 55*)—MORTGAGES—FORECLOSURE—DEPOSIT.

A provision in a decree for the sale of a street railroad under mortgage foreclosure, requiring prospective bidders to deposit \$50,000 at least 24 hours before noon on the day of the sale, was within the discretion of the court.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 55.*]

11. STREET RAILROADS (§ 55*)—MORTGAGES—FORECLOSURE—ADVERTISEMENT OF SALE.

That the method of advertisement of the property of a street railroad company to be sold under a foreclosure decree did not conform to the method designated in the mortgages was immaterial; such foreclosure being governed by the provision of Act Cong. March 3, 1893, c. 225, 27 Stat. 751 (U. S. Comp. St. 1901, p. 710).

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 55.*]

12. STREET RAILROADS (§ 55*)—MORTGAGES—FORECLOSURE—UPSET PRICE.

Whether an upset price should be fixed for the sale of street railway property under mortgage foreclosure was within the judicial discretion of the trial court.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 55.*]

Appeal from the Circuit Court of the United States for the District of New Jersey.

Action by the Provident Life & Trust Company of Philadelphia, trustee, against the Camden & Trenton Railway Company and others. From a decree of foreclosure and sale, defendant Daniel Killion appeals. Affirmed.

William A. Glasgow, Jr., Spencer Simpson, and Benjamin Nields, for appellant.

French & Richards, Abraham M. Beitler, and Samuel Dickson, for appellee.

Argued before GRAY and BUFFINGTON, Circuit Judges, and CROSS, District Judge.

CROSS, District Judge. The Camden & Trenton Railway Company executed two mortgages to the Provident Life & Trust Company of Philadelphia as trustee. The first, dated November 1, 1899, was made to secure an issue of 750,000 bonds, and the second, July 2, 1901, to secure an issue of 1,750,000. Bonds to the amount of \$710,000 were certified and are outstanding under the first mortgage and under the second (a general mortgage) to the amount of \$622,500. Default was made in the payment of the coupons due November 1, 1907, on the first mortgage, and of those due January 1, 1908, on the second mort-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

gage. The president of the Camden & Trenton Railway Company thereupon, on February 18, 1908, filed his bill of complaint in the Court of Chancery of the state of New Jersey, charging, among other things, that said company was hopelessly insolvent; that for a long time it had been operated at a loss; that the deficit for the year 1907 was \$46,558.90; and that it owed about \$200,000 over and above its mortgage indebtedness. The allegations of the bill having been admitted by the answer of the company, a receiver was appointed, pursuant to the prayer of the bill. In September, 1908, as appears by a statement in the brief of the appellees, and not denied at the argument, the appellant, Daniel Killion, filed a petition in the Circuit Court of the United States for the District of New Jersey, setting out that he owned a \$1,000 bond secured by the first mortgage above mentioned; that the company was insolvent; that its roadbed was in a dangerous condition, so that accidents frequently occurred; that it was necessary for the protection of the bondholders that the property be proceeded against promptly and sold; and that he had requested the trustee to institute a suit to foreclose said mortgage, but that, acting in collusion with the other bondholders to deprive him of his rights, it had refused so to do. He therefore asked for a rule that the trustee show cause why it should not institute such a suit at once, so that the premises might be sold by an order of said court. The trustee answered said petition, stating that it had been requested by over 90 per cent. of the bondholders secured by the first mortgage to institute foreclosure proceedings thereon, and that it intended to do so at once. The trustee thereupon applied to the Court of Chancery of New Jersey for permission to sue the receiver appointed by that court, which was granted by the chancellor upon terms, among others, that all known bondholders should be made parties defendant to such suit when instituted. Accordingly, Killion, the appellant herein, was made a defendant. Subsequently a similar suit was commenced upon the second mortgage, whereupon the two actions were consolidated by order of the court. Killion, however, did not cause his appearance to be entered in the suit to which he was a party, nor did he file any answer thereto. Consequently a decree pro confesso was entered against him, and an order of reference made to a master, with the specific direction, among others, that he should "ascertain and report what is due and payable to the complainant trustee for principal and interest upon the two mortgages made to it by the defendant." Killion was allowed to appear before the master, and upon the coming in of his report filed exceptions thereto, which were entertained by the court and disposed of after Killion's counsel had been heard thereon. Killion, however, was not heard upon the settlement of the final decree, for the reason, as stated therein, that a decree pro confesso had been entered against him. He accordingly has appealed from such decree, and has filed 13 assignments of error. It may properly be noted at this point that Killion, as was admitted at the argument, holds but one \$500 bond issued under the first mortgage, the amount of which, with interest thereon to date, was tendered him in open court at the time this appeal was allowed, upon condition that he would assign his bond; which proposition, however, he declined. He is not interested at all under the second mort-

gage; the amount due upon which, owing to the consolidation of the two suits, as already stated, is included in and forms a part of the decree appealed from. No appeal has been taken by any one, and manifestly could not be by the appellant, from so much of the decree as relates to the second mortgage, so that in any event the complainant trustee is entitled to a sale thereunder.

Before entering upon the consideration of the various assignments of error, one of the propositions raised and argued in behalf of the appellees demands attention. The point made is that, inasmuch as the Camden & Trenton Railway Company, its receiver, and the other defendants have taken no appeal, the appellant cannot. That proposition is well recognized in equity practice, and must be regarded as settled. So far as the record shows, no application was made by Killion to the other defendants to join in the appeal, nor was there any refusal on their part to do so, nor did he make any application to the court for a summons and severance, or any equivalent thereof. In the case of *Hardee v. Wilson*, 146 U. S. 179, 181, 13 Sup. Ct. 39 (36 L. Ed. 933), the court says:

"In the case of *Masterson v. Herndon*, 10 Wall. 416 [19 L. Ed. 953], it was held that it is the established doctrine of this court that in cases at law, where the judgment is joint, all the parties against whom it is rendered must join in the writ of error; and in chancery cases all the parties against whom a joint decree is rendered must join in the appeal, or they will be dismissed. There are two reasons for this: (1) That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. (2) That the appellate tribunal shall not be required to decide a second or third time the same question on the same record. In the case of *Williams v. Bank of the United States*, 11 Wheat. 414 [6 L. Ed. 508], the court says that, where one of the parties refuses to join in a writ of error, it is worthy of consideration whether the other may not have remedy by summons and severance; and in the case of *Todd v. Daniel*, 16 Pet. 521 [10 L. Ed. 1054], it is said distinctly that such is the proper course."

Again, in *Davis v. Mercantile Trust Company*, 152 U. S. 590, 14 Sup. Ct. 693, 38 L. Ed. 563, it is stated that one of the ordinary rules respecting appeals is that all the parties to the record who appear to have any interest in the order or ruling must be given an opportunity to be heard on such appeal; citing *Masterson v. Herndon*, 10 Wall. 416, 19 L. Ed. 953, *Hardee v. Wilson*, *supra*, and *Inglehart v. Stansbury*, 151 U. S. 68, 14 Sup. Ct. 237, 38 L. Ed. 76. And later on in the opinion, speaking of the appellant therein, who as a bondholder had been allowed to intervene in a foreclosure proceeding, the court says:

"Neither does the appeal from the decree stand in any better condition. In a decree for the foreclosure of a mortgage the two parties principally and primarily interested are the mortgagee and the mortgagor. No third party should be permitted to disturb such a decree unless and until both mortgagee and mortgagor are given an opportunity to be heard. The mortgagor may be unwilling that the decree should be set aside notwithstanding irregularities in prior proceedings, for fear that on a subsequent hearing a larger sum may be decreed against him. It is not necessary in any given case to determine that his interests would or would not be promoted by the setting aside of the decree; it is enough that in that matter he has a direct interest, and because of this interest common justice requires that no change shall be made in the terms of that decree, nor shall it be set aside without giving him a chance to be heard in its defense. Ordinarily it may be presumed that all the par-

ties to the record are interested, and so it is often said that all such parties must be joined as appellants or appellees, plaintiffs in error or defendants in error; but it is unnecessary to rest this case upon the mere fact that the mortgagor in this case was a party to the record—the only defendant in the first instance. It was not only such a party, but is also one directly and vitally interested in the question whether the decree of foreclosure and the sale shall stand, and yet it is not before us."

Again, in *Beardsley v. Ark. Louisiana Railway Company*, 158 U. S. 123, 127, 15 Sup. Ct. 786, 788 (39 L. Ed. 919), the Supreme Court, by Chief Justice Fuller, says:

"It is settled, for the reasons too obvious to need repetition, that in equity cases all parties against whom a joint decree is rendered must join in an appeal if any be taken; but this appeal was taken by John D. Beardsley alone, and there is nothing in the record to show that his codefendants were applied to and refused to appeal, nor was any order entered by the court on notice granting a separate appeal to John D. Beardsley in respect of his own interest. The appeal cannot be sustained. *Hardee v. Wilson*, 146 U. S. 179 [13 Sup. Ct. 39, 36 L. Ed. 933]; *Davis v. Mercantile Co.*, 152 U. S. 590 [14 Sup. Ct. 693, 38 L. Ed. 563]."

See, also, *Sipperly v. Smith*, 155 U. S. 86, 15 Sup. Ct. 15, 39 L. Ed. 79; *Wilson v. Kiesel*, 164 U. S. 248, 17 Sup. Ct. 124, 41 L. Ed. 422; *Inglehart v. Stansbury*, 151 U. S. 68, 72, 14 Sup. Ct. 237, 38 L. Ed. 76; *Feibelman v. Packard*, 108 U. S. 14, 1 Sup. Ct. 138, 27 L. Ed. 634; *Mason v. United States*, 136 U. S. 581, 10 Sup. Ct. 1062, 34 L. Ed. 545; *Port v. Schloss Bros. & Co.*, 149 Fed. 731, 79 C. C. A. 437; *Hedges v. Seibert Cylinder Oil Cup Co.*, 50 Fed. 643, 1 C. C. A. 594.

Notwithstanding, however, that the appeal is fatally defective for want of parties, and would have to be dismissed upon that ground, we have examined the various assignments of error and find them without merit. Such only of them, however, as were urged in the appellant's brief and upon the oral argument will be herein considered, and those as briefly as may be.

The first assignment of error, following the order of their consideration in appellant's brief, is based upon the refusal of the court below to hear Killion upon settlement of the final decree, for the reason, as therein stated, that a decree pro confesso had been entered against him. Counsel for appellant cites as authority for his contention *Chicago & Vincennes R. R. Co. v. Fosdick*, 106 U. S. 47, 27 L. Ed. 47; *Southern Pac. R. Co. v. Temple et al.* (C. C.) 59 Fed. 17; *Davis et al. v. Garrett* (C. C.) 152 Fed. 723. From the first case cited he quoted a passage taken from the opinion of the court in *Clark v. Reyburn*, 8 Wall. 318, 19 L. Ed. 354, relating to a suit instituted for the strict foreclosure of a mortgage, in which case it appeared that there was no finding either of the fact or amount of indebtedness due under the mortgage. This was deemed a ground of reversal, notwithstanding a decree pro confesso had been taken against the parties holding the entire beneficial interest. Obviously such a decree would be fatally defective. The object of the suit was never attained. The amount for which the property could be redeemed was not ascertained, by reason of which lapse the mortgagor was virtually deprived of his right of redemption. In the second and third cases cited it appears that the party against whom the decree went had appeared in the cause by a solicitor, and for that

reason, and that only, such party was deemed entitled to notice of the entering of the final decree. The facts in the case at bar are different. As already stated, Killion had not entered any appearance when the decree pro confesso was taken against him, and furthermore, the final decree herein is complete in itself, and determines all of the essential factors. The effect to be given a decree pro confesso in the federal courts is prescribed in Equity Rule 18, which says:

"And thereupon, after the entry of such a decree, the cause shall be proceeded in ex parte, and the matter of the bill be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and it is proper to be decreed."

In *Frow v. De La Vega*, 15 Wall. 552, 21 L. Ed. 60, the Supreme Court says:

"The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree pro confesso against him, and proceed with the cause upon the answers of the other defendants. The defaulting defendant has merely lost his standing in court. He will not be entitled to service of notices in the cause, nor to appear in it in any way. He can adduce no evidence; he cannot be heard at the final hearing. But if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike, the defaulter as well as the others. If it be decided in the complainant's favor, he will then be entitled to a final decree against all."

Austin v. Riley (C. C.) 55 Fed. 833, holds that a person against whom a decree pro confesso has been entered is not entitled to notice of an application for a final decree when such application is made in open court. See, also, *Thomson v. Wooster*, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. Ed. 105.

The next assignment of error, in substance, is that the court failed to find, determine, and ascertain the property covered by the mortgage and to be sold under the decree. Cases cited by the appellant support this proposition, but, as a matter of fact, the property embraced in the mortgages herein was, in our opinion, sufficiently ascertained and defined. It directs, in substance, that all of the property described in the mortgages be sold. This is the customary form. It would be unusual to describe at length in a decree the property which it directed to be sold, unless, indeed, some portions of the mortgaged property had been released from the lien of the mortgage, or other like special circumstances were made to appear. The decree in question directed a sale of the property described in the mortgages of the complainant, and in the mortgage of J. Kearney Rice, receiver, which the master appropriately found under the order of reference to be subsequently acquired property, and, as such, expressly included in the lien of the complainant's mortgages. The property decreed to be sold is therefore sufficiently defined. It is susceptible of definite ascertainment. The master reported it with such certainty that the appointee directed to make the sale could have no difficulty in knowing what property he was directed to sell, or a prospective purchaser what property he was about to buy. This assignment is not in accordance with the facts.

The next assignment of error, briefly stated, alleged that the principal sums evidenced by the bonds were not due and payable. This was

one of the matters specifically referred to the master to ascertain. The language of the order of reference in that respect has already been given. It will be recalled that he was "to ascertain and report what is now due and payable to the complainant, trustee, for principal and interest upon the two mortgages made to it by the defendant." Killion, although not entitled to be present and heard in view of the interlocutory decree standing against him, nevertheless attended before the master, was heard by him, and later was permitted to, and did, file exceptions to his report; but he did not except to the master's explicit finding that the principal and interest of the bonds were due. Having failed to raise the question below, although given the opportunity, he ought not to be permitted to raise it for the first time on appeal, and this irrespective of the fact of the decree *pro confesso* standing against him. In *City of New Orleans v. Fisher*, 91 Fed. 574, 34 C. C. A. 15, the Circuit Court of Appeals for the Fifth Circuit held that questions concerning the correctness of a master's findings, which were not raised by proper exceptions to his report, could not be made the ground of assignments of error on appeal. So, too, in *Burns v. Rosenstein*, 135 U. S. 449, 10 Sup. Ct. 817, 34 L. Ed. 193, the Supreme Court held, in relation to certain matters then under consideration, that the defendant should have brought them to the attention of the court below by exceptions to the master's report, and, having failed to do this, could not for the first time object that the master proceeded upon erroneous views. In *McMicken v. Perin*, 18 How. 507, 15 L. Ed. 504, the court said:

"The appellant further objects that his debt was not accurately ascertained by the master upon the decree of reference. In *Story v. Livingston*, 13 Pet. 359 [10 L. Ed. 200], this court decided that no objections to a master's report can be made which were not taken before the master; the object being to save time, and to give him an opportunity to correct his errors and reconsider his opinion. And in *Heyn v. Heyn*, 4 Jacob. 47, it was decided that after a decree *pro confesso* the defendant is not at liberty to go before the master without a special order, but the accounts are to be taken *ex parte*. This court will not review a master's report upon objections taken here for the first time."

Again, in *Metzker v. Bonebrake*, 108 U. S. 66, 2 Sup. Ct. 351, 27 L. Ed. 654, the court held that the findings of a master are *prima facie* correct, and that only such matters as are brought before the court by exceptions are to be considered. To the same effect are *Coghlan v. South Carolina R. Co.*, 142 U. S. 101, 12 Sup. Ct. 150, 35 L. Ed. 951, and *Topliff v. Topliff et al.*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658. Furthermore, that Killion was heard at all was by the favor of the court, and when that favor was withdrawn he had no just cause to complain that he had not been heard as fully as he now desires. The temporary indulgence of the court conferred upon him no such right. So long as a decree *pro confesso* stood against him, his only right was to move for cause to set it aside. It should also be noted in this connection that neither the mortgagor, its receiver, who under the New Jersey statute has title to the property, nor the chosen trustee of the bondholders, among whom was the complainant, is making any complaint in the premises. It is, moreover, the manifest tenor and purport of the mortgages in question that Killion's rights in any

litigation growing out of a default in the payment of the mortgage bonds were expressly surrendered to, and merged in, the trustee named in the mortgages, whenever such trustee should in good faith act at the request of a majority of the bondholders, and as in this case it is doing at the request of 90 odd per cent. of the bondholders, and with no dissentient save Killion. Under the circumstances, therefore, it is unnecessary to discuss the question whether the entire principal of the mortgage in question is due because of the default in the payment of certain of the coupons.

The next assignment alleges error because the decree did not fix a time within which the mortgagor in the several mortgages mentioned might redeem the property embraced therein, but, on the contrary, directed a sale to be made without affording an opportunity to the mortgagor to pay the mortgage debt and redeem the property covered by the mortgages. No such form of decree, however, was necessary. The bill of complaint in this cause was not filed for a strict foreclosure, the purpose of which is well understood. It is alleged by appellant, however, that there is matter in the prayer of the bill which points to relief by way of strict foreclosure. But if that were admitted, still the decree actually made can be justified under the general prayer for relief, as was held in *Sage v. Central R. R. Co.*, 99 U. S. 334, where at page 342 (25 L. Ed. 394) Mr. Justice Strong, in speaking of the prayer in a bill for the foreclosure of a mortgage then under consideration, says:

"The specific relief sought was a strict foreclosure, but, under the prayer for general relief, it is not questioned that a decree for a sale was appropriate."

Furthermore, under the decree entered in this case, the mortgagor, as a matter of fact, had the right to redeem, according to some authorities, until a sale had been made, but according to the United States Supreme Court, not only until a sale had been made and confirmed, but the deed had been actually delivered. Thus in *Chicago & Vincennes R. R. Co. v. Fosdick*, *supra*, that court said:

"But as in cases of strict foreclosure so in cases of sale, the equity of the mortgagor as against the mortgagee is not exhausted until sale is actually confirmed; for if at any time prior he should bring into court for the mortgagee the amount of the debt, interest, and costs, he will be allowed to redeem. It is the deed made to the purchaser, actually transferring the title of the parties to the suit, that terminates the mortgagor's equity of redemption. *Brine v. Insurance Co.*, 96 U. S. 627 [24 L. Ed. 858]."

It is unnecessary to inquire, therefore, whether the bill in this case was in form for a strict foreclosure or for foreclosure and sale, or to note the distinction between those forms of procedure, since in either case the decree under consideration preserved the mortgagor's right of redemption, which exists and will exist until a sale has actually taken place and the title passed thereunder. But were this not so, the assignment under consideration would seem to raise a question in which the appellant has no concern, since under no circumstances would he have any right of redemption; which right, so far, at least, as the equities in this case are disclosed, exists solely in the mortgagor, its successors and assigns.

The next assignment for consideration relates to the mortgage held by J. Kearney Rice, receiver of the New York-Philadelphia Co., and asserts that it is not a lien upon the mortgaged premises prior to the mortgages under foreclosure, for the reason that it has been paid. The master, however, found the contrary, and his conclusions, upon exception by appellant, were, after correcting the interest item, affirmed by the court below, and embodied in its decree. The evidence fully supports the finding, and we would not be warranted in disturbing it. The rule in such cases is that the findings of a master upon conflicting evidence are presumably correct, and will not be disturbed unless obvious error or mistake appears. *Warren v. Keep*, 155 U. S. 265, 15 Sup. Ct. 83, 39 L. Ed. 144; *Furrer v. Ferris*, 145 U. S. 132, 12 Sup. Ct. 821, 36 L. Ed. 649; *Crawford v. Neal*, 144 U. S. 585, 12 Sup. Ct. 759, 36 L. Ed. 552.

The next assignment of error relates to the compensation of the receiver, which by the decree is given priority of lien over the mortgages. Upon inspection of the decree it appears that the charges and expenses complained of are made payable prior to the mortgage debts only so far as any moneys in the hands of the receiver shall be insufficient to pay them. While it is true that the receiver is a receiver by appointment of the Court of Chancery, and not of the court below, it is equally true that the title to the property embraced in the mortgages of the complainant was vested in him, and that leave to make him a party defendant herein was sought and obtained from the state court upon condition, among others, that such permission should not extend "to interfere with the present receivership, or disturb the position or control of the receiver, or his management or administration of the estate of the insolvent corporation." It appears by the master's report that the complainant trustee and the bondholders' committee, admittedly representing about 97 per cent. of the bondholders, conceded before him that the receiver's compensation was prior to the lien of the mortgages, and that no person other than the appellant dissented therefrom. The master upon the reference reached the conclusion that the receiver, under the circumstances, "was really acting throughout for the benefit of the bondholders secured by the two mortgages made to the complainant as trustee," and that the case was brought within the principle applied by Vice Chancellor Stevenson in *Lembeck v. Jarvis Terminal Co.*, 68 N. J. Eq. 352, 59 Atl. 565, and accordingly found that the receiver's allowance, fees, and costs, due and to become due, were a lien on the mortgaged premises prior to the mortgages, in so far as any moneys in the hands of the receiver should be insufficient to pay the same. The court below adopted the conclusion of the master. We think the master took a correct view of the matter, and that the decree below in this respect is entirely justified. The receiver's control had undoubtedly conserved the mortgaged property and kept it intact as a going concern. It appears in the case not only that the mortgagor was insolvent, but that its property was greatly dilapidated and in need of repair, and it is not too much to assume that without repair the road not only could not have been safely operated, but would have gone to greater waste; furthermore, that unless

operated its franchises would have been imperiled. The receiver may, therefore, under the circumstances, well be considered as the receiver of the trustee and bondholders. His care and services were in their interests.

The next assignment relates to a required deposit by prospective bidders at the sale of \$50,000, to be made at least 24 hours prior to 12 o'clock noon on the day of the sale. This matter rested largely in the discretion of the court, and in the absence of any apparent abuse of such discretion ought not to be disturbed; especially should this be so since we do not see that the appellant will be appreciably injured thereby.

The next assignment, briefly stated, charges that the mode of advertisement prescribed by the decree does not conform to that designated in the mortgages. It is impossible to see how the language in the mortgages can be made to apply to a judicial sale. The provision in that respect is applicable solely to a sale by the trustee, which he is permitted to make under certain circumstances by the provisions of the mortgages. It does not relate in any manner to a judicial sale. Such sales are governed by the provisions of the act of Congress passed March 3, 1893, c. 225, 27 Stat. 751 (U. S. Comp. St. 1901, p. 710).

The only other assignment argued complains because a minimum bid to be received and entertained by the appointee to make the sale was not fixed by the decree. The only authority cited is *Blair v. St. Louis, etc., R. Co.* (C. C.) 25 Fed. 232, in which Brewer, J., after holding that an upset price must be made, later modifies the positive language of his opinion and says:

"In many states foreclosures of mortgages are attended with an appraisalment, and the property must bring a certain proportion of that appraised value, and so we, in harmony with that idea, think an upset price should be fixed."

An examination of the case shows, moreover, that an order of that character was manifestly appropriate therein, because of the fact that there were outstanding receivers' certificates and prior liens which required protection. We can see no necessity, however, for it in this case, and think the matter rested largely in the discretion of the court. The sale is subject to confirmation, and if the property should bring a grossly inadequate price, doubtless the sale would not be confirmed.

The decree is affirmed, with costs.

JOSLYN V. CADILLAC AUTOMOBILE CO.

(Circuit Court of Appeals, Sixth Circuit. March 8, 1910.)

No. 1998.

I. EVIDENCE (§§ 244, 265*)—ADMISSIONS BY CORPORATE AGENT—STATEMENTS MADE AFTER TRANSACTION—WEIGHT AND EFFECT.

A statement made by the general sales manager of a corporation defendant that an automobile made by it and sold to plaintiff would not develop the horse power represented to plaintiff when the sale was made

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by 20 per cent., as an admission by defendant, was competent but not conclusive evidence of the fact stated.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-936, 1029-1050; Dec. Dig. §§ 244, 265.*]

2. SALES (§ 398*)—ACTION BY BUYER TO RECOVER PRICE—MISREPRESENTATION—WHEN QUESTION FOR JURY.

In an action by the purchaser of an automobile to recover the purchase price paid, on an attempted rescission of the contract for misrepresentation inducing the sale, the question whether the machine would develop the horse power represented is one of fact for the jury, notwithstanding the testimony of experts as to the theoretical horse power which would be developed by an engine of the dimensions of that sold.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 398.*]

3. APPEAL AND ERROR (§ 854*)—REVIEW—CORRECT DECISION BASED ON ERRONEOUS GROUNDS.

A judgment will not be reversed because of the direction of a verdict on an erroneous ground if it was proper on other grounds.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3408; Dec. Dig. § 854.*]

4. PRINCIPAL AND AGENT (§ 92*)—CONTRACT CREATING RELATION—GENERAL SALES MANAGER OF CORPORATION.

The relation of principal and agent exists as to third persons between a manufacturing corporation and one employed by it as its general sales manager.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 92.*]

5. SALES (§ 38*)—RESCISSION BY BUYER—GROUNDS—MATERIAL MISREPRESENTATION INDUCING CONTRACT.

A contract of sale, although it contains no warranty of the article sold, may be rescinded by the buyer for a material misrepresentation by the seller external to the contract with respect to the article sold, of which he was also the manufacturer, which induced the contract and was made for that purpose, whether or not such representation was in fact known by the seller to be false.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 65-77, 85; Dec. Dig. § 38.*]

6. SALES (§ 130*)—RIGHT OF BUYER TO RESCIND—ACQUIESCENCE AND WAIVER.

Acquiescence and waiver, when set up to defeat the right of a buyer to rescind a contract of sale, are always questions of fact, with the burden of proof resting upon the defendant.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 130.*]

7. SALES (§ 121*)—RIGHT OF BUYER TO RESCIND—WAIVER.

The exercise by a buyer of acts of ownership over the article bought, which are inconsistent with the right to rescind the contract, constitute a waiver of such right.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 296-301; Dec. Dig. § 121.*]

8. PRINCIPAL AND AGENT (§ 121*)—EVIDENCE OF AGENT'S AUTHORITY—TESTIMONY OF AGENT.

The rule that statements made by an alleged agent are not competent as against his principal to prove his authority as agent does not apply to his testimony as a witness on the trial in which such authority is in issue.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 416-419; Dec. Dig. § 121.*]

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

Action by George A. Joslyn against the Cadillac Automobile Company. Judgment for defendant, and plaintiff brings error. Reversed.

P. B. Moody and C. D. Joslyn, for plaintiff in error.

Harrison Geer, for defendant in error.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

KNAPPEN, Circuit Judge. The plaintiff in error brought suit against the defendant for the recovery of the purchase price of an automobile claimed to have been bought by plaintiff from defendant; plaintiff having elected to rescind the purchase by reason of certain alleged false and material representations claimed to have induced the sale. There was a jury trial. The judge submitted to the jury the questions of fact involved, but later instructed a verdict for defendant. The apparent ground of this direction is that in the opinion of the court there was no substantial evidence that the automobile did not fully meet the alleged representations.

The alleged misrepresentations relied on, so far as material here, were that the engine would develop 30 horse power and that it would weigh about 400 pounds less than proved to be its weight. We may dismiss from consideration the question of weight, for the reason that the declaration contains no allegation of misrepresentation in this regard, and the court below was not asked to submit such question to the jury.

In our opinion, the learned judge was in error in holding that there was no testimony that the car did not have 30 horse power. There was testimony to the effect that Mr. Metzger, the defendant's sales manager, directly admitted to plaintiff; after the controversy over the power of the car had arisen, that defendant had turned out 150 cars of the type in question supposing that they had 30 horse power, but had found that they would develop but 24 horse power; that accordingly defendant was getting out some new parts, by way of additions, which it was thought would add from 15 per cent. to 20 per cent. to the power, and would so bring it up to 30 horse power; that there had been trouble and complaints over quite a number of these cars, and that the defendant claimed that its next year's model, which embraced the additions referred to, had about 30 horse power. The plaintiff also offered certain testimony, which was rejected, by way of comparison of the power of the car in question with another car of a lower rated power. It is alleged that this statement of the sales manager was shown to have been merely his personal opinion; that upon the trial he disclaimed the possession of expert knowledge at the time of the making of the admission referred to, and testified that he had since found that the car would develop 30 horse power; and it is insisted that the prior admission had thus no force as evidence of the fact. But not only is the testimony referred to susceptible of the construction that the defendant had actually ascertained the fact of the deficiency in power, but the defendant and those by whom it speaks are presumed to have knowledge of the power of the machine which the defendant manufactures and sells. The admission in question must be held

competent, although not conclusive, evidence of the fact of the alleged deficiency in power.

It is also urged that the expert testimony on both sides shows that an engine of the type in question, with a $4\frac{3}{8}$ inch cylinder and a 5 inch stroke, is bound to develop 30 horse power. But there was testimony tending to show that this proposition is only theoretically true; that is to say, that it is true only when all of numerous conditions are normal and perfect. In our opinion, the power of the machine was a question of fact for the jury.

This conclusion, however, does not work a reversal of the judgment provided, as is contended by defendant, the verdict might properly have been directed in its favor upon other grounds. *Currier v. Dartmouth College*, 117 Fed. 44, 54 C. C. A. 430; *Latting v. Owosso Manf'g Co.*, 148 Fed. 369, 78 C. C. A. 183.

It is earnestly contended by defendant that the testimony showed beyond dispute that plaintiff did not purchase the car from defendant, but that he bought it from Metzger, in his capacity as local seller of defendant's cars in Detroit and vicinity. There was positive and express testimony to that effect, supported by the undisputed facts, among others, that the order was addressed to Metzger personally, the invoice issued in his name, and the purchase price paid directly to him. On the other hand, there was testimony tending to show that the sale of the automobile proper, as distinguished from certain accessories, was made by defendant through Metzger as its general sales manager; such testimony embracing, among other things, correspondence with plaintiff both by defendant and Metzger, recognizing the sale of the machine as made by the defendant itself, and the latter as the one under duty to satisfy plaintiff; the fact that defendant sent its own expert to Omaha to put the car in condition; the fact that Meigs, who is alleged to have participated in making the sale, was in the sole employ of the defendant; that Metzger's retail agency extended by its terms only to sales in Detroit and vicinity, and thus not, on its face, to a sale to an Omaha customer; as well as testimony that the reason the car was billed through Metzger was, in the opinion of the witness Meigs, "that a discount was given to plaintiff off the list price, and it was thought best because of agency arrangements to bill it through Metzger's company, to avoid trouble arising from the discount."

That under Metzger's contract and employment as sales manager the relation of principal and agent was created between him and defendant is clear. *Wheaton v. Cadillac Automobile Co.*, 143 Mich. 21, 106 N. W. 399; *Willcox & Gibbs Sewing Machine Co. v. Ewing*, 141 U. S. 627, 12 Sup. Ct. 94, 35 L. Ed. 882. The substantial question is, in which relation—that of sales manager or retail dealer—the contract with plaintiff was made. This was obviously a question of fact for the jury.

It is further urged by defendant that there is no competent evidence of the making of any misrepresentations by defendant justifying a rescission of the contract of sale; that the written contract contains no warranty or representation whatever, the reference in the order

to the machine contracted for being merely "one model D. Cadillac four car, aluminum body, etc."; that the provision in the contract that "no verbal or other agreement or promise not clearly specified in this order will be recognized" forbids parol proof of representations adding to the terms of the written contract; and that, even if a warranty can be predicated upon the language of the advertising pamphlet, which refers to the model D. as "four cylinder, vertical 30 H. P., 4 $\frac{3}{8}$ inch bore by 5 inch stroke" (such words being claimed to be descriptive merely), no right of rescission, by reason of breach of warranty, exists in the case of an executed sale, at least unless fraudulent.

Plaintiff does not necessarily take issue with defendant upon the two propositions of law last stated. Plaintiff, however, does not claim a warranty, but relies upon the alleged fact of misrepresentation external to the contract, with respect to facts material thereto and inducing the same. In such cases the rule is that misrepresentation may be shown, not for the purpose of adding to or varying the terms of the contract, but to show that the contract was obtained by misrepresentation, and so gave the right to rescind on that ground. *Peck v. Jenison*, 99 Mich. 326, 329, 58 N. W. 312. There was evidence tending to show that the machine was represented as having 30 horse power, and that this representation was material, and that the plaintiff made the contract in reliance upon it; and, as already said, there was evidence tending to show that this representation was untrue. There was, however, no express testimony that defendant knew when the representations were made that they were untrue.

Plaintiff contends that proof of defendant's knowledge of the falsity of its representations is not necessary to entitle him to rescind, and relies upon the proposition that the vendee in a contract of purchase of goods may, at his own election, rescind the contract on discovering the falsity of the representations inducing it, and recover the purchase price paid, even though such misrepresentations were honestly made.

Under the common-law rule, an innocent misrepresentation or concealment of the truth is not recognized as ground, in an action at law, for the avoidance of a contract of sale, unless, perhaps, the representations were such as to show that there was a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration; the rule being that a misrepresentation, in order to justify a rescission, must have been made either with knowledge of its falsity or without belief in its truth, although there has been on the part of the common-law courts a strong tendency to bring any statement which was material enough to effect consent, if possible, into the terms of the contract. 2 *Mechem on Sales*, §§ 863, 875. In the courts of equity, however, material misrepresentations, though without knowledge of their falsity on the part of the vendor, were early held to give the right of rescission. 2 *Mechem on Sales*, §§ 863, 875 and following, section 931 and following. *Derry v. Peek*, 14 App. Cas. 337; *Benjamin on Sales* (5th Ed.) p. 437; *McFerran v. Taylor*, 3 Cranch, 270, 2 L. Ed. 436; *Smith v. Richards*, 13 Pet. 26, 10 L. Ed. 42. See, also, *Turner v. Ward*, 154

U. S. 618, 14 Sup. Ct. 1174, 23 L. Ed. 391; *Kell v. Trenchard*, 142 Fed. 16, 23, 73 C. C. A. 202. By the decisions of the Supreme Court of Michigan material misrepresentations as to an existing fact, however honestly made, inducing a contract of purchase, give the right to rescind both in equity and at law, as well as action at law for damages (*Totten v. Burhans*, 91 Mich. 495, 499, 51 N. W. 1119; *Holcomb v. Noble*, 69 Mich. 396, 37 N. W. 497; *Busch v. Wilcox*, 82 Mich. 315, 46 N. W. 940; *Ripley v. Case*, 86 Mich. 261, 49 N. W. 46; *Webster v. Bailey*, 31 Mich. 36, 42; *Converse v. Blumrich*, 14 Mich. 109, 123, 90 Am. Dec. 230; and in a few of the other states the same rule seems to prevail. The courts of the United States do not seem to have gone to the full extent of holding that untrue representations made by a vendor in absolute good faith and in an honest belief in their truth will, when not amounting to a breach of condition precedent or a warranty, justify a suit at law for the recovery of the purchase price upon rescission by the mere act and election of the vendee and without the aid of a court of equity. See, however, *Hindman v. First Nat'l Bank*, 112 Fed. at page 944, 50 C. C. A. 623, 57 L. R. A. 108. It is enough for the purposes of this opinion to say that it is the rule in the courts of the United States, not only that a statement recklessly made without knowledge of its truth is a false statement knowingly made (*Cooper v. Schlesinger*, 111 U. S. 148, 4 Sup. Ct. 360, 28 L. Ed. 382); but that fraud may be predicated of a vendor who makes material untrue representations in respect to his own business or property for the purpose of their being acted upon, and which are in fact relied upon by the purchaser, the truth of which representations the vendor is bound and must be presumed to know; and that where the representations are material, and are made by the vendor for the purpose of their being acted upon, and relate to matters which he is bound to know or is presumed to know, his actual knowledge of their being untrue is not essential (*Lehigh Zinc & Iron Co. v. Bamford*, 150 U. S. 665, 673, 14 Sup. Ct. 219, 37 L. Ed. 1215). To prevent a false statement being fraudulent there must, to say the least, have been not only an honest belief in its truth, but an honest effort to ascertain the truth. As stated by Judge (now Mr. Justice) Lurton, in *Hindman v. First Nat'l Bank*, *supra*:

"A representation in respect to a matter with the intent to influence the conduct of another implies necessarily the belief of the party making it that the statement is true. If the fact be one within his means of knowledge, and he have no knowledge of the fact, a jury will be authorized to believe that the statement was knowingly false."

And as said by the same judge in *Simon v. Goodyear Metallic Rubber Shoe Co.*, 105 Fed. 573, 580, 44 C. C. A. 612, 52 L. R. A. 745, which was an action for fraud and deceit in procuring a sale:

"It was not of the essence of his case that he (the defendant) knew his representations to be false. If he made the representations, which it is claimed he did make, with the intent of procuring the contract in question, and with the intent that the plaintiff should act upon it, without knowledge as to whether it was true or not, it would be a false representation within the rule."

See, also, *Moline Plow Co. v. Carson*, 72 Fed. 387, 392, 18 C. C. A. 606; *Schagun v. Scott Mfg. Co.*, 162 Fed. 209, 222, 89 C. C. A. 189; *McRae v. Lonsby*, 130 Fed. 17, 64 C. C. A. 385. The principles of these decisions would seem to be specially applicable here, for the vendor was also the manufacturer. It certainly is not too much to ascribe to a manufacturer of an article knowledge of its inherent qualities. His representation, therefore, as to a quality that is not readily discernible by others ought at least *prima facie* to charge him with both knowledge and a purpose to influence the sale. It follows that the plaintiff should have been permitted to go to the jury upon the question whether the defendant made the alleged misrepresentations fraudulently, within the definition of that term as given in the authorities we have cited.

It is urged that the plaintiff unreasonably delayed in exercising his option to rescind. The order for the machine was given September 8, 1905. It was shipped about the middle of the next month. Complaint as to the power and weight of the machine was immediately made, and the defendant during the next month sent its expert to Omaha to examine and remedy the defects in the machine. Negotiations as to the remedying of those defects were continued until the following February. There was testimony tending to show that plaintiff did not learn until February that the machine had less than 30 horse power; that the defendant thereafter agreed to send within 30 days the necessary parts to bring the machine up to 30 horse power, and that if it failed to do so it would take the car back and give plaintiff a later model; that defendant continued its promises to send new parts and to excuse its delay until in April, when it stated that it would send a man with the new parts not later than May 10th. On May 24th plaintiff offered to return the machine and demanded back his money, none of the new parts having been received up to that time. Acquiescence and waiver are always questions of fact, and where set up to defeat rescission the burden is upon the defendant to make it out. *Mudsill Mining Co. v. Watrous*, 61 Fed. 163, 186, 188, 9 C. C. A. 415; *Pence v. Langdon*, 99 U. S. 578, 25 L. Ed. 420. Under these circumstances, the question whether the option of rescission was exercised within a reasonable time was one of fact for the jury.

It is also urged that plaintiff, after his alleged rescission, exercised control over the car inconsistent with such rescission. This proposition is predicated upon an advertisement published in a newspaper, offering the car for sale. If such act was an exercise of ownership inconsistent with rescission, the right thereto was waived. *Thomas China Co. v. C. W. Raymond Co.*, 135 Fed. 25, 67 C. C. A. 629. Plaintiff claims, however, that this advertisement was of a humorous nature, and designed to "clear up the chagrin" he had suffered, and that he did not expect to sell the car. We are not prepared to say that this statement may not be true. We think there was room for a question of fact upon the proposition whether the advertisement evidenced a claim of ownership inconsistent with the claimed rescission.

The objection is also made that the statement of the salesman Meigs

was not sufficient evidence to prove his authority as agent. The cases relied upon by defendant, of which *Bond v. Pontiac, O. & Pt. A. R. Co.*, 62 Mich. 643, 29 N. W. 482, 4 Am. St. Rep. 885, is a type, relate only to the assertions of the alleged agent as to his authority, made by acts or conduct out of court. They have no pertinency to the testimony of the agent as a witness upon the trial.

It is also objected against the plaintiff's right of recovery that he failed to surrender certain accessories purchased with the car. There was testimony tending to show that the accessories in question were not purchased from defendant, but were bought from the local company with which Mr. Metzger was connected; the plaintiff disclaiming the right to recover for these accessories. The plaintiff was not required to return to defendant goods not bought from the latter.

It is also insisted that the alleged deficiency in power was not such as to justify rescission, for the assigned reason that plaintiff might have procured from defendant or elsewhere parts which would remedy the difficulty. In our opinion the case is readily distinguishable from *Pullman Co. v. Metropolitan Ry. Co.*, 157 U. S. 94, 15 Sup. Ct. 503, 39 L. Ed. 632, in that the latter case involved only an implied warranty, the vendee had accepted the cars, had demanded of the vendor that it make the brakes sufficient, and had expressed its willingness to pay for the cars as soon as the brakes were so put in proper condition, and the vendor had expressed willingness to make the brakes good. It was shown, moreover, that the defects in the brakes could be readily supplied by the vendee with little expense and without unreasonable exertion by the addition of a well-known and readily obtained brake, the cost of which was held, under the circumstances, to be the most that the vendee could claim in reduction of the purchase price of the cars; while in the case we are considering a material false representation is relied upon, and it does not conclusively appear that plaintiff could have satisfactorily remedied the defect.

It results from these views that the judgment of the Circuit Court must be reversed, and a new trial ordered.

WILCOX v. JONES.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1910.)

No. 928.

1. RECEIVERS (§§ 186, 187*)—ACTION AGAINST FEDERAL RECEIVER IN STATE COURT—CONCLUSIVENESS AND EFFECT OF JUDGMENT.

Under Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 436 (U. S. Comp. St. 1901, p. 582), which authorizes the suing of a federal receiver in respect of any act of his in carrying on the business without the previous leave of the court which appointed him, but such suit to be subject to the general equity jurisdiction of said court so far as the same shall be necessary to the ends of justice, a judgment rendered against such a receiver by a state court in an action brought against him for the death of an employé is conclusive on the federal court as to the right to recover, and the amount

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that should be recovered, but the time and manner of payment is within the control of the federal court.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 375, 377½; Dec. Dig. §§ 186, 187.*

Actions by and against receivers of federal courts, see note to *J. I. Case Plow Works v. Finks*, 26 C. C. A. 49.]

2. RECEIVERS (§ 187*)—PETITION TO ENFORCE JUDGMENT AGAINST RECEIVER—PLEADING.

A petition in intervention in a federal court in the matter of a receivership, by one who has recovered a judgment against the receiver in another court, is a special proceeding for the purpose of presenting the judgment for adjustment and payment, and the court in its discretion has power to permit the pleadings to be reformed so as to properly present such matter.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 377½; Dec. Dig. § 187.*]

3. RECEIVERS (§ 186*)—JUDGMENT AGAINST RECEIVER—INTEREST.

A judgment obtained against a federal receiver in a state court bears interest at the rate provided by the laws of the state, which in South Carolina under Civ. Code 1902, § 1660, is 7 per cent.

[Ed. Note.—For other cases, see *Receivers*, Dec. Dig. § 186.*]

Appeal from the Circuit Court of the United States for the District of South Carolina, at Charleston.

Petition in intervention by Leila A. Jones, administratrix of the estate of James A. Jones, deceased, against P. A. Willcox, receiver, in suit of the Meyer Rubber Company against the Georgetown & Western Railroad Company. From an order granting the petition (174 Fed. 731), the receiver appeals. Affirmed.

On the 9th day of December, 1902, the Circuit Court made an order appointing Freeman S. Farr as receiver of the Georgetown & Western Railroad Company, such order being made in the case of the Meyer Rubber Company, a corporation of the state of New Jersey, plaintiff, against the Georgetown & Western Railroad Company, a corporation of the state of South Carolina, defendant. The receiver so appointed was authorized and directed to carry on the business of the defendant company as a common carrier. On the 28th day of February, 1905, the receiver so appointed died, and P. A. Willcox was appointed as his successor. On the 3d day of December, 1904, while the receiver was engaged in operating the railroad of the said company, one of the locomotives engaged in hauling a log train became derailed, resulting in the killing of James A. Jones, the engineer in charge of the said locomotive. On the 2d day of February, 1906, Leila A. Jones, the wife of the said James A. Jones, deceased, having been duly appointed as administratrix of the estate of her deceased husband, commenced an action as such administratrix in the court of common pleas for Georgetown county, state of South Carolina, against the said P. A. Willcox, as receiver, for \$60,000 damages for the alleged negligent killing of her husband, such action being brought for the benefit of herself and her infant child, as wife and daughter, respectively, of the said James A. Jones, deceased. Such action being at issue, the same was tried at the June term of such court, in 1906, the jury rendering a verdict in favor of the plaintiff for \$7,500. A motion was made by the defendant for a new trial, and, this motion being overruled, an appeal was taken to the state Supreme Court. Subsequently the state Supreme Court rendered its judgment dismissing the appeal and affirming the judgment of the lower court. A petition for a rehearing was filed, but this petition was refused, and the mandate of the Supreme Court was transmitted to the Circuit Court. On February 5, 1907, judgment was duly entered on such verdict in the sum of \$7,986.33, such sum including interest on the amount of the verdict to that date and the plaintiff's costs and disbursements. On April 28, 1908, judgment was duly entered in the further sum of \$79.50, the same being adjudged as costs and disbursements on the ap-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

peal to the Supreme Court. In the month of June, 1908, such judgment not having been paid, the said Ella A. Jones, as administratrix, filed her petition of intervention herein, setting up her judgment against the receiver, and praying an order of the court directing payment thereof. On motion of the attorneys for the receiver an order was made by the court referring the cause to Special Master D. B. Gilliland, with instructions to take the testimony on the issues raised and report the same to the court. Such testimony having been taken and reported by the special master, the matter came on and was heard by the court on the 3d day of April, 1909. On the hearing counsel for the receiver contended, first, that the judgment rendered in the state court was not conclusive, the court having authority to go behind such judgment for the purpose of inquiring into the justice of the cause; and, second, that the intervener, if entitled to have her judgment paid, was not entitled to interest thereon after affirmation thereof by the state Supreme Court. These contentions Judge Brawley overruled, holding that the judgment rendered by the state courts was conclusive, and that the intervener was entitled to interest on her judgment at the legal rate of 7 per cent. From this judgment, appeal is taken upon the several grounds set out in the record.

P. A. Willcox and H. E. Davis (Willcox & Willcox and Le Grand Walker, on the brief), for appellant.

Walter Hazard and W. B. Gruber (Howell & Gruber, on the brief), for appellee.

Before PRITCHARD, Circuit Judge, and WADDILL and CONNOR, District Judges.

PRITCHARD, Circuit Judge (after stating the facts as above). The principal question for our consideration is as to whether this court has the power in this proceeding to review the action of the state court wherein the intervener obtained a judgment against the receiver. The intervener instituted an action in the state court of South Carolina against the receiver, and obtained judgment against him for the sum of \$8,065.63, together with interest on the sum of \$7,845.61 from February 5, 1907. From this judgment an appeal was taken to the Supreme Court of the state, and the judgment of the lower court was affirmed by that court. The intervention upon which this suit is based is in pursuance of Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 436 (U. S. Comp. St. 1901, p. 582) which reads as follows:

"That every receiver or manager of any property appointed by any court of the United States may be sued in respect to any act or transaction of his in carrying on the business connected with such property without the previous leave of the court in which such receiver or manager was appointed; but such suits shall be subject to such equity jurisdiction of the court in which such receiver or manager was appointed so far as the same shall be necessary to the ends of justice."

Prior to the enactment of this statute a receiver could not be sued without leave of the court by which he was appointed. This was a rule of universal application in so far as the federal courts were concerned; but by the enactment of this statute receivers may be sued in any court of competent jurisdiction. The suit in the state court was to recover damages for personal injuries caused by the negligence of the receiver or his agents in operating a railroad as a common carrier, and was, therefore, a common-law proceeding. A claimant may intervene, and thus have the validity of his claim passed upon by the court appointing the receiver, or under this statute he may institute suit in

another court. If the claimant intervenes in the suit wherein the receiver is appointed, he thereby waives his right to a trial by jury, which is contemplated by this section.

In the case of *Flippin v. Kimball et al.*, 87 Fed. 258, 31 C. C. A. 282, this court, among other things, said:

"The appellant, Flippin, could have proceeded in an action at law against the receivers without leave of the court. 25 Stat. 433, Act 1888. Of his own accord he intervened in a suit in equity, and submitted himself to the jurisdiction of the court. By doing this he waived his right to a trial by jury, for it is a fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction."

In that case the petitioner could have instituted a suit against the receivers in the state court, and by doing so would have been entitled to a trial by jury. This statute is framed so as to permit the United States courts to fully administer estates that may be placed in the hands of receivers, and while permission is granted to institute suits against receivers, still there is nothing in the statute which in the slightest degree authorizes the doing of any act calculated to hinder, delay, or embarrass a court of equity in the exercise of its functions.

In *Street's Federal Equity Practice*, § 2688, in referring to the reservation contained in the second clause of this section, it is said:

"The most important feature of this statute so far as regards equity practice is that of the reservation contained in the second clause. This reservation has at least two important effects, namely, (1) it prevents the creditor who is thus permitted to sue from obtaining any undue advantage over other creditors or claimants, and (2) it prevents such creditor from depriving the receiver, and, through the receiver, the court, of the possession or control of any property in his hands by virtue of the receivership."

In the case of *St. Louis S. W. Ry. Co. v. Holbrook*, 73 Fed. 112, 19 C. C. A. 385, this question was passed upon by the Circuit Court of Appeals for the Fifth circuit. In that case the appellee had received severe personal injuries, which he charged were caused by the servants of the receivers in operating trains on their road. He began a suit against the receivers in the state court of the state of Texas. The receivers appeared and answered. On November 10, 1890, the appellee secured a judgment against the receivers for the sum of \$10,000. In Texas such actions (all civil actions) are tried without a jury unless a jury is demanded by one of the parties. Neither party demanding a jury, the case was tried, upon issues of fact as well as law, by the judge. A writ of error to the Court of Civil Appeals of that state was sued out, but was dismissed because the writ was not taken in time. The appellee then filed an intervention in the Circuit Court. That court held that the judgment of the state court was conclusive as to the facts found and as to the amount of the appellee's claim against the receivers, and that the claim was a charge acquired by the appellant under the decrees mentioned above. The case was taken by appeal to the Circuit Court of Appeals. That court, in disposing of the matter, said:

"The assignment of errors presents these two questions: (1) Was the judgment of the state court conclusive as to the right of the plaintiff to recover, and as to the amount that should be recovered? (2) Is the claim thus established a charge on the property acquired under the decrees of the court?"

"The first of these questions was directly presented to this court, at a former term, in the case of *Dillingham v. Hawk*, 9 C. C. A. 101, 60 Fed. 495 [23 L. R. A. 517], and was answered in the affirmative. Without expressly approving all of the reasoning of the opinion, which did not then receive the full concurrence of all the judges rendering that decision, we adhere to the conclusions then expressed as to the sound construction of the third section of the act of March 3, 1887 [c. 373, 24 Stat. 554 (U. S. Comp. St. 1901, p. 582)]. In the state court in which appellee's action went to judgment, the parties had the right to have their case submitted to a jury, on a demand therefor. They chose to not demand a jury. Section 649 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 525] provides for trying issues of fact in civil cases by the court, without the intervention of a jury, and the finding of the court upon the facts has the same effect as the verdict of a jury. And where the submission of a civil case is made without the stipulation in writing, the judgment cannot be questioned, if it is warranted by the pleadings. The analogies, therefore, would seem to indicate that where parties could try their issues before a jury, and choose to try them without a jury, the finding of fact and judgment of the court would have at least the same effect as the verdict of a jury."

It is contended by counsel for the appellant that this statute gives the court appointing a receiver or manager the right to review any judgment that may be recovered in a state court against the receiver or manager; that the language "subject to the general equity jurisdiction of the court" means that the court appointing the receiver or manager is to exercise full and complete jurisdiction over such suit and to inspect and review the proceedings of the court in which it may be instituted. To adopt this construction would be to constitute such court a court of review quoad cases of this character. The language employed is not susceptible of such construction, even if it had been the intention of Congress to confer such power; but it is manifest that it was not the intention of Congress to invest the courts of the United States with jurisdiction to that extent. This statute, in the first place, was intended to give claimants an opportunity to institute suit without previous leave of the court in which a receiver may be appointed, and leaves them free to institute such suit in a state court. Why authorize a claimant to institute suit against a receiver in another court unless it was intended thereby to permit such party to have his rights determined according to the well-defined rules of legal procedure as in this instance? Under such circumstances, to hold that a court appointing a receiver has a right to inspect and review the entire proceedings would render this statute a useless piece of legislation. The proviso, "but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed so far as the same shall be necessary to the ends of justice," was intended to leave the court wherein the receiver was appointed in undisputed control of the property in the possession of its receiver, with full power to manage and control the same, to distribute the funds, and to adjust the equities and priorities between claimants according to the rights of the several parties. In the case of *Central Trust Co. v. St. L., A. & T. R. R. Co.* (C. C.) 41 Fed. 551, Caldwell, C. J., in discussing this question, said:

"The court is asked to qualify the order relating to judgments recovered in the state courts by adding a proviso to the effect that when it is shown that the judgment is for a grossly excessive amount this court will reduce it to a just and reasonable sum. This court will not entertain the suggestion that its

receiver will not obtain justice in the state courts. The act of Congress gives the right to sue the receiver in the state court. *Central Trust Co. v. St. Louis, A. & T. R. Co.*, 40 Fed. 426. The state court has jurisdiction of the parties and the subject-matter, and its judgment against the receiver of this court is as final and conclusive as it is against any other suitor. The right to sue the receiver in the state court would be of little utility if its judgment could be annulled or modified at the discretion of this court. It is open to the receiver to correct the errors of the inferior courts of the state by an appeal to the Supreme Court. But this court is not invested with appellate or supervisory jurisdiction over the state courts, and cannot annul, vacate, or modify their judgments. *Randall v. Howard*, 2 Black (U. S.) 585 [17 L. Ed. 269]; *Nougue v. Clapp*, 101 U. S. 551 [25 L. Ed. 1026].

"It is true that the act of Congress provides that, when the receiver is sued, the 'suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.' This clause of the act established no new rule, but is merely declaratory of the previously existing law. The receiver holds the property for the benefit of all persons having any interest or lien upon it. The road is a unit. Broken into parts, or deprived of its rolling stock, its value would be greatly impaired. Suits, therefore, which seek to deprive the receiver of the possession of the property, and all process, the execution of which would have that effect, are subject to the control of the court appointing the receiver, so far as may be necessary to the ends of justice. The marshaling of the assets, and the orderly distribution of the fund or property according to the rights and equities of the several parties in interest, is not to be interfered with by the judgment or process of the state courts. The judgment of the state court is conclusive as to the amount of the debt, but the time and mode of its payment must be controlled by the court appointing the receiver."

In the absence of a provision of this character, this statute would lead to interminable confusion and conflict of jurisdiction. Therefore, Congress has wisely provided that the courts of the United States in such cases shall have ample power to settle and adjust all equities arising in such suits without hindrance, by providing that they shall be subject to the general equity jurisdiction of such courts, thus, among other things, giving a court of the United States the power to say whether the judgment thus obtained is a first lien on the property in the hands of the receiver, to determine when the same shall be paid, the order of its payment, and cases might occur in which it would be necessary for the court to determine as to whether the court wherein the judgment was rendered had jurisdiction. Thereby the courts of the United States are clothed with ample power, by injunction, to prevent judgment creditors from harassing a receiver or interfering with the property in his possession. The final settlement and adjustment of all claims and the payment of all moneys are to be made subject to the decree of the court appointing the receiver. To this extent the power of such court is supreme. The contention that it is contemplated by this statute that the United States courts should at all times have jurisdiction over such suits in the state courts to such an extent as to review the action of such courts cannot be sustained upon principle, nor is there anything in the statute to warrant such contention.

Among other things the appellant insists that the court erred in permitting the amendment which gave the petitioner the right to "retract the allegations of the seventh paragraph of her original petition" and to allege instead that she had filed in the court of common pleas

for Georgetown county, S. C., a complaint substantially alleging the matters stated in said paragraph. In the seventh paragraph of the petition filed in the court below it is alleged that the death of the party injured was due to the negligence and willfulness of the receiver in the operation of the road. This paragraph was denied by the receiver. Therefore, the receiver insists that this raised an issue which should have been tried by the court below and that the court had no power to strike out a portion of the paragraph upon which such issue was based. It is insisted that a bill in equity cannot be amended so as to set up a new cause of action, and that this petition should be treated as being in the nature of a bill in equity. This would be true, ordinarily, but this is in the nature of a special proceeding, and the pleadings clearly show that it was the purpose of the intervener to acquaint the court below with the fact that she had obtained a judgment in the state court against the receiver, and that she thereby desired to submit herself to the jurisdiction of the court of equity in pursuance of section 3, c. 866, 25 Stat. 836, in order that such judgment might be considered by the court in the adjustment of the equities between the parties and in the payment of claims against the receiver; and that she might obtain the relief to which she was entitled as a judgment creditor. Under these circumstances the court, in the exercise of its discretion, had ample power to permit the pleadings to be reformed so as to properly present the matter.

It is also insisted that "the court erred in holding that the reports of the standing master and accounts of the receiver on file show that the receiver has received sufficient income to pay this judgment." The court below had before it the reports of the standing master and the accounts of the receiver, and has found as a fact that the receiver has sufficient income to pay this judgment. Under the circumstances we are not inclined to disturb the findings of the court in this respect.

It is also assigned as error that the court erred in holding that the judgment which the petitioner is seeking to enforce in this proceeding bears interest. It is insisted that the case of *In re Bound v. S. C. Ry. Co. et al.*, *Ex parte H. S. Evans*, decided by Judge Simonton, reported in 174 Fed. 729, is controlling. The statute in force at that time was enacted in 1815 (6 St. at Large, pp. 4, 5), and the court in rendering the decision had before it the decision of the Supreme Court of South Carolina in considering that act. The act in question reads as follows:

"Be it enacted, by the honorable the Senate and the House of Representatives, now met and sitting in General Assembly, and by the authority of the same, that all judgments and decrees of the courts of law or equity of this state, hereafter to be obtained and rendered on any judgment, bond, bill, promissory note, or other cause of action, bearing interest, the principal sum of the judgment, bond, bill, promissory note, or other cause of action on which such judgment shall be obtained and rendered, shall continue to bear the same interest as the original cause of action did bear before the entry of judgment thereon; and in the body of every execution hereafter to be issued on such judgment or decree the sheriff or other officer who may be required to execute the same, shall be directed, by virtue of such execution, to levy the interest which shall accrue on the principal of the said debt, obligation or other security on which the judgment or decree has, or may be had, or rendered, up to the day on which such levy shall be made, and satisfaction entered on said execution."

'This act was repealed in 1866 (13 St. at Large, p. 463), and the act repealing the same put all judgments on the same footing by providing for interest thereon at 7 per cent. per annum. Section 2 of the act of 1866 reads as follows:

"That in all money decrees and judgments of courts of law and equity, hereafter enrolled or entered, in all cases of accounts hereafter stated, and in all cases wherein any sum or sums of money shall hereafter be ascertained, and being due, shall draw interest, according to law, the legal interest shall be and remain at the rate of seven per centum per annum."

It is obvious that the learned judge who rendered the decision in the case of *In re Bound v. S. C. Ry. Co. et al.*, Ex parte H. S. Evans, supra, overlooked the fact that the act of 1866 (now treated as section 1660 of the Code of Laws of 1902) repealed the act of 1815. If the act of 1815 were in force, there would be merit in the contention of the appellant; but, inasmuch as that act has been repealed, we are governed by the later enactment which provides that in all cases "where any sum or sums of money shall hereafter be ascertained, and being due, shall draw interest according to law, and the legal rate shall be and remain at the rate of seven per centum per annum."

The case of *Moore v. Holland*, 16 S. C. 15, is very much in point. Judgment had been obtained in the Circuit Court on a bond rendered in 1867 bearing interest at 16 per cent. per annum. The plaintiff contended that the judgment should bear interest at the contract rate. However, the Circuit Judge, in passing upon the question, said:

"The judgment is not a confession of judgment. 6 St. at Large, pp. 160, 161. §§ 1, 2; 11 St. at Large, pp. 72, 75; 3 Blackstone, 395. It is a consent judgment by the court. But under our statutes there can be no difference in the grades of judgments as to the matter of interest. The judgment cannot be considered as a contract, for a contract in its final analysis made by debtor with creditor is but a right of action conveyed by the debtor to the creditor, and the right of action ceases with the judgment, which is but the sentence of the law pronounced by the court. If the contract or note upon which the judgment is based had borne no rate of interest, still the judgment would bear interest at the legal rate of 7 per centum per annum. So the judgment could not bear a higher rate of interest, even though the note bore a rate exceeding seven per centum per annum."

The case was carried to the Supreme Court of the state and that court, after considering the matter, in sustaining the judgment of the lower court, among other things, said:

"Now, was Holland entitled to recover on this judgment 16 per cent., as specified in the note and in the confession, or was the Circuit Judge right in restricting him to 7 per cent. after judgment? We concur with the Circuit Judge, and we do not know that we can add anything to the argument by which he sustains his opinion."

The case of *Maner v. Wilson*, 16 S. C. 477, is very much in point. The court said:

"A judgment at law bears interest at the rate of 7 per cent. per annum. 13 St. at Large, p. 463."

The judgment of the intervener, having been obtained in the courts of South Carolina, constitutes a full and conclusive claim against the receiver in this respect. The statute of that state provides that such judgment shall bear interest at 7 per cent. per annum. This court

being governed by such statute, we are of the opinion that there is no error in the ruling of the lower court as respects this matter.

For the reasons herein stated, we conclude that the decree entered by the court below is proper, and should be affirmed.

SANFORD & BROOKS CO. v. COLUMBIA DREDGING CO.

(Circuit Court of Appeals, Fourth Circuit. March 16, 1910.)

No. 857.

1. SHIPPING (§ 42*)—TIME CHARTERS—IMPLIED WARRANTY OF FITNESS OF VESSEL—RULE OF CAVEAT EMPTOR.

The rule of caveat emptor applies to contracts of letting as well as of sale, and the hirer of a vessel, who accepts the same after full inspection, as in compliance with the contract, cannot hold the owner to an implied warranty against defects which were then discoverable, where he could not have done so had he been a purchaser.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 42.*]

Implied warranty of seaworthiness, see notes to *The Carib Prince*, 15 O. C. A. 388; *Nellson v. Coal, Cement & Supply Co.*, 60 O. C. A. 179.]

2. SHIPPING (§ 49*)—HIRE OF SCOWS—FITNESS—EFFECT OF ACCEPTANCE AFTER INSPECTION.

Libelant hired to respondent, by a charter made verbally and by correspondence, a tug and three scows, to be used in dredging work, at a monthly rental; respondent agreeing to keep and return them in as good condition as they then were, ordinary wear excepted. When the scows were tendered, respondent made complaint of their condition, and refused to accept them as they were, and libelant had them repaired at a cost of \$3,000. By a supplemental agreement, it was provided that the hire of the scows should commence from the time each was "finally overhauled" and accepted by respondent. They were so accepted, and were retained and used by respondent for about 14 months. During such use the dumping gear was found unsatisfactory in operation, and complaint was made to libelant, which promptly replied that it would make no further alterations or improvements, whereupon respondent had the same made. It at no time offered to return the scows, and the defects in the gear were easily discoverable at the time they were accepted. *Held*, that the defects were not such as to render the scows unseaworthy, and that respondent was bound by their acceptance after inspection and their retention, and could not set off against the hire the cost of the repairs and alterations made by it thereon.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 49.*]

3. SHIPPING (§ 42*)—CHARTERS—"SEAWORTHY."

To be "seaworthy" a vessel must be sufficiently tight, staunch, and strong to resist the ordinary attacks of winds and seas.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 156; Dec. Dig. § 42.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6362-6365; vol. 8, p. 7796.]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

Suit in admiralty by the Columbia Dredging Company against the Sanford & Brooks Company. Decree for libelant (163 Fed. 362), and respondent appeals. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

H. H. Little, for appellant.

Henry R. Miller and N. T. Green, for appellee.

Before PRITCHARD, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

BRAWLEY, District Judge. This is a libel to recover \$2,426.99, the balance alleged to be due for the hire of a tug and three mud scows, and also to recover the further sum of \$1,822.58, alleged to have been expended by the libelant in repairing the scows upon their redelivery at the termination of the work, in order to put them in the condition in which they were when delivered to respondents. This last-mentioned claim was not allowed by the court below, and, as there is no appeal by the libelant, it will not be considered.

The respondents filed a cross-libel, claiming \$3,442.34 for work done upon the scows during the progress of the work, and for loss of time while such repairs were being made. There was also a claim in the cross-libel for the time lost by the tug and expenditures for another tug hired in lieu of the tug, and also a claim for certain deductions on account of holidays. These two last items have not been pressed in the argument before us, and need not be considered. The case was referred to a commissioner for the purpose of taking and stating the accounts between the parties, who reported in favor of the libelant for the amount first above stated as due upon their account, and allowed the respondents the sum of \$3,442.34, the claim set up in the cross-libel adjudging that the respondents should recover from the libelant the sum of \$1,015.35; that being the excess of the claim proved by it over the claim of the libelant. Exceptions were filed by the libelant, and a decree was entered by the district judge overruling the report in so far as it allowed the claims above referred to set up in the cross-libel, and a decree was entered in favor of the libelant for the amount of its claim. From that decree respondents have appealed.

In the spring of 1904 the Sanford & Brooks Company, which was engaged in the dredging business, had a contract with the government for cutting away a portion of Hospital Point in Norfolk harbor, and, needing additional equipment, entered into negotiations with the Virginia Dredging Company for the hire of its tug the E. J. Codd and three mud scows, known as Nos. 9, 10, and 11, which plant was at that time in New London, Conn. The negotiations resulted in a contract for the hire of this equipment, the Sanford & Brooks Company agreeing to pay \$1,200 (afterwards increased to \$1,260) per month for the tug, and 2 cents per cubic yard capacity per day for each of the scows. They also were to pay a part of the towage charges for bringing this equipment to Norfolk. The contract was not in writing, but was the result of interviews between the parties, and correspondence. Inquiry was made by a representative of the respondents as to the condition of the scows, and he was told that so far as he knew they were in good condition, as they had been but a short time before engaged in similar work in New London. He supposed they were all right, and knew nothing to the contrary. Upon the arrival of the scows in Norfolk,

early in May, complaint was made as to their condition, and respondents declined to accept them as they were, and upon receiving these complaints the owner of the scows ordered its representative at Norfolk to have them put in condition satisfactory to Sanford & Brooks. Certain repairs were made, about \$3,000 in all being expended upon them. The repairs on scows Nos. 9 and 11 were completed before May 23d, on which day there was a meeting between the parties at Baltimore for the purpose of arriving at an understanding as to the date of the delivery and acceptance of the scows. At this meeting Jeffress, the president of the libelant company, and Brown, its agent, who had superintended in its behalf the repairs at Norfolk, represented the libelant, and Sanford & Brooks represented the respondents. The following letter gives the result of that interview:

"Baltimore, Md., May 23, 1904.

"Mr. Thomas F. Jeffress, President Virginia Dredging Company, Hotel Jefferson, Richmond, Va.—Dear Sir: Referring to our interview to-day, we understand the following to be the result: We agree to pay you for the tug 'Codd' \$1,262 a month instead of \$1,200. In regard to the scow hire, we agree to pay you for the yardage that the scows have produced in accordance with the statement inclosed herewith, it being understood that we will not take the three scows until they are finally overhauled and turned over to us; # 11 having been completed and turned over to us on the 16th inst., # 9 we understand was turned over to us on Saturday last, May 21st, and # 10 is now under repairs. In regard to the towage bill which you paid for bringing the scows and tug from New London, we agree to pay \$600 towards this bill.

"Very truly yours,

W. B. Brooks, Jr., Vice President."

Subsequent letters show that scow #10, upon which repairs were made to the extent of \$1,500, was accepted as of date June 21, 1904. The Virginia Dredging Company on or about July 29, 1904, assigned and transferred all its interest in this contract and in the tug and scows to the Columbia Dredging Company, the above-named libelant. Testimony as to the precise nature of the repairs made upon the scows prior to their acceptance is lacking; Sanford, who represented the respondent company, being dead at the time of the hearing, and Brown, who supervised the work on the part of the libelant company, being then in a dying condition. When the contract was made no definite time was fixed for the use of the scows. They were kept by the respondents about 14 months. The question for our determination is whether the respondents are entitled to recover from libelant the amount expended for repairs to the scows after their acceptance, and for the loss of time when they were undergoing repair. We do not find in the record an exact statement of the nature of these repairs, but we infer that the greater part of the expense was in providing new gear, as we find from the correspondence that complaints were made that the ratchets and pawls were defective, so that the scows were dumping their pockets, and a new set of steel castings were put in; the old ironwork that operated the pockets being removed. The commissioner, whose report was in favor of the respondent upon this item, does not state precisely what the repairs were, but finds generally that they were "unseaworthy and unserviceable by reason of structural weakness or defective appliances." The court below, in its opinion on this point, says:

"The repairs charged for, and which form the subject of the exception under consideration, were all made subsequent to this final acceptance of the scows, and at periods covering from one to five months thereafter, and in the opinion of the court the changes are made up chiefly of such items of repairs as became necessarily incident to the working of the scows, or of improvements rather of a permanent character in the structural makeup of the scows, which respondents saw fit to make for its own convenience and the better handling of the same. Manifestly, improvements of the latter kind could not be made at libelant's cost and without its knowledge and consent, and those of the former class were clearly such as the contract of hire contemplated the bailee should make."

In his letter of May 2d to Jeffress, president of libelant company, Brooks, the vice president of respondent company, says:

"If you will have your Captain Brown see Mr. Sanford, they will go over these scows together, and see what ought to be done with them."

In the letter of May 23d from the same to the same, as the result of the interview between the parties in interest, had for the purpose of fixing the date when the scows were to be accepted, there is this phrase:

"It being understood that we will not take the three scows until they are finally overhauled and turned over to us; No. 11 having been completed and turned over to us on the 16th inst., No. 9 we understand was turned over to us on Saturday last, May 21st"

—and No. 10, as appears from a subsequent letter, was accepted June 21st, so at the respective dates these scows were accepted as having been "finally overhauled." The respondents had abundant opportunity to ascertain their true condition; they accepted them, knowing the style of gear and its condition. After the middle of July, in reply to insistent demands of libelant for the more prompt payment of its bills, the respondents began to make complaint of the condition of the scows, but neither then nor at any time thereafter was offer made to return the scows, or any demand made upon the libelant that it should repair them. On July 23d Sanford writes to Jeffress, stating with considerable detail the defects in the gear, and that he had ordered a new set of castings, etc. On July 25th Jeffress writes to Sanford, calling his attention to the agreement of May 23d, which fixed the date of their acceptance of the scows, and says:

"It was clearly understood that from the date of these acceptances we were not to be called upon for any more repairs, but were to be paid at the charter rate from that time on"

—suggesting that possibly the trouble arose from inefficient help in handling them, stating that they had already made considerable concessions; that the charter price was 20 per cent. lower than the usual price, and distinctly repudiating any obligation on the part of the libelant to pay for these repairs. There is no contention that there was any express warranty or that there was any agreement on the part of the libelant to pay for these repairs. The respondents' case rests entirely upon the implied warranty, to wit:

"In every contract for the carriage of goods between the person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire and the person putting goods on board or employing a vessel or lighter for

that purpose it is a term of the contract upon the part of the carrier or lighterman, implied by law, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public."

And further:

"That this implied warranty means not only that the owners have used their best efforts to make her seaworthy, but she must in fact be so."

There is no dispute as to the correctness of these propositions. What constitutes seaworthiness varies with the occasion. A vessel may be seaworthy for a river or bay, and not for ocean navigation. That is not a happy term to use except with regard to that condition of a vessel which enables it to avoid exposure of the cargo to the perils of the sea. It must be sufficiently tight, staunch, and strong to resist the ordinary attacks of winds and seas. The cases are innumerable as to what constitutes seaworthiness where vessels are chartered for the carriage of goods, but they are rare as to what is meant by seaworthiness in craft similar to those in the case at bar. In *The Northern Belle*, 9 Wall. 530, 19 L. Ed. 746, Mr. Justice Miller, in the case of a barge loaded with wheat on one of the western rivers, which was sunk and the wheat damaged, says:

"She must be so tight that water will not reach the cargo; so strong that these ordinary applications of external forces will not spring a leak or sink her; so sound that she will safely carry the cargo in bulk through these ordinary shocks to which she must every day be subjected. If she is capable of this, she is seaworthy."

If this is a correct definition of seaworthiness, it cannot be doubted that these scows were sufficiently tight, staunch, and strong to float safely in the waters where they were employed; indeed it is not contended that they were not.

The defects alleged were with respect to the pawls, ratchets, and gear in use upon the scows for the purpose of discharging the mud and sand loaded upon them. No case has been cited, and our researches have not enabled us to discover one, where appliances of this nature have been discussed as affecting the question of seaworthiness. In the absence of direct authority, the case must be decided upon general principles, and we take it that there is no doubt that a warranty, whether express or implied, may be waived by agreement or by acts. If the scows had been sold outright on May 23, 1904, after the respondents had full opportunity to discover their condition, it could scarcely be contended that the respondents would not be bound to pay the purchase price agreed upon, whatever defects might have been subsequently discovered therein. The rule of caveat emptor applies to the sales of ships as in the sales of other personal property. 1 *Parsons on Admiralty*, 86. This rule is stated by Mr. Justice Davis in *Barnard v. Kellogg*, 10 Wall. 388, 19 L. Ed. 987, as follows:

"No principle of the common law has been better established or more often affirmed, both in this country and in England, than that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of caveat emptor applies."

In *Kellogg Bridge Company v. Hamilton*, 110 U. S. 116, 3 Sup. Ct. 542, 28 L. Ed. 86, Mr. Justice Harlan says:

"According to the principles of decided cases and upon clear grounds of justice, the fundamental inquiry must always be whether, under the circumstances of a particular case, the buyer had the right to rely and necessarily relied on the judgment of the seller and not upon his own. In ordinary sales the buyer has an opportunity of inspecting the article sold, and the seller, not being the maker, and therefore having no special or technical knowledge of the mode in which it was made, the parties stand upon grounds of substantial equality. If there be, in fact, in a particular case, any inequality, it is such that the law cannot and ought not to attempt to provide against. Consequently, the buyer in such cases, the seller giving no express warranty and making no representations intending to mislead, is holden for the purchase entirely on his own judgment."

On principle there would seem to be no reason why the rule thus stated should not apply here. Conceding to the full extent claimed that there is an obligation upon the owner of every vessel, implied by law, that his vessel is tight, staunch, and fit for the purposes for which he holds it forth, and that this means not only that the owners have used their best efforts to make her seaworthy, but that she must be in fact so, the proofs show that these scows were sufficiently fit, tight, and staunch to fulfill the warranty. The claim for which the respondents filed their cross-libel is not for work done upon the scows to enable them to float safely, but in the main is for repairs and improvements upon the gear, ratchets, and pawls; the old gear being found defective. They had full opportunity to discover the nature of this gear at the time they accepted the scows. The owner made no representation as to its condition, and did nothing to divert the eye or obscure the observation or mislead the respondents in any way. The defects in the gear were plainly discoverable. They were not such as required the exercise of special skill or care to detect them. With full opportunity to examine, they must be presumed to have used their senses, and if by ordinary care—that degree of care that men are generally capable of exercising—they omitted to use their senses, but closed their eyes, they cannot claim now to have relied upon an implied warranty. They could have amply protected themselves by inspection which would have disclosed the true condition and quality of the gear, and could have refused to accept them. If after their acceptance certain defects were discoverable not obvious before, they should, within a reasonable time, have notified the libellant, and allowed him opportunity to remedy the defects. It is true that, as appears from the correspondence, they did from time to time make complaint as to the condition of the scows. These letters were written in response to the demand of libellant for payment of the stipulated hire, but in no case did they make any offer to return the scows, or demand that the libellant should make the repairs as a condition of their further retention. The letter of the president of the libellant company of July 25th, already referred to, clearly notified them that the libellant would not pay for the contemplated changes and improvements, of which respondents informed him in their letter of July 23d. This failure to give notice, coupled with the fact that they retained possession and

continued to use the scows longer than was necessary for a trial, is conclusive against their right to assert a breach of the implied warranty. It is well settled that, in the absence of contract, the lessee is not entitled on the expiration of tenancy to any compensation from the lessor for any improvements made on the demised premises.

We have not been able, after a somewhat exhaustive search, to find any case directly in point on the questions arising here. One of the cases cited by appellee as to a waiver of the warranty may be referred to. It is from the Circuit Court of Appeals, Ninth Circuit, *Waterhouse v. Rock Island, etc., Co.*, 97 Fed. 466, 38 C. C. A. 281. The third syllabus is as follows:

"Where the undisputed evidence showed that a vessel was examined by a charterer, and accepted by him with full knowledge of the condition of her machinery and appliances, it was not error to instruct the jury, in an action count of damages and delays alleged to have resulted from the defective condition of such machinery and appliances should not be considered unless the to recover her hire under the charter, that claims set up by defendant on defects complained of were latent and unknown to defendant."

By the terms of the contract of hiring, the respondents agreed to "keep the scows in as good repair as they are when received, and return them in like manner; ordinary wear and tear excepted." By the civil law in cases of the *locatio rei* or letting to hire, the letter is bound to keep the thing in suitable order and repair for the purposes of the bailment. This is considered by Pothier as an obligation arising by operation of law, from the fact that the enjoyment or use contemplated by the contract cannot otherwise be obtained. That obligation extended to all faults or defects which went to the total prevention of the use or enjoyment of the thing, but not to those which render the use or enjoyment less convenient, and the letter was bound to reimburse to the hirer the necessary expenses incurred about the thing hired; but this is not the rule of the common law, where the landlord without an express agreement is not bound to repair, and the tenant must make necessary repairs at his own expense. Other implications may arise from the usages of trade and the customs of the place. *Central Trust Company v. Wabash, etc., Railway Co.* (C. C.) 50 Fed. 857, was a case in equity, where the bailor sought to recover compensation for the use of certain cars, and the bailee interposed as an offset for repairs to the cars made while in his possession. Thayer, Circuit Judge, refused to allow the offsets interposed, saying:

"By the civil law the bailor for hire is bound to keep the thing in order or in a state of repair suitable for use. No such absolute liability, however, is recognized by the common law. Whether the bailor or the bailee is bound at common law to pay the ordinary expenses incident to keeping the article hired in a state of repair while in the custody of the bailee seems to depend largely on custom and usage and the character of the article, when the matter is not regulated by express contract between the parties."

There is no testimony in this case as to any usage or custom.

Ripley v. Scaive, 5 *Barnewall & Cresswell*, 167, was an assumpsit on a charter party, where the freighter of a ship agreed to pay for her £200 per month for six months' service. The ship was to be kept in

repair by the owner. Before the termination of the voyage for which the ship was chartered certain repairs were necessary, which occupied a period of 28 days. It was held that the freighter was not entitled to deduct those days in calculating the period for which he was to pay freight. The contention was that, if the freighters were bound to pay freight for the period of time consumed in repairing the vessel, the repairs would, in effect, be done at their expense, and not at the expense of the owner; but the court held the freighter bound to pay the full amount stipulated.

The judgment of the District Court is affirmed.

PETERS, Sheriff, v. UNITED STATES ex rel. KELLEY.

(Circuit Court of Appeals, Seventh Circuit. January 28, 1910.)

No. 1,584.

1. HABEAS CORPUS (§ 30*)—SCOPE OF WRIT—ORIGINAL CONTROVERSY.

Where relator was imprisoned under a body execution on a judgment in an action for trespass vi et armis and assault and battery, a writ of habeas corpus was unavailable to bring the original parties into court to re-litigate the original controversy, or to review alleged errors of law or fact in the original litigation.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25: Dec. Dig. § 30.*]

2. BANKRUPTCY (§ 424*)—DISCHARGE—LIABILITY.

The character of the "liability," as that word is used in Bankr. Act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]) § 17, subd. 2, as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 (U. S. Comp. St. Supp. 1909, p. 1310)), specifying certain debts of a bankrupt not affected by a discharge, is not changed by the fact that the liability has been reduced to judgment.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 424.*]

3. BANKRUPTCY (§ 424*)—DISCHARGE—"WILLFUL AND MALICIOUS INJURY."

The term "willful and malicious injury," as used in the bankruptcy act, providing that a discharge shall not relieve the bankrupt from liability therefor, does not necessarily involve hatred or ill will as a state of mind, but arises from a wrongful act done intentionally without just cause or excuse; it being sufficient, to constitute a willful and malicious injury to person or property, that the wrongful act is intentionally done without just cause or excuse, special malice not being required.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 424.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7477-7480; vol. 5, p. 4308.]

4. BANKRUPTCY (§ 424*)—WILLFUL AND MALICIOUS INJURY.

Where a judgment against a bankrupt was rendered on a declaration containing a count for trespass vi et armis, alleging that she overstepped her authority as a school teacher in administering corporal punishment to the plaintiff, it would be assumed, under the full faith and credit clause of the federal Constitution, that the verdict rendered in the state court on which the judgment was based was sustained by sufficient evidence, and was rendered under proper instructions, and hence that the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

judgment was for a willful and malicious injury from which a discharge in bankruptcy would not relieve, under the rule that a judgment for damages under a count for trespass *vi et armis* cannot lawfully be rendered except on proof of a willful and malicious injury.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 424.*]

Grosscup, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of Illinois.

Habeas corpus by the United States, on the relation of Annie Kelley, against J. M. Peters, Sheriff of Champaign County, Illinois. From an order discharging petitioner from custody (166 Fed. 613), respondent appeals. Reversed.

After relatrix was adjudged a bankrupt by the court below, and before she was discharged, appellant as sheriff took her into custody under an execution against her body. The execution was issued by virtue of a judgment entered against her in favor of Michael Burke by the circuit court of Champaign county, Ill., before her voluntary petition in bankruptcy was filed. On her petition for a writ of habeas corpus in the District Court, she was temporarily released from custody, pending her application for a discharge in bankruptcy. After her discharge in bankruptcy was granted, the District Court considered her petition for the writ, the sheriff's return, and certain testimony, and thereupon entered the order appealed from, finally discharging relatrix from the custody of the sheriff.

Section 17 of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 530 (U. S. Comp. St. 1901, p. 3428), as amended in 1903 (Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 [U. S. Comp. St. Supp. 1909, p. 1310]), provides that "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are liabilities * * * for willful and malicious injuries to the person or property of another."

The sheriff's return exhibited the record of the proceedings and judgment of the Champaign county circuit court. On the hearing, relatrix admitted that the proceedings and judgment were correctly stated in the return.

Burke's declaration was in three counts. The first was the common-law count for trespass *vi et armis*. The second stated that Burke was 11 years old, and was attending a public school in Champaign county, of which relatrix was the teacher; that relatrix, under pretense of inflicting punishment upon him for some alleged infraction of the rules, kept him after school, and then and there, without any just or sufficient excuse, unlawfully, willfully, wantonly, and maliciously struck and beat him violently with a certain stick or club; that the punishment administered as aforesaid was grossly and maliciously excessive; whereby he was permanently injured, etc. The third also detailed a "wanton and malicious" assault with a stick and club.

Relatrix pleaded the general issue; also that the alleged assault was only a moderate and proper punishment of Burke as pupil by relatrix as teacher; and, further, that the alleged assault occurred while relatrix was making a proper defense against an assault by Burke.

On issues so tendered, and closed by Burke's general replication, the jury returned a general verdict of guilty and assessed Burke's damages at \$1,800. Judgment in due form was entered. Relatrix prayed an appeal to the Appellate Court of Illinois, but the appeal was never perfected; and no bill of exceptions, preserving the evidence and the instructions of the court to the jury, was ever filed.

At the habeas corpus hearing the District Court permitted relatrix, over appellant's objection, to go into her side of the merits of the alleged assault. Appellant introduced no evidence touching the original occurrence on which the declaration was based.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

H. I. Green and William M. Acton, for appellant.
W. A. Perkins, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). If the District Court and this court were at liberty to inquire de novo into the question whether relatrix inflicted a willful and malicious injury upon the person of her 11 year old pupil, a fair answer could not be given from this record. Relatrix and her witnesses gave their present version of her side of the story (some of them admitting on cross-examination that they were adding matters not testified to by them in the state court); but the boy and his witnesses did not attend the hearing in the District Court. We could not properly pass upon the truth of the original charge de novo, without considering the testimony in support of the charge.

Relatrix's direct adversary in the District Court was not the boy, but the sheriff; and he evidently thought that he was doing his full duty as a disinterested officer of the law when in response to the demand that he show cause why he detained relatrix in custody he produced the writ he held and the record of the proceedings and judgment on which the writ was issued. And so he was; for a writ of habeas corpus cannot lawfully be used as a means of bringing the original parties into court to relitigate their original controversy—it cannot even be used lawfully to review and revise alleged errors of law or fact in the original litigation. "No court may properly release a prisoner under conviction and sentence of another court, unless for want of jurisdiction of the cause or person, or for some other matter rendering its proceedings void. Where a court had jurisdiction, mere errors which have been committed in the course of the proceedings cannot be corrected upon a writ of habeas corpus, which may not in this manner usurp the functions of a writ of error." *Kaizo v. Henry*, 211 U. S. 146, 29 Sup. Ct. 41, 53 L. Ed. 125, and cases there cited. Also *Ex parte Watkins*, 3 Pet. 193, 7 L. Ed. 650, and *In re Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110.

The character of the "liability," as that word is used in amended section 17 (2) of the bankruptcy act, is not changed by the fact that the liability was reduced to judgment. *Tinker v. Colwell*, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754; *Boynton v. Ball*, 121 U. S. 457, 466, 7 Sup. Ct. 981, 30 L. Ed. 985; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 292, 8 Sup. Ct. 1370, 32 L. Ed. 239. The question, therefore, is whether the judgment of the state court is conclusive evidence of a liability of relatrix for a willful and malicious injury to the person of the judgment plaintiff.

"Willful and malicious injury," in the bankruptcy act and everywhere in the law, does not necessarily involve hatred or ill will as a state of mind, but arises from "a wrongful act, done intentionally, without just cause or excuse." "In order to come within that meaning as a judgment for a willful and malicious injury to person or property, it is not necessary that the cause of action be based upon

special malice, so that without it the action could not be maintained." *Tinker v. Colwell*, 193 U. S. 473, 485, 24 Sup. Ct. 505, 508, 48 L. Ed. 754.

In the second and third counts of the declaration the charge was explicitly made that relatrix inflicted the injury willfully and maliciously; that she intentionally overstepped her authority as teacher, and administered an excessive punishment without just cause or excuse. By her pleas of denial, of authority as teacher, and of self-defense, she accepted the gage; and the jury found her guilty. What the evidence was, what the instructions were, we do not know; nor, if the second and third were the only counts, could we inquire, for unquestionably a judgment thereon would be conclusive that in fact and in law the relatrix had inflicted a willful and malicious injury upon the person of the judgment plaintiff.

Relatrix contends that under the first count, for trespass *vi et armis*, a recovery could be had without proof of a willful and malicious injury, and thereupon insists that it was not erroneous for the District Court to inquire *de novo* into the real nature of the alleged assault. If the assumption as to the character of the first count were warranted, the predicated result would not follow. The most that would be authorized (if anything) would be to show that at the trial in the state court no evidence was introduced in support of the second and third counts, and that the evidence which was introduced under the first count did not tend to prove a willful and malicious injury. This, not on the theory of disputing the record or questioning the adjudication, but on the theory that the record was ambiguous, and that therefore evidence dehors the record was proper and necessary to disclose what in truth had been adjudicated. The assumption, however, is unwarranted, for by the law of Illinois (as generally elsewhere) a judgment for damages under a count for trespass *vi et armis* cannot lawfully be rendered except upon proof of a willful and malicious injury. *Jernberg v. Mix*, 199 Ill. 254, 65 N. E. 242; *Gilmore v. Fuller*, 198 Ill. 143, 65 N. E. 84, 60 L. R. A. 286; *Forsyth v. Vehmeyer*, 176 Ill. 365, 52 N. E. 55; *In re Mullen*, 118 Ill. 551, 9 N. E. 208; *In re Murphy*, 109 Ill. 31; *Paxton v. Boyer*, 67 Ill. 133, 16 Am. Rep. 615; *Razor v. Kinsey*, 55 Ill. App. 605; *Tinker v. Colwell*, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754; *McChristal v. Clisbee*, 190 Mass. 120, 76 N. E. 511, 3 L. R. A. (N. S.) 702. And the full faith and credit to which the judgment of the state court is entitled would not be rendered if a doubt were entertained that the jury under proper instructions based their verdict on sufficient evidence.

The order appealed from is reversed, and the cause is remanded to the District Court with the direction to dismiss the petition.

SEAMAN, Circuit Judge (concurring). The bankruptcy act in plain terms (section 17) excludes from the benefit of a discharge liabilities "for willful and malicious injuries to the person or property of another"; so, if the judgment introduced against the bankrupt awards recovery upon an issue of liability thus defined, the constitutional re-

quirement that it receive full faith and credit leaves no escape from the conclusion for reversal of the order appealed from. No question arises, as I believe, for interpretation of the further provisions whereby liabilities for fraud or other wrongful conduct affecting property rights (plainly distinguishable from the injuries above mentioned) are likewise excluded from discharge in bankruptcy.

The judgment referred to is that of a circuit court of the state of Illinois, and the authorities in Illinois, cited in the prevailing opinion, clearly prescribe the issues, as tendered under each and every count of the declaration upon which the judgment rests, to require proof of willful and malicious injury to the person of the plaintiff therein. It is my understanding, not only that the rule thus stated is in accord with the general rule of pleading at common law, but that such decisions are controlling in this forum, and leave no inquiry open in the present proceeding, either upon the merits of the controversy thus determined, or as to the evidence introduced at the trial. The foregoing view does not rest in any sense on the rule upheld in *Tinker v. Colwell*, 193 U. S. 473, 480, 24 Sup. Ct. 505, 48 L. Ed. 754, although well supported by the opinion in that case. The single question there involved was quite different, namely, whether a judgment in favor of a husband for damages arising out of criminal conversation with his wife was within the above-mentioned provision as implying willful and malicious injury to person or property of the husband. I concur for reversal.

GROSSCUP, Circuit Judge (dissenting). The policy of the Bankruptcy Law is to discharge all honest debtors who have fallen into insolvency, that they may have another opportunity in the race of life. The debtors excepted from this general policy are those who have become such through "fraud," or through the obtaining of property "by false pretenses or false representations," or through the committing of "willful and malicious injuries to the person or property of another." Under the old bankruptcy law, the exception founded on fraud could only be made out by the disclosure of "a fraud involving moral turpitude or intentional wrong," and did not extend to a mere fraud implied by law. *Hennequin v. Clews*, 111 U. S. 676, 681, 4 Sup. Ct. 576, 28 L. Ed. 565; *Forsyth v. Vehmeyer*, 177 U. S. 177, 20 Sup. Ct. 623, 44 L. Ed. 723 (quotation from *Tinker v. Colwell*, 193 U. S. 488, 24 Sup. Ct. 509, 48 L. Ed. 754). The Supreme Court does not hold that "fraud," as the word is employed in the present bankruptcy act, is met by anything less than the foregoing, for it says (*Tinker v. Colwell*, 193 U. S. 489, 24 Sup. Ct. 509, 48 L. Ed. 754):

"Assuming that the same holding would be made in regard to the fraud mentioned in the present act, it is clear that the cases are unlike. The implied fraud which the Court in the above-cited cases released was of such a nature that it did not impute either bad faith or immorality to the debtor, while in a judgment founded upon a cause of action, such as the one before us [crim. con.] the malice which is implied is of that very kind which does involve moral turpitude."

And, of course, a debtor who has become such through the obtaining of property by false pretenses or false representations (the second

element in the list of exceptions), necessarily has become such debtor by bad faith, or conscious wrong. Up to this point then, so far as the Supreme Court has construed the present bankruptcy act, the exceptions are founded upon the element of bad faith or conscious wrong involved in the debts from which release is asked.

Is the third exception, "willful and malicious injuries to the person or property of another," to receive a like interpretation? I am deeply impressed with the belief that such will be the interpretation put upon it by the Supreme Court when the question is squarely presented to that Court. This impression is founded, first, upon the care that the Court has taken in *Tinker v. Colwell* to exclude any contrary impression; for in every sentence of the Court's opinion, stress is laid upon the element of actual bad faith and moral turpitude involved in the particular debt before the Court.

"The judgment here mentioned comes, as we think," says the Court, "within the language of the statute reasonably construed. The injury for which it was recovered is one of the grossest which can be inflicted upon the husband, and the person who perpetrates it knows it is an offense of the most aggravated character; that it is a wrong for which no adequate compensation can be made, and hence personal and particular malice towards the husband as an individual need not be shown, for the law implies that there must be malice in the very act itself, and we think Congress did not intend to permit *such an injury* to be released by a discharge in bankruptcy." (The italics are my own.)

I am also impressed that it is the interpretation that, to carry out the intention of Congress, ought to be put upon the phrase as used in the bankruptcy act. The exception is in the nature of a denial—the denial of something that all others obtain. And it seems to me that Congress meant that this denial should be interposed, not upon any mere fiction of the law, or any mere empty implication of the law, but only upon the disclosure of something, in the transaction out of which the debt arose, that gives to it the color of bad faith or conscious wrong doing.

The case before us is that of a school teacher, who, in the lawful exercise of her power to inflict punishment, has inflicted excessive punishment. I say this is the case before us, because unless such be a "willful and malicious injury" within the meaning of the bankruptcy act, the judgment in the trespass suit is not conclusive upon the bankruptcy Court; for, by the law of Illinois and most common law jurisdictions, under the issue raised by the first count (trespass vi et armis for simple assault and battery), the pleas of moderate castigavit and son assault demesne, and the replication de injuria, a recovery could be had for an excess of force employed by the relatrix beyond reasonable chastisement, assuming, of course, that the evidence submitted warranted such recovery. *Ayres v. Kelley*, 11 Ill. 17; *Fortune v. Jones*, 30 Ill. App. 116; *Hannen v. Edes*, 15 Mass. 347; *Bennett v. Appleton*, 25 Wend. 371; *Devine v. Rand*, 38 Vt. 621. And, for the purposes of this appeal, the scope of that judgment, where doubt or ambiguity exists, must be construed most strongly against him who invokes it as *res judicata*; from which it follows, that the verdict returned, being a general verdict (and being as applicable to the first

count as to the second or third counts) is as applicable to a case of mere excess of force, initially lawful, employed beyond reasonable chastisement, though without any conscious or designed wrong-doing, as it would be to a case of assault originating in conscious wrong-doing.

No one pretends that a school teacher chastising a pupil, or a master of a vessel punishing some member of his crew, or an individual resisting an assault, may not, without actual malice, go beyond the force actually needed and therefore make themselves liable to a civil action for trespass *vi et armis*. In each of these cases, the malice imputed may be the mere "fiction of malice"—a fiction created to give the complaining party a standing for a civil suit in the form of action selected. There is in such conduct, unless of course actual malice is shown, no bad faith or conscious wrong—nothing indeed that distinguishes the moral quality of the act from the moral quality of the owner of a factory who allows his employees to come into contact with defective machinery, or the owner of a carriage who takes in a passenger with knowledge that he has a defective vehicle, or, as put by Justice Peckham in *Tinker v. Colwell*, *supra*, "one who negligently drives through a crowded thoroughfare and negligently runs over an individual, would not, as I suppose, be within the exception."

True, in *In re Murphy*, 109 Ill. 31, it was said that malice was the gist of an action of trespass for assault and battery; but it was not ruled that mere malice, as a fiction of law, was the same thing as conscious wrong-doing. The facts in *In re Murphy* are not given. The case relied on as a precedent was *First National Bank of Flora v. Burkett*, 101 Ill. 392, 40 Am. Rep. 209, in which it was said:

"It (malice) in some cases implies a wrong inflicted on another, with an evil intent or purpose, and this is the sense in which it is employed in the statute."

And for anything appearing in *In re Murphy*, it was that kind of malice that was there shown. Indeed, the Court says, speaking of the facts before it (as already said, the facts are not reported):

"Here there was an intent to do harm, and an unlawful execution of that intent, resulting in the infliction of a wrong and injury upon another. Under such circumstances was malice the gist of the action?"

And that this, in its application to the State insolvent law, is as far as the Supreme Court of Illinois meant to go (considering the case as one of actual malice and not mere malice by fiction of law) is shown by that Court in the subsequent case of *Jernberg v. Mix*, 199 Ill. 254, 256, 65 N. E. 242, where it is said:

"The term 'malice,' as used in the act in question (the insolvent act) applies to that class of wrongs which are inflicted with an evil intent, design or purpose. It implies that the guilty party was actuated by improper or dishonest motives, and requires the intentional perpetration of an injury or a wrong on another."

Let me not be misunderstood. As I understand the Supreme Court of the United States in *Tinker v. Colwell*, and the Supreme Court of Illinois in the cases just spoken of, a distinction is observed, where the bankruptcy and insolvent laws are involved, between malice as a fiction of law and malice arising from bad faith or conscious wrong-

doing. Indeed, in the supposititious case stated by Justice Peckham, the form of action might have been trespass *vi et armis* or trespass on the case, that is to say might have been an action implying malice by fiction of law, or an action not implying malice at all, depending, on the election of the plaintiff, whether he counted upon the negligence or upon*the forcible invasion of his right to security as the basis of recovery. *Percival v. Hickey*, 18 Johns. (N. Y.) 257, 9 Am. Dec. 210. That Congress intended that discharge from debts, under this exception to the general policy of the bankruptcy law, should be granted or denied, not according to the real inherent quality of the transaction out of which the debt arose, but wholly in accordance with the accident whether recovery is sought in one form of action or another, I cannot believe; for whether, as a mere fiction of law, there be malice or not, the moral character of the wrong complained of is the same, the evidence alone determining the animus of the act. And in the case before us, the evidence alone can determine whether or not the excessive punishment was due to an honest mistake of judgment or want of due care, or whether it was due to motives of ill-will, hatred and malevolence.

I am giving expression to this dissent because, in my judgment the majority opinion misinterprets *Tinker v. Colwell* (and in that decision there were four dissenting justices); and because this misinterpretation, unless this clause of the bankruptcy act is construed by the Supreme Court, is liable to be followed by what seems to me an unjust, if not unauthorized, application of the law.

One other phase of this question has thus far wholly gone unnoticed. The phrase, in the bankruptcy act, is "willful and malicious injuries." If this means that willfulness and malice, even though the malice be merely a fictitious malice, must concur, then the case of a school teacher, master of a vessel, or party assaulted, who uses more force than what is needed, but does it without consciousness of such excess, cannot be said to be willful, for "willful" means conscious intention. And to put such an interpretation upon the phrase—joining the two words as characterizing the act—brings this third exception into line with the first and second exceptions, to-wit, "fraud" and the obtaining of property by "false pretenses or false representations."

I am not sure that the order appealed from in this case should be affirmed. That might preclude the holder of the judgment from showing, in some appropriate way, that the injury was actually malicious. But the judgment from which this is a dissent, on the other hand, accepts the judgment in the trespass suit as *res judicata*, and thereby forestalls any appropriate inquiry as to whether the injury was without actual malice, bad faith, or conscious wrong-doing.

CONNECTICUT FIRE INS. CO. v. MANNING et al.

(Circuit Court of Appeals, Eighth Circuit. March 14, 1910.)

No. 3,127.

1. APPEAL AND ERROR (§ 78*)—FINAL JUDGMENT—NONSUIT.

A judgment of nonsuit, though not *res judicata* of the merits of the controversy between the parties, is nevertheless a final judgment, reviewable on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 471; Dec. Dig. § 78.*]

2. APPEAL AND ERROR (§ 1203*)—REMAND—VOLUNTARY NONSUIT—RIGHT TO DISMISS.

Rev. St. Mo. 1899, § 639 (Ann. St. 1906, p. 658), provides that plaintiff shall be allowed to dismiss or take a nonsuit at any time before the suit is finally submitted to the jury, or to the court sitting as a jury, or to the court, and not afterwards. *Held* that, under the conformity act (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]), requiring federal courts in actions at law to follow the established practice of the state court, plaintiffs in a suit on a fire policy in the federal court, after reversal and remand for new trial, were entitled as of right to take a nonsuit on the case being reached on the trial court calendar for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4688; Dec. Dig. § 1203.*]

State laws as rules of decision in federal courts, see note to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Action by Louis R. Manning and another against the Connecticut Fire Insurance Company. From an order overruling a motion to set aside a nonsuit, defendant brings error. Motion to dismiss writ denied, and judgment affirmed.

Shepard Barclay (P. H. Cullen and Thomas T. Fauntleroy, on the brief), for plaintiff in error.

Edward Robb, for defendants in error.

Before SANBORN, Circuit Judge, and RINER and WM. H. MUNGER, District Judges.

WM. H. MUNGER, District Judge. For convenience, plaintiff in error will be designated as defendant and defendants in error as plaintiffs. Plaintiffs commenced an action in the proper state court of Missouri to recover for a loss upon a policy of fire insurance. The cause was removed into the Circuit Court of the United States, where issues were joined, trial had, verdict and judgment for the plaintiffs. Defendant prosecuted error to this court, and the cause was reversed (160 Fed. 382, 87 C. C. A. 334), this court holding that one of the conditions of the policy, to wit—"if the interest of the assured be or become other than the entire, unconditional, unincumbered, and sole ownership of the property, * * * this policy shall be void, unless otherwise provided by agreement indorsed thereon"—constituted

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a warranty; that, as there was an incumbrance thereon by a trust deed, to secure the payment of a promissory note for \$500, such incumbrance was material to the risk as a matter of law, and the court should not have submitted the question to the jury. The cause was remanded for a new trial. Thereafter, defendant filed its motion in the trial court for judgment on the pleadings, which motion was overruled, and plaintiffs made application for leave to file an amended reply, which was granted; the amended reply seeking to avoid the effect of the decision of this court by alleging knowledge of such incumbrance on the part of defendant's agent at the time of issuing the policy of insurance and accepting the premium therefor. When the cause was reached for trial, the plaintiffs took a nonsuit. At the same term, and within four days thereafter, defendant filed a motion to set aside said nonsuit, for various reasons stated, which motion was by the court overruled, and defendant excepted, and brings the case to this court by writ of error. Plaintiffs have filed a motion to dismiss the writ of error for the reason that the judgment of nonsuit was not a final judgment.

The motion to dismiss is overruled. The judgment of nonsuit was a final one as to that case. The fact that it may not be *res adjudicata* of the merits of the controversy between the parties, and that the plaintiffs are not thereby estopped from bringing a new action founded on the same subject-matter, does not prevent the judgment of nonsuit being a final judgment of the Circuit Court with respect to the then pending case. A writ of error from a judgment of nonsuit was entertained by this court in *Chicago, M. & St. P. Ry. Co. v. Metalstaff*, 101 Fed. 769, 41 C. C. A. 669. Such is the practice in some of the state courts. *Bee Bldg. Co. v. Dalton*, 68 Neb. 38, 93 N. W. 930.

By section 639 of the Revised Statutes of Missouri of 1899 (Ann. St. 1906, p. 658) it is provided:

"The plaintiff shall be allowed to dismiss his suit or take a nonsuit at any time before the same is finally submitted to the jury or to the court sitting as a jury, or to the court, and not afterwards."

In numerous decisions by the Supreme Court of the state of Missouri the above statute has been construed to permit the plaintiff to take a nonsuit at any time before the case has been actually submitted to the jury, although even after the close of all the evidence a motion to direct the jury to return a verdict for the defendant has been by the court sustained, but where the jury have not actually been so instructed and retired.

Chicago, M. & St. P. Ry. Co. v. Metalstaff, *supra*, involved the identical question presented here. Judge Thayer, in that case, after referring to the foregoing statute of Missouri, said:

"The construction which has been invariably placed upon the statute, so far as the decisions show, is that after a demurrer to the plaintiff's evidence has been sustained, or after a peremptory instruction is given at the close of all the evidence directing the jury to return a verdict for the defendant, the plaintiff may then take a nonsuit before the jury has actually retired to consider of its verdict, and that he may take a nonsuit either with or without leave to subsequently move to set the nonsuit aside. It matters not that leave to take a nonsuit is not sought until after the law of the case has been fully

declared by the court, since the plaintiff has the right, under the aforesaid statute, to take a nonsuit at any time before the jury has actually retired. *Wood v. Nortman*, 85 Mo. 298, 304; *Templeton v. Wolf*, 19 Mo. 101; *Lawrence v. Shreve*, 26 Mo. 492; *Mayer v. Old*, 51 Mo. App. 214, 218; *Bank v. Gray*, 146 Mo. 568, 570, 48 S. W. 447; *Wilson v. Stark*, 42 Mo. App. 376. Indeed, the rule of practice last stated is so well settled and so well understood in the state of Missouri that it is almost a work of supererogation to cite the authorities. * * * We perceive no sufficient reason why the federal courts sitting in Missouri should decline to be bound by the rule of procedure now in question, which is so well established in the courts of the state, and has been in force for so many years that it would doubtless have been abrogated long since if it had led to any considerable inconvenience or to the increase of litigation, or had tended in any way to defeat the ends of justice. It is desirable for many reasons that those rules of practice which govern the local courts, and with which the bar are familiar, should likewise receive recognition by the federal courts, and control the conduct of litigation therein, when no evil results are liable to ensue."

In *Francisco v. Chicago & A. R. Co.*, 149 Fed. 354, 357, 79 C. C. A. 292, 295, this court, speaking by Judge Sanborn, said:

"The difference between a judgment upon an instructed verdict and a judgment of nonsuit is that the former prevents, while the latter permits, the maintenance of another action for the same cause. When the evidence was closed in the suit before us, each party had established rights in the trial of this action. The plaintiff had the right to elect whether he would take a nonsuit (section 639, Rev. St. Mo. 1899; *Chicago, M. & St. P. Ry. Co. v. Metalstaff*, 41 C. C. A. 669, 101 Fed. 769), or would submit the whole cause upon the motion to instruct, and endeavor to secure a verdict in his favor. The defendant had a right to elect whether it would endeavor to obtain a nonsuit or a verdict on the merits in its favor. It chose the latter alternative, and moved the court for a directed verdict. This motion the plaintiff opposed, and submitted the cause to the court for decision. The court granted the motion, and the plaintiff excepted. He then had the right to elect whether he would take a nonsuit, and bring another action on the same cause, or would take a verdict against himself, and secure a review of the rulings of the court by a writ of error. He chose the former remedy. He moved the court for leave to take an involuntary nonsuit. The parties then stood in this situation: The defendant asked and pressed for an instructed verdict, and thereby necessarily objected to the nonsuit, which gave the plaintiff an opportunity to bring another action. The plaintiff prayed for the nonsuit, and thereby necessarily objected to the instructed verdict and to a judgment which would prevent his maintenance of another action. The court granted the request of the plaintiff, and denied that of the defendant. Plaintiff thereby secured his right to maintain his action for the same cause, and the defendant lost the judgment in its favor and the entire benefit of a trial in which it had succeeded."

By these decisions this court is committed to the rule that, by the conformity act of Congress (section 914, Rev. St. [U. S. Comp. St. 1901, p. 684]), it will follow the established practice of the state court with respect to the right of a party to take a nonsuit. Such, also, is the holding in the Seventh Circuit. *Meyer v. National Biscuit Co.*, 168 Fed. 906, 94 C. C. A. 335. As bearing upon the same question, see *Gardner v. Michigan Central R. R. Co.*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107, and cases cited.

As the case had not been finally submitted to the court or jury, plaintiffs were entitled to take a nonsuit, and the judgment is affirmed.

SANBORN, Circuit Judge (dissenting). The decision of the majority in this case is not in accord with my opinion concerning it,

which will be briefly stated. Under the decision in this case by this court, which is found in 160 Fed. 382, 87 C. C. A. 334, the insurance company had the legal right to a final judgment on the merits in its favor when it moved for judgment on the pleadings after the return of the case to the Circuit Court. That court erroneously denied that motion, and the company excepted to its ruling on April 20, 1909. The moment that exception had been taken, this court acquired appellate jurisdiction to review and correct the error of that ruling, and to command the rendition of the judgment on the merits, to which the company had the legal right. Neither the statutes of the states, nor the practice of the state courts, nor any act of the plaintiffs below, could deprive this court of the power, or relieve it of the duty, to correct that error at the suit of the party aggrieved. *Barber Asphalt Paving Company v. Morris*, 132 Fed. 945, 953-955, 66 C. C. A. 55, 63-65, 67 L. R. A. 761, and cases there cited.

The act of conformity and the statutes and the practice of the states do not prescribe or limit the jurisdiction of the federal appellate courts, nor do they govern the proceedings for a review of the rulings of the national trial courts. The power and practice of the national appellate courts are derived exclusively from the Constitution, the acts of Congress, the ancient English statutes, and the rules and practice of the courts of the United States, and this practice may neither be extended nor contracted, controlled nor affected, by the statutes of the states or the practice of their courts. *Francisco v. Chicago & A. R. Co.*, 149 Fed. 354, 358, 359, 79 C. C. A. 292, 296, 297; *Chateaugay Iron Co., Petitioner*, 128 U. S. 544, 554, 9 Sup. Ct. 150, 32 L. Ed. 508; *Hudson v. Parker*, 156 U. S. 277, 281, 15 Sup. Ct. 450, 39 L. Ed. 424; *City of Manning v. German Ins. Co.*, 107 Fed. 53, 55, 57, 46 C. C. A. 144, 146, 148; *Hooven, Owens & Rentschler Co. v. John Featherstone's Sons*, 49 C. C. A. 229, 235, 111 Fed. 81, 87; *Louisville & N. Ry. Co. v. White*, 40 C. C. A. 352, 356, 100 Fed. 239, 243; *West v. East Coast Cedar Co.*, 51 C. C. A. 411, 415, 113 Fed. 737, 741; *St. Clair v. United States*, 154 U. S. 134, 153, 14 Sup. Ct. 1002, 38 L. Ed. 936; *Boogher v. Insurance Company*, 103 U. S. 90, 95, 26 L. Ed. 310; *Newcomb v. Wood*, 97 U. S. 581, 24 L. Ed. 1085; *Fishburn v. Railway Co.*, 137 U. S. 60, 11 Sup. Ct. 8, 34 L. Ed. 585; *Kentucky Life, Acc. & Ins. Co. v. Hamilton*, 63 Fed. 93, 98, 11 C. C. A. 42, 47; *Elder v. McClaskey*, 17 C. C. A. 259, 278, 70 Fed. 529, 556; *Ghost v. United States*, 168 Fed. 841, 843, 94 C. C. A. 253, 255. In the opinions of the courts cited by the majority there is no discussion or consideration of the right of a plaintiff, who has succeeded on the trial of an issue of law upon the hearing of a demurrer or upon a motion for judgment which challenges his whole case, to deprive the defendant of the right to a correction of an erroneous ruling upon this trial by dismissing his case without prejudice weeks afterwards. The plaintiffs did not dismiss their case when the motion for judgment was made or when it was decided, or when an exception to the decision was taken on April 20, 1909, but they subsequently stipulated to try it by the court, and continued to prosecute it until June 15, 1909, when they first made their motion to dismiss.

The insurance company was granted by act of Congress the right to the review and correction by this court of the error of law committed by the Circuit Court when that court denied its motion for judgment on the pleadings, and neither the statute of Missouri cited by the majority, nor the decisions of the courts of that state, could deprive the insurance company of that right. Hence, that statute and the proceedings in this case between April 20, 1909, when the exception to the ruling denying the motion was taken, and June 15, 1909, when the motion for dismissal was first made, and the final erroneous judgment of dismissal without prejudice to another action was rendered, are in my opinion irrelevant to the issue in this case. But, even if they are material, the result should not in my opinion be different. The Missouri statute permits a plaintiff to dismiss his suit only before the same is "finally submitted to the jury, or to the court sitting as a jury, or to the court, and not afterwards." The hearing and decision of a motion for judgment on the pleadings, to the granting of which the moving party has a right, is a trial of the action upon a question of law and a final submission of it to the court; and after the decision of this question of law and an exception, which gives the appellate court jurisdiction to review that decision, it is too late, even if the statute applies to the case, to revoke the submission or to divest the appellate court of that jurisdiction. *State v. Court*, 32 Mont. 37, 79 Pac. 546, 547, 549; *Babbitt v. Clark*, 103 U. S. 606, 26 L. Ed. 507; *Alley v. Nott*, 111 U. S. 472, 475, 4 Sup. Ct. 495, 28 L. Ed. 491; *Laidly v. Huntington*, 121 U. S. 179, 181, 7 Sup. Ct. 855, 30 L. Ed. 883; *State v. Scott*, 22 Neb. 628, 36 N. W. 121; *Lookout Mountain R. Co. v. Houston & Co. (C. C.)* 32 Fed. 711; *Goldtree v. Spreckles*, 135 Cal. 666, 67 Pac. 1091; *Beaumont v. Herrick*, 24 Ohio St. 445. A like rule prevails in chancery. *Daniell's Chancery* (5th Ed.) 790. The judgment below in my opinion should be reversed, and a judgment in favor of the insurance company on the merits should be directed.

HEFFNER v. SPRAGUE ELECTRIC CO.

(Circuit Court of Appeals, Third Circuit. April 15, 1910.)

No. 47 (1,348).

1. MASTER AND SERVANT (§ 238*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Plaintiff, who was employed by defendant as a tester of electric hoists which defendant manufactured, having tested a new brake which had been put on an electric hoist in defendant's factory, with knowledge that the current had been turned on and that the operator had gone into the cage from which the hoist was operated, started to descend to the gallery floor below by means of a ladder. In climbing down the ladder, plaintiff took hold of the rail on which the carriage of the hoist ran, knowing that the carriage was only six feet distant, and while his hand grasped the rail the carriage was started by the operator, and the wheels ran over and crushed his fingers. *Held*, that plaintiff was guilty of contributory negligence precluding a recovery.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 681, 743-748; Dec. Dig. § 238.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MASTER AND SERVANT (§ 197*)—INJURIES TO SERVANT—PROXIMATE CAUSE—FELLOW SERVANTS.

The proximate cause of plaintiff's injury was the negligence of the operator of the hoist, who was plaintiff's fellow servant, for which negligence the master was not liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 489, 490; Dec. Dig. § 197.*]

3. MASTER AND SERVANT (§ 156*)—INJURIES TO SERVANT—SCOPE OF EMPLOYMENT.

A master is not liable for injuries to a servant merely because he was engaged in work outside the scope of his employment at the time he was injured, where the danger was neither hidden nor concealed, but was as open and obvious to the servant as to the master, and was one of which the servant had actual knowledge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 311, 312; Dec. Dig. § 156.*]

4. MASTER AND SERVANT (§ 154*)—INJURIES TO SERVANT—WARNING.

A master was not negligent in failing to warn a servant of a danger concerning which the servant was fully informed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 308, 309; Dec. Dig. § 154.*]

In Error to the Circuit Court of the United States for the District of New Jersey.

Action by William H. Heffner against the Sprague Electric Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Francis C. Lowthorp and Elwood W. Moore, Jr., for plaintiff in error.

William J. Davis and F. W. Hastings, for defendant in error.

Before BUFFINGTON, Circuit Judge, and ARCHBALD and CROSS, District Judges.

CROSS, District Judge. The Sprague Electric Company, the defendant in error, on November 4, 1907, was engaged in the manufacture of electrical hoists, motors, and generators at its factory in Bloomfield, N. J. On that date an accident happened whereby the plaintiff in error, one of its employes, was injured, and for the injury thus received he instituted a suit in the court below to recover compensatory damages. He had entered the employment of the defendant on the seventh day of the previous month as a tester of electric hoists. He also did some other work about the factory, to which reference will be made later. The defendant had erected and was using in its business at that time an elevated track, supported on two I beams running lengthwise of its shop. Upon this track ran a carriage, which supported a hoisting apparatus, equipped with a brake, which was electrically operated by an operator, who was stationed in a cage under the carriage and between the rails over which it ran. The accident happened to the plaintiff on Monday, November 4th. On the previous Saturday, he with one or two others had been sent to repair and test the brake of the carriage or to put on a new brake. He was engaged on the work during Saturday and Sunday, and on Monday, the job having been almost completed, he returned for the purpose of finally testing the brake. While the repairs were being made, the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

electric current had been turned off, but it was on again on Monday morning. On that morning a man by the name of Marlow accompanied the plaintiff, and at the time of the accident was in the cage. After the brake had been tested and adjusted, the plaintiff picked up his tools with his right hand, and walked across the I beam from the carriage to an iron ladder reaching from the gallery floor below to, and resting against, the flange of the I beam. The carriage at the time was but six feet distant from the ladder. In climbing down the ladder backwards, the plaintiff with his left hand took hold of the rail on the top of the I beam nearest him, and, while his hand grasped the rail, the carriage was started towards the ladder by Marlow, and in its progress ran over and crushed the fingers of his hand, so that it subsequently became necessary to amputate them. The plaintiff admits that he knew the use of the rail; that the hoisting apparatus was electrically operated; that the current of electricity which operated it had been turned on; and that Marlow, the man who operated the carriage supporting the hoisting apparatus, was in the cage from which it was operated, and was ready to operate it. He also practically admitted that he told Marlow that he had completed the work. This is his language: "I probably said (to Marlow) I was through; it seems to me I did." The learned trial judge directed a judgment of nonsuit to be entered, and it is for the purpose of reviewing such judgment that this writ of error was brought. The judgment was directed on the ground that the proximate cause of the injury was the negligent act of Marlow, who was a fellow servant of the plaintiff. As soon as the court had indicated that a nonsuit must be entered for the reason stated, counsel for the plaintiff raised the point that the plaintiff when injured was engaged in work outside the scope of his employment. The judge, however, held that the facts did not warrant such a conclusion, and adhered to his original ruling.

Notwithstanding the unfortunate accident, with its resultant injury to the plaintiff, we are impelled to the conclusion that a nonsuit was properly ordered. It plainly appears from the facts that the plaintiff was guilty of contributory negligence. He had been engaged in work at the scene of the accident for parts, at least, of three days, and his usual place of work was on the gallery floor at the foot of the ladder, and only about 20 or 30 feet away from the point where he was injured. He had therefore necessarily become familiar with his surroundings, and knew, as already intimated, the use of the rail on which his hand rested when it was injured; knew that an electrically operated carriage, then standing but 6 feet away, was accustomed to pass over it; knew that the electric current had been turned on, and that Marlow, who operated the carriage, was in the cage whence it was operated, and ready at any moment to start the carriage, having probably been told by the plaintiff that he had completed his work. Under the circumstances, common prudence required either that the plaintiff himself should have notified Marlow not to start the carriage, or that he should have refrained from placing his hand upon the rail. The case of *Ball v. Ransome Machinery Co.*, 75 N. J. Law, 477, 68 Atl. 104, seems peculiarly apposite. The facts sufficiently appear in the opinion of the court, from which the following extract is taken:

"The building contained a traveling crane, used for the purpose of moving heavy machinery. It ran upon wheels upon iron rails, supported by beams, near the roof. Plaintiff was familiar with the operation of the crane by observation, and by seeing it move during the short time that he had been employed on the building. At the time he was injured he was working upon a scaffold, and was aiding others in placing joists on the unfinished side of the building, upon which the covering of the side was to be placed. Having to nail the top of a joist at a point which, it may be assumed, he was unable to reach while standing on the scaffold, he, without raising the scaffold, or using other means to raise himself so as to perform the work without danger, stepped upon a studding above the scaffold, and there, it may be assumed, occupied a position that required him to support himself, to some extent, at least, with his left hand. In doing so he placed that hand on the top of the rail, and, the traveling crane then moving, his hand was caught under one of the wheels and injured. There was no signal given of the intention to move the crane. Upon this evidence the trial judge determined that the plaintiff showed that he had, by his conduct, subjected himself to a risk of injury which was perfectly obvious, and which he could not thus encounter without negligence. In that conclusion we concur. It is impossible to conceive that plaintiff did not know that the rail was a place of danger for him to put his hand upon. Nor was there anything to justify him in thinking that the crane would not move without notice, which might have presented a question for the jury."

The same conclusion follows, however, if we accept the view of the court below to the effect that the proximate cause of the plaintiff's injury was the negligence of Marlow, who was unquestionably a fellow servant of the plaintiff. They were both at the time of the accident, and had been previously, engaged in a common employment, under a common master. Marlow, knowing that the plaintiff had completed his work and was about to descend the ladder, ought not, as a prudent man, to have started the carriage without warning, or until he knew that the plaintiff was in a safe position. The facts above mentioned were practically undisputed, and the judge, in determining them as he did, and in directing a judgment of nonsuit, committed no error.

It is strenuously insisted, however, that at the time the plaintiff received his injury he was engaged in work he had been directed to perform outside of the scope of his employment. In our judgment, however, the work in which the plaintiff was engaged when injured was not outside of the scope of his employment. His general employment was to test hoists and hoisting apparatus, electrically operated. The work at which he was engaged when injured was repairing or putting on a new brake and testing a hoist, which was a part of the working apparatus of the factory in which he was employed. That his general employment may have been to test newly manufactured hoists and brakes does not seem to us to be essentially different from testing a hoist and brake already installed. But this is not all, for it appears from his own testimony that his general employment was not so restricted as now claimed, but, on the contrary, that he had done some wiring and piece work, and that the usual testing of hoists and brakes included lifting, power, speed, and other matters of that nature. It is not shown, therefore, that he was, when injured, engaged in work outside of the scope of his employment; but if he were, the danger to which he was exposed was in no wise hidden or concealed; it was an open and obvious danger, as open and

obvious to him as to the master, and, furthermore, one of which he had actual knowledge. Knowing his surroundings and the danger to which he was exposed, there was no duty imposed upon the master to instruct him. The master could not, so far as appears, have told him anything which he did not already know, or anything which was not open and apparent to any one of ordinary intelligence and experience.

The law pertaining to the duty of a master who puts a servant at work which is outside of the scope of his employment is so well settled that any general citation of authorities seems unnecessary. It has, however, been so clearly expressed in *Reed v. Stockmeyer*, 74 Fed. 186, 20 C. C. A. 381, a case decided by the Circuit Court of Appeals for the Seventh Circuit, in which Mr. Justice Harlan sat, that a quotation therefrom may be permitted:

"When the servant is required by the master to perform temporary service beyond and without the scope of that which he has engaged to do, a question of somewhat different nature is presented. The master may not lawfully expose his servant to greater risks than those pertaining to the particular service for which he has engaged, and against which the servant, through want of skill, or by reason of tender age or physical inability, could not presumably defend himself if unapprised of the danger. He is bound to warn the servant of the danger if it be not obvious, and to instruct him how it may be avoided. If, however, the servant be of mature years, and of ordinary intelligence and experience, he is presumed to know and comprehend obvious dangers. In such case the master is not liable for injury happening to the servant in the performance of dangerous work without the scope of his engagement or service merely because he has been directed by the master to perform such work. If the servant is possessed of knowledge and experience sufficient to comprehend the danger, and without objection undertakes the service, the master is not liable for injury received by the servant in such new and more dangerous employment. *Cole v. Railway Co.*, 71 Wis. 114, 37 N. W. 84 [5 Am. St. Rep. 201]; *Paule v. Mining Co.*, 80 Wis. 350, 50 N. W. 189; *Dougherty v. Steel Co.*, 88 Wis. 343, 60 N. W. 274; *Buzzell v. Manufacturing Co.*, 48 Me. 113, 121 [77 Am. Dec. 212]. The liability upon the master in cases of injury to the servant received in a dangerous employment outside of that for which he had engaged arises, therefore, not from the direction of the master to the servant to depart from the one service and to engage in the other and more dangerous work, but from failure to give proper warning of the attendant danger in cases where the danger is not obvious, or where the servant is of immature years, or unable to comprehend the danger."

It should be noted, moreover, before closing, that the plaintiff was not injured while actually engaged at the work in question, but after he had completed it, and was in the act of descending a ladder to the floor. In placing his hand upon the rail where it was injured, he exposed himself, as already stated, not only to obvious but known danger, and must accept the consequences.

The judgment will be affirmed.

BARTHOLOMEW v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. April 5, 1910.)

No. 1,990.

1. INDICTMENT AND INFORMATION (§ 203*)—PARTLY ERRONEOUS SENTENCE—SENTENCE ON DIFFERENT COUNTS.

Where there is a general verdict of guilty on an indictment containing several counts, the fact that some of the counts are bad does not vitiate a sentence of imprisonment based on a good count, although a separate sentence for the same term is imposed on each count, when it is further provided that the terms shall run concurrently.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 2093-2101; Dec. Dig. § 203.*]

2. INDICTMENT AND INFORMATION (§ 99*)—REFERENCE FROM ONE COUNT TO ANOTHER.

A count in an indictment under Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), for using the mails to carry out a scheme to defraud, is not insufficient because it refers to a prior count for a statement of the scheme to defraud, where the reference is adequate to the making up of a sufficient accusation.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 270, 270½; Dec. Dig. § 99.*]

3. POST OFFICE (§ 48*)—USE OF MAILS TO DEFRAUD—INDICTMENT.

An indictment under Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), for using the mails in the execution of a scheme to defraud, considered, and held sufficient.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 48.*]

Nonmailable matter, see note to Timmons v. United States, 30 C. C. A. 86.]

4. CRIMINAL LAW (§ 951*)—SENTENCE—CONFORMITY TO STATUTE.

A sentence on conviction under a statute, which provides that the punishment for its violation shall be by "fine and imprisonment," is not invalid because imprisonment only is imposed, not exceeding the term authorized.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 951.*]

In Error to the District Court of the United States for the Northern District of Ohio.

Ellis Bartholomew was convicted of a criminal offense, and brings error. Affirmed.

Horace Ward, for plaintiff in error.

Wm. L. Day, for the United States.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

SEVERENS, Circuit Judge. The plaintiff in error, whom we will style the "defendant," was convicted in the District Court upon an indictment charging him with violating the provisions of section 5480 of the Revised Statutes (U. S. Comp. St. 1901, p. 3696), concerning the use of the postal establishment of the United States for the promotions of schemes to defraud. The offense charged was that, having formed a scheme to defraud the Bankers' Money Order Association, a corpora-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion doing business at New York, which scheme involved the use of the postal service of the United States, the defendant posted three certain letters at Galion, Ohio, addressed to the said money order association at New York.

There were three counts in the indictment. The first count charged that the defendant had formed the scheme on January 26, 1907, and posted the letter therein described on January 26, 1906, and the letter itself bears this last date, thus presenting an anachronism which is criticised by his counsel, who claims that the charge is of an impossibility. The scheme to defraud is thus set out:

It is first alleged in this count that the scheme to defraud was to be effected by the said Ellis Bartholomew opening and carrying on correspondence and communication with the said Bankers' Money Order Association, etc., by means of and through the post office establishment of the United States, "so devising and intending to devise said scheme to defraud by means of the post office establishment of the United States, the use of said post office establishment being a part of said scheme to defraud," and then proceeds as follows:

"The said Bankers' Money Order Association, a corporation, as aforesaid, was then a corporation, with its said place of business in the city of New York, engaged in the business of issuing and putting forth money orders which it issued through banks throughout the United States, the said money orders to be later redeemed by said association at its said office in New York, the said banks so issuing said money orders acting as agents of said association in the issuing and putting forth of said money orders; it being a part of the business plan of said Bankers' Money Order Association to supply to genuine and reputable banks and bankers throughout the United States forms of said money orders, the same to be validated at time of sale and issue by the signature of the banker or an officer of the bank of issue, the said banks and bankers becoming agents of said Bankers' Money Order Association under an agreement to remit, immediately after sale, to said Bankers' Money Order Association, money of the amount of orders so sold and issued, and it being a part also of the business of said association that money orders so issued to customers of said banks would later be redeemed by said association; said forms to be so furnished to banks and bankers as aforesaid, by said association without any money or other tangible security being given to said association guaranteeing the proper use of said blanks and the remittance of funds received from sale of money orders, the said association relying entirely on the business integrity of banks and bankers with whom agencies were established and to whom forms were furnished; and the said Ellis Bartholomew, then and there well knowing the plan of the said business of said Bankers' Money Order Association, planned and intended by his said scheme and artifice to defraud to obtain possession of a number of blank forms of the said Bankers' Money Order Association, used in the issuing of said money orders, and so having obtained said blank forms, he further planned and intended that he would use the same and issue them under the name of said pretended bank, the said American Exchange Bank of Galion, and cause said orders to appear as if they had been issued by a real and bona fide bank acting as an agent of said Bankers' Money Order Association, and the said Ellis Bartholomew further intended and planned that in issuing said money orders he would issue them for his own personal use and benefit, that is, he would issue them in the name of and to personal creditors of his own in payment of his personal obligations and also to personal agents of his own to the end that said agents might get said money orders cashed at various banks and there secure money thereon in an amount equal to each of said money orders, for the use and benefit of said Ellis Bartholomew; it being the plan of the said Ellis Bartholomew that he would so obtain said blank forms from said association by pretending that he would establish a bona fide bank at the city of Galion,

Ohio, to be known as the American Exchange Bank, and by pretending that he was a bona fide agent and officer of said bank; he, the said Ellis Bartholomew, further intending never to remit to the said Bankers' Money Order Association, as said orders should be issued, an amount of money representing the amounts and values of said money orders, respectively, so to be issued under the name of said American Exchange Bank, at Galion, aforesaid, or approximating thereto, but intending to defraud the said Bankers' Money Order Association out of substantially the whole amount for which orders should be issued by the so-called American Exchange Bank of Galion, Ohio, aforesaid; the said scheme and artifice to defraud, so devised as aforesaid, being false and fraudulent in the following particulars:

"That the said Ellis Bartholomew did not intend to establish or to have at Galion, Ohio, any bank known as the American Exchange Bank or any bona fide bank known by any other name; that, in fact, there was no such bank at Galion, nor has there been any such bank at Galion doing a banking business; that said Ellis Bartholomew did not intend to become, and in fact, did not become, a real and bona fide banker or bank official at Galion; that prior to the dates named herein the said Ellis Bartholomew had been connected with an institution known as the American Exchange Bank at Pleasant Hill, Ohio, which said institution had been doing a banking business and had done business with and for the said Bankers' Money Order Association, acting as an agent for said association, in the selling and issuing of its money orders, and had obtained credit with said association, and the said Ellis Bartholomew relying upon said credit, so obtained, represented to said Bankers' Money Order Association that the said pretended Bank of Galion to be known as the American Exchange Bank, would be a branch of the American Exchange Bank at Pleasant Hill, Ohio, aforesaid, causing the officers and agents of said Association to rely upon said representations so made, and to furnish to said Ellis Bartholomew and to said pretended bank at Galion a large number of its blank forms with authority to issue the same; that said Ellis Bartholomew so obtaining said money order blanks in the manner aforesaid, did not intend to sell and issue the same (according to the plan of said Bankers' Money Order Association, as above set forth) to customers who might want the same in their business, but intended to issue the same for his own use and benefit for the purpose of having the same cashed to obtain money for himself and to pay obligations of his own, and thereby convert to his own use the credit and money of said Bankers' Money Order Association, and thereby to defraud said association of the amount of said orders so to be issued—all of which he, the said Ellis Bartholomew, then and there well knew."

The second count charged that the defendant had on February 5, 1907, formed a scheme to defraud—"that is to say, the same scheme and artifice that is set forth and described in the first count of this indictment, to which said first count for said description reference is hereby made, the same as if herein fully rewritten"—and charged that he, on that day, posted at Galion a letter of the same date which is set forth, and appears to be a letter addressed to the same money order association and signed by the defendant.

The third count alleges that having before the 9th day of February, 1907, formed the same scheme to defraud, "as fully described and set forth in the first count of this indictment, to which said first count for said description reference is hereby made, the same as if herein fully rewritten," the defendant posted at Galion another letter of that date, which is set out, addressed to the said money order association and signed by "C. L. Snider, Cashier."

With respect to the defect in the first count, it is contended that, inasmuch as the evidence given at the trial is not incorporated in a bill of exceptions, the court may presume that the facts might have shown that what appears in the indictment to have been impossible was ex-

plained, and one suggestion is that the date, January 26, 1906, was a clerical mistake owing to a common habit of forgetfulness that a new year has come in; and that a person reading the indictment would suppose that this had happened to the defendant in writing the letter, and that the district attorney in preparing the indictment had overlooked the mistake. All this may well be, but these circumstances would hardly excuse a faulty indictment. We are not, however, required to determine whether this count is fatally bad for the reason stated, if the second and third counts, or either of them, are good. This is the general rule. *Claassen v. United States*, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966; *Hardesty v. United States*, 168 Fed. 25, 93 C. C. A. 417, the latter being a recent decision of this court. The practice is supported by the presumption after judgment that, when some of the counts are good and some are bad, the court rested its sentence on the good counts, "unless," said Judge Lurton in the *Hardesty* Case, "something to the contrary appears upon the record." And something does appear in this case to repel the presumption. It is that the court awarded a separate sentence on each of the three counts, of imprisonment for the period of eighteen months. But the terms of imprisonment were to be "concurrent, and not cumulative." The result to the defendant was the same as if a sentence on the first count had not been imposed, or as if a verdict of not guilty had been rendered on that count. There is nothing therefore of which he can complain. It was so held by the Eighth Circuit Court of Appeals in *Haynes v. United States*, 101 Fed. 817, 42 C. C. A. 34, and in *Tubbs v. United States*, 105 Fed. 59, 44 C. C. A. 357, in both of which cases the sentences on the good and bad counts were to run concurrently.

The defendant moved in arrest of judgment, but the motion was denied. The grounds on which it was urged were the same as are now relied upon for reversal, namely, the insufficiency of the indictment.

The objections to the second and third counts arise from the fact that they each of them fail to embody in themselves a statement of the facts essential to constitute an offense. This is done by reference to the first count for the statement of the scheme to defraud. While this, as has sometimes been said, is a dangerous practice, because, unless care is taken, the reference may be insufficient to make a complete statement of the offense intended to be charged, yet it has been recognized as not objectionable when the reference is adequate to the making up of a sufficient accusation. *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097. The description of the scheme to defraud in the first count (and it is only to that part of the count to which the reference is made in the second and third) is quite sufficient to show that a fraud was intended, and that it involved the intended use of the postal service; and when brought in by the reference we see no reason to doubt that the second and third counts were sufficient and valid.

In the case of *Stokes v. United States*, 157 U. S. 187, 188, 189, 15 Sup. Ct. 617, 618 (39 L. Ed. 667), it was said that these three things must be charged and proven in order to convict the respondent:

"(1) That the persons charged must have devised a scheme or artifice to defraud. (2) That they must have intended to effect this scheme by opening

or intending to open correspondence with some other persons through the post office establishment, or by inciting such other persons to open communication with them. (3) And that in carrying out such schemes such person must have either deposited a letter or packet in the post office, or taken or secured one therefrom."

In the first count of the indictment it is alleged that the scheme was to be effected by means of communication through the post office; "the said use of said post office establishment being a part of said scheme and artifice to defraud." Taken in connection with the other excerpt from the first count above quoted and the other allegations contained in the second and third counts, they fulfilled all the requirements of the statute.

No other questions than those which concern the sufficiency of the indictment are presented. The evidence was not objected to, nor was the instruction given to the jury.

One other supposed error is relied upon, which is that the court did not impose a fine in addition to the imprisonment; and counsel point to the letter of the statute which reads that the punishment shall be by fine and imprisonment. We think it clear from the context that "and" was used in the sense of "or." But, if not, the defendant is not harmed by this omission in the punishment imposed. An adherence to the letter of the statute as the defendant claims should have been done would only add to the penalty, and his complaint in that regard is absurd.

Finding no reason for reversal, the judgment must be affirmed.

BORDEN'S CONDENSED MILK CO. v. BAKER et al.
(Circuit Court of Appeals, Third Circuit. April 18, 1910.)

No. 76 (1,266).

1. ABATEMENT AND REVIVAL (§ 12*)—FEDERAL COURTS—PENDING SUIT IN STATE COURT.

Pendency of a prior suit in a state court is neither a temporary nor a permanent bar to the prosecution of a subsequent suit in a Circuit Court of the United States between the same or different parties for the same cause of action or involving the same subject-matter; complainant being entitled to apply to both courts for relief and, subject to certain qualifications, to prosecute both proceedings at its election until in one of them final satisfaction shall be either obtained or refused.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 87; Dec. Dig. § 12.*

Pendency of action in state or federal court as ground for abatement of action in the other, see notes to Bunker Hill & Sullivan M. & C. Co. v. Shoshone M. Co., 47 C. C. A. 205; Barnsdall v. Waltemeyer, 73 C. C. A. 521.]

2. COURTS (§ 262*)—FEDERAL COURTS—REMEDY AT LAW IN STATE COURT.

The existence of a remedy at law in a state court does not oust a federal court of jurisdiction in equity, under the rule that a federal court of equity, following the chancery precedents, does not inquire concerning the remedies available in a state court, but whether a federal court of law offers an adequate remedy, which inquiry is confined to the remedies in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

federal courts, regardless of the antiquity of the remedies offered by the state.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 262.*]

3. INJUNCTION (§ 85*)—ADEQUATE REMEDY AT LAW—STATE COURT—CERTIORARI.

Since a writ of certiorari will not issue out of a federal court, except in aid of such court's jurisdiction, and is not available to review and annul an alleged invalid municipal ordinance, the fact that under the state practice such a writ had been available for that purpose since 1789 did not afford complainant an adequate remedy at law, precluding it from maintaining a suit to restrain the enforcement of such ordinance in the federal court, though it had previously instituted certiorari proceedings in the state court to the same end.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 156; Dec. Dig. § 85.*]

Appeal from the Circuit Court of the United States for the District of New Jersey.

Suit by Borden's Condensed Milk Company against Moses N. Baker and others. From an order sustaining a demurrer to the bill (168 Fed. 111), complainant appeals. Reversed, with directions.

Gilbert Collins, for appellant.

Edward M. Colie, for appellees.

Before BUFFINGTON, Circuit Judge, and McPHERSON, District Judge.

J. B. McPHERSON, District Judge. Under a general statute the local boards of health of the state of New Jersey apparently possess the power to pass ordinances forbidding the sale of "milk containing any unhealthy ingredient, constituent or substance, or which has been transported or stored in an unclean manner or place, or which is produced from cows which are diseased or which are kept or stabled under unhealthful conditions." Acting under this authority the defendants—who constitute the board of health of the town of Montclair—adopted an ordinance on April 9, 1907, which contains, inter alia, the following provisions:

"Sec. 5. Cows and Feed. (a) No milk shall be sold or offered for sale or distributed in the town of Montclair except from cows in good health, nor unless the cows from which it is obtained have within one year been examined by a veterinarian whose competency is vouched for by the State Veterinary Association of the state in which the herd is located, and a certificate signed by such veterinarian has been filed with the board of health stating the number of cows in each herd that are free from disease. This examination shall include the tuberculin test and charts showing the reactions of each individual cow shall be filed with this board. All cows which react shall be removed from the premises at once if the sale of milk is to continue, and no cows shall be added to a herd until certificates of satisfactory tuberculin tests of said cows have been filed with this board."

"Sec. 8. Cream. No cream shall be sold, exposed for sale or delivered within the town of Montclair unless it be produced and handled in accordance with the requirements hereinbefore set forth for the production and handling of milk."

"Sec. 9. Any person violating any of the provisions of this article shall upon conviction thereof forfeit and pay a penalty of twenty-five dollars for each offense."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

The complainant is a New Jersey corporation extensively engaged in producing, distributing and selling milk and milk products. Among the communities where its business is carried on is the town of Montclair. The milk and cream thus supplied come by rail from Oxford, in the state of New York, where the complainant buys it from farmers and dairymen. Its business in Montclair is large and increasing, and calls for the ownership and use of real and personal property valued at say \$25,000, and for the employment (there and in Oxford) of about 50 men. As will be noticed, the ordinance in question requires a tuberculin test to be applied to all cows whose milk is sold in Montclair, and it is this requirement that is chiefly objected to. The grounds of the objection need not be stated here. It is enough to say that they are fully set out in the bill, and that one result of enforcing the test, or of imposing the penalties for disobedience, will be (so the complainant declares) to compel it to abandon its business in Montclair. This, it is averred, would take away its property without due process of law, and would also deny it the equal protection of the laws. Moreover, the obnoxious provisions of the ordinance are also denounced as in violation of the commerce clause of the federal Constitution, because they are said to regulate and interfere with commerce between the states of New York and New Jersey, by imposing an unreasonable, inefficient, and injurious test with which importers of milk from New York into New Jersey cannot comply, and with which those persons in New York and other states who sell to such importers will not comply. It is further objected that, if the imposition of the tuberculin test shall be upheld as constitutional, the board may impose penalties of more than twenty million dollars annually, and the penalty provisions are therefore attacked as illegal and excessive, threatening the complainant with ruin unless a court of equity shall interfere. Accordingly, the bill prays for process against the board of health, and for a decree (1) that the foregoing provisions of the ordinance be declared void because they violate the federal Constitution in the particulars referred to; (2) that the complainant has no adequate remedy at law; and (3) that a permanent injunction may issue restraining the board from enforcing the tuberculin test and from imposing the penalty provided for disobedience.

The bill was filed on July 13, 1908. It does not ask for a preliminary injunction, and no such motion has at any time been made; the reason no doubt being that on May 9, 1908, the complainant had already sued out a writ of certiorari from the Supreme Court of New Jersey in which so much of the ordinance as imposes the tuberculin test is attacked, not only on the federal grounds just referred to, but also on other grounds which a state court alone should be asked to consider. Under the New Jersey practice, the allowance of the certiorari stayed the enforcement of the ordinance until the state Supreme Court should determine the case, and it is therefore apparent that no preliminary action of the Circuit Court was needed to protect whatever rights the complainant might be entitled to enjoy under the federal Constitution. In September the board of health filed (and afterwards amended) a plea to the present bill, of which the material averment is that the proceeding by certiorari furnished a complete and

adequate remedy at law. As a reason for this position the plea states that all the complainant's objections that are set up in the bill are also set up in the other proceeding, and may therefore be decided at law. The learned judge of the Circuit Court was of opinion that the plea should be sustained, giving these reasons for his conclusion:

"Before the complainant filed its bill in this court, it chose the Supreme Court of the state of New Jersey as the forum in which it would test the validity of the ordinance. The objections to the ordinance there assigned include those assigned here. It obtained from that court an order staying the enforcement of the ordinance as against it up to the time of final decision upon the writ. In other words, it secured from the New Jersey court an injunction against the enforcement of the ordinance until final judgment should be entered by that court. That proceeding is still pending. The injunction in its favor is still operative. What equitable right, then, has it to another injunction from this court? There is no pretense that the local board of health, or any of its members or agents, intend to do anything, during the pendency of the certiorari proceedings, that will in any wise interfere with the business of the complainant. If this court should be of the opinion that the provisions of the ordinance complained of are void, and that the complainant ought to be protected against the enforcement of those provisions, the practical effect of an injunction issued now would be merely to afford that protection at some time in the future if the Supreme Court of New Jersey, differing with this court, should conclude that the complainant is not entitled to protection. I have not heard that any court has ever granted any such provisional, conditional, or contingent injunction. Counsel for the defendants admit, in their brief, that 'until final determination the operation of the ordinance is suspended by virtue of the writ of certiorari and by virtue of the special order of the New Jersey Supreme Court.' The complainant seeks an injunction from this court for the protection of its property rights. Those rights are not now in jeopardy. No suit against the complainant for the enforcement of the ordinance has been commenced. None can now be commenced. None can ever be commenced, unless it be ultimately decided in the certiorari proceedings that the ordinance is valid, or that the writ of certiorari should be dismissed. Whether, if such a decision be rendered, the complainant will then be entitled to injunctive relief, is a question not now to be decided. The present facts show that the case is not one in which the extraordinary remedy by injunction can now be properly invoked."

Accordingly the bill was dismissed, and the present appeal complains of that decree. As it seems to us, the court below went too far. Much, perhaps all, that was said by the learned judge would have been pertinent upon a motion for a preliminary injunction, and we do not decide that such an injunction might not have been properly refused. But it seems to have been overlooked that no motion for a preliminary injunction had been made, and therefore that none was presented for consideration. It is true that a permanent injunction is prayed for; but the bill merely looks forward to this as the final step after answer and a hearing, and this stage in the litigation had not yet been reached. To dismiss the bill as a consequence of the plea means that the complainant cannot even begin an action looking ultimately to an injunction in the federal courts—or at all events can carry on no such action—as long as the writ of certiorari is pending; and to this proposition we are not prepared to assent. Judge Bradford, speaking for the Court of Appeals of the Third Circuit in *Lamar v. Spalding*, 154 Fed. 30, 83 C. C. A. 114, and citing ample authority for his statement, declares the general rule to be that:

"The pendency of a prior suit in a state court is no bar, temporary or permanent, to the prosecution of a subsequent suit in a Circuit Court of the United States between the same or different parties for the same cause of action or involving the same subject-matter."

If this rule be applied, it will be seen that the proceeding by certiorari did not prohibit the complainant from bringing the present action in the Circuit Court unless some special reason exists to support the prohibition. The complainant had a right to apply for relief to both courts, and (subject perhaps to some qualifications not now material) it could go on with both proceedings *pari passu*, until in one of them final satisfaction should be either obtained or refused.

But the appellee contends that this general rule does not govern the present situation, because the writ of certiorari in New Jersey is an ancient remedy, old enough to antedate the federal Constitution and the judiciary act of September 24, 1789 (1 Stat. 73, c. 20), and therefore furnishes the adequate remedy at law that deprives the Circuit Court of jurisdiction to entertain the bill. In our opinion, however, the antiquity of the New Jersey writ is not so vitally important as the appellees seem to suppose. It may be true that in the year 1789 a New Jersey Court of Chancery could not have taken jurisdiction of a controversy in which the writ of certiorari would have furnished an adequate remedy in a New Jersey court of law. But it does not follow that the writ would have been equally restrictive at that date, or is equally restrictive now, upon the equity jurisdiction of the federal courts. As it seems to us—so far as concerns the present question—the jurisdiction of the Circuit Court in equity depended then, as it depends now, upon the existence or nonexistence of an adequate remedy at law available in the federal courts themselves, and did not, as it does not, depend upon the question whether an adequate remedy at law existed in the courts of New Jersey in the year 1789. To hold that the existence of a remedy at law in a state court ousts the federal jurisdiction in equity would undoubtedly tend to destroy the uniformity of such jurisdiction. For example, such an ordinance as is now in question could not be attacked in the Circuit Court sitting in New Jersey, and perhaps in other states, because the ancient writ of certiorari, or some other ancient remedy at law, might be available; while in all the states that have been admitted to the Union since 1789 the equitable attack could not be prevented, even if the identical remedy at law should have been adopted by a statute of the state. As it seems to us, certain language in some of the cases has been misunderstood, and it may therefore be as well to state briefly what we understand to be meant by the adequate remedy at law that will prevent a federal court of equity from taking jurisdiction. Such a court has an equitable jurisdiction (unless changed by Congress) similar in extent to the jurisdiction that belonged to the English chancery in 1789. Among the cases in which the chancery exercised jurisdiction were certain controversies for which no adequate remedy existed in the English courts of law. The chancery did not inquire whether the complainant could obtain redress in a foreign court, but whether an English court of law could fully deal with the situation. So a federal court of equity, following the chancery

precedents, does not inquire about the remedies available in a state court (which for this purpose is a foreign tribunal), but whether a federal court of law offers an adequate remedy; and this inquiry is confined to the remedies in the federal courts, no matter how ancient may be the remedies offered by the state. Congress may, of course, change the federal remedies from time to time; the change may be made by original legislation, or by adopting the remedies of the state; but the test is always whether the remedy under examination is available in the federal courts. If it is not, its existence does not affect the equitable jurisdiction of the Circuit Court. As we understand the decisions, these rules have been applied from the beginning of the federal jurisprudence, and have not been departed from in any authoritative decision. In support of this statement we refer to the following cases, among many others: *Payne v. Hook*, 74 U. S. 425, 19 L. Ed. 260; *McConihay v. Wright*, 121 U. S. 201, 7 Sup. Ct. 940, 30 L. Ed. 932; *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873; *Smyth v. Ames*, 169 U. S. 516, 18 Sup. Ct. 418, 42 L. Ed. 819; *Taylor v. Louisville, etc., R. R.*, 88 Fed. 358, 31 C. C. A. 537, and cases cited in 1 *Rose*, Fed. Proced. § 935 (f) and (g), and in 1 *Foster*, Fed. Prac. (3d Ed.) p. 9, § 5. Special reference may be made, also, to *Barber Asphalt Co. v. Morris*, 132 Fed. 945, 66 C. C. A. 55, 67 L. R. A. 761, in which Judge Sanborn discusses the subject elaborately and cites the authorities with fullness.

Against these authorities we know of little, if any, opposing expressions of opinion, except a doubtful sentence or two in *Ewing v. St. Louis*, 72 U. S., on page 419, 18 L. Ed. 657, and *Pa. R. R. Co. v. National Docks Co. (C. C.)* 56 Fed. 697. The paragraph in *Ewing v. St. Louis* is as follows:

"The complainant can ask no greater relief in the courts of the United States than he could obtain were he to resort to the state courts. If, in the latter courts, equity would afford no relief, neither will it in the former."

This is certainly capable of the meaning that the federal courts offer the same kind of relief as is offered in the courts of a state; and, thus understood, it is in harmony with the cases already cited. If it means what the appellee argues, it seems to be an inadvertent statement; for it would then be inconsistent with both earlier and later decisions of the same tribunal, and in that event we venture to believe it may be safely disregarded. The case of *Pa. R. R. v. Docks Co.*, which was decided in this circuit, rests upon the supposed authority of *Ewing v. St. Louis*.

It only remains to add that the writ of certiorari is not available in the federal courts of law, except where it is necessary to be used in aid of their jurisdiction. *Ex parte Vallandigham*, 68 U. S. 243, 17 L. Ed. 589; *U. S. v. Young*, 94 U. S. 258, 24 L. Ed. 153; *American Construction Co. v. Jacksonville, etc., Ry.*, 148 U. S. 372, 13 Sup. Ct. 158, 37 L. Ed. 486; and *Taylor v. Railway Co.*, 88 Fed. 358, 31 C. C. A. 537. It cannot be employed by the Circuit Court to bring up for review and possible annulment the validity of a municipal ordinance such as is now in question.

The decree is reversed with costs, the bill is reinstated, and the Circuit Court is directed to overrule the plea and to take such other steps in the cause as are not inconsistent with this opinion.

NOTE.—See, also, *McClellan v. Carland* (Sup. Ct. U. S., decided April 11, 1910) 30 Sup. Ct. 501, 54 L. Ed. —.

ZANONE v. OCEANIC STEAM NAVIGATION CO.

(Circuit Court of Appeals, Second Circuit. March 7, 1910.)

No. 133.

1. SHIPPING (§ 80*)—INJURIES TO LICENSEES—DEATH.

Decedent, who had previously been employed as a tally clerk by defendant steamship company, went to defendant's pier where tally clerks were hired, but without employment, and without authority, went on board defendant's steamship on which dangerous preparations for the discharge of cargo were in progress, and, while there, was struck and killed by a bridge which had been lifted out of the way of a hatch, caused by the breaking of a new rope selected by defendant's servants from among an ample supply furnished by defendant in all sizes. *Held*, that decedent was at most a licensee on the ship, as to whom defendant owed no duty except not to injure him willfully, which duty it did not violate.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 352; Dec. Dig. § 80.*]

2. TRIAL (§ 69*)—FURTHER TESTIMONY—DISCRETION.

After a motion to dismiss had been argued, and the court was about to direct a verdict for defendant, the court had discretion to refuse to open the case on plaintiff's motion for further testimony, and it properly refused to do so in the exercise of such discretion, where the evidence sought to be introduced had no legitimate bearing on the issue, and was insufficient to establish defendant's liability.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 164-165; Dec. Dig. § 69.*]

In Error to the District Court of the United States for the Southern District of New York.

Action by Paul Zanone, as administrator of the estate of Frank S. Zanone, deceased, against the Oceanic Steam Navigation Company. A verdict was directed for defendant, and plaintiff brings error. Affirmed.

Williamson & Smith (J. Boyce Smith, Jr., of counsel), for plaintiff in error.

Robinson, Biddle & Benedict (Morton L. Fearey, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. On Friday, November 29, 1907, the plaintiff's intestate, Frank S. Zanone, was killed on the defendant's steamship *Adriatic* which was lying at Pier 48, North River, New York. The *Adriatic* had arrived that morning from Europe and was preparing to discharge her cargo. Zanone had on previous occasions been employed as tally clerk by the defendant but he was not so em-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ployed on November 29th, although he had undoubtedly gone to the pier seeking and expecting employment. The plaintiff endeavored to establish the proposition that Zanone was legally and properly on the pier. It will simplify the discussion if this contention be conceded. The vital question is was he rightfully on the ship, for he was killed, not on the pier, but on the ship. The crew were engaged in lifting a bridge in order to facilitate unloading No. 5 hatch when a drag rope broke, permitting the bridge to swing over to where Zanone was climbing over the rail preparatory to descending a ladder, and strike him with such force as caused his death. How he got on the ship does not appear; that he had no business there is manifest. He had not been employed and could not have been seeking employment because the office where tally clerks are hired was not on the ship but on the pier. Nothing but idle curiosity could have brought him to this part of the ship where hazardous operations were being carried on preparatory to unloading. There was no invitation, expressed or implied, to justify his appearance at this place of danger and he therefore assumed all the risks incident to the business which was being there carried on. His presence there was gratuitous, unexpected and could not have been foreseen without extraordinary precautions which the defendant was under no obligation to take. The defendant owed Zanone no duty except not to injure him knowingly. The rope which broke was a new one about five-eighths of an inch in diameter. If insufficient to do the work the selecting of it was the fault merely of one of the defendant's servants. In no sense was it a fault which can be imputed to the defendant in an action by one who at best was a mere licensee. The defendant had an ample supply of rope of all sizes both on the ship and on the pier and a larger and heavier one would have been selected had there been any reason to expect that the one used was defective or inadequate. In short, the deplorable accident was one which could not have happened but for Zanone's action in going on the defendant's ship where he had no legitimate business, where operations of a dangerous character were in progress and where his presence was not known and could not have been foreseen. It is unnecessary to hold that he was a trespasser, but he was on the ship without right and the defendant was under no obligation except not to injure him willfully. The foregoing propositions are amply sustained by the following authorities: *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 4 N. E. 752, 54 Am. Rep. 718; *Metcalf v. Cunard S. S. Co.*, 147 Mass. 66, 16 N. E. 701; *Singleton v. Felton*, 101 Fed. 526, 42 C. C. A. 57.

After the plaintiff had rested and the motion to dismiss was being argued and the court was about to direct a verdict for the defendant, the plaintiff's counsel asked that the case be reopened to enable him to introduce further testimony. First, he asked to be permitted to introduce the lease of the pier in question and, second, to call a witness who had been employed as a tally clerk and who had on previous occasions gone upon the defendant's vessels while not actually engaged in discharging the duties of his vocation. The court declined to grant the motion and the plaintiff reserved an exception. A complete answer to the plaintiff's contention is that the granting of the motion was

discretionary and no error can be assigned based on the refusal to open the case. Nevertheless, we should hesitate to place our ruling on this ground if we were satisfied that the proposed testimony tended to establish the defendant's liability. As we have seen, it was wholly immaterial whether Zanone was lawfully or unlawfully on the pier as the accident did not occur there. The testimony of the tally clerk if it had been received, could not have changed the status of the parties. It was wholly insufficient to establish a custom and had no legitimate bearing upon any issue involved.

The judgment is affirmed.

THE INDRANI.

(Circuit Court of Appeals, Second Circuit. March 7, 1910.)

No. 143.

1. SHIPPING (§ 136*)—LIABILITY OF VESSEL FOR INJURY TO CARGO—HARTER ACT.

A shipowner is not deprived of the protection given by section 3 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]) against liability for injury to cargo resulting from a broken suction pipe because it was not proved that the pipe was inspected at the commencement of the voyage, where it is shown that it was in good condition after the voyage commenced, that the break was new, and it was sufficiently accounted for by the straining of the ship during very rough weather on the voyage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. § 136.*]

Statutory exemptions of shipowners from liability, see notes to *Nord-Deutscher Lloyd v. Insurance Co.*, 49 C. C. A. 11; *Ralli v. New York & T. S. S. Co.*, 83 C. C. A. 294.]

2. SHIPPING (§ 136*)—LIABILITY OF VESSEL FOR INJURY TO CARGO—FAULT IN "MANAGEMENT OF SHIP."

The tipping of a vessel by the head by the master while discharging cargo for the purpose of examining her propeller, and having nothing to do with the discharge of the cargo, was an act of management of the ship within section 3 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), and, where the owner had complied with the requirements of said section at the commencement of the voyage, neither he nor the vessel is liable for a resulting injury to the cargo.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. § 136.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4318, 4319.]

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Suit by Herman Pauli and Emil Rump against the steamship *Indrani*. Decree for claimant, and libelants appeal. Affirmed.

Kneeland & Harison (Lawrence Kneeland, of counsel), for appellants.

Convers & Kirlin (J. Parker Kirlin and John M. Woolsey, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WARD, Circuit Judge. The master of the steamship *Indrani* lying at the Bush Terminal, Brooklyn, discharging cargo, tipped her by the head in order to examine her propeller. This was accomplished by letting sea water through the sea cock and other intermediate valves into No. 1 ballast tank. Cargo was stowed over this tank and also in the forepeak just forward of it. It was subsequently found that 11 feet of water had got into the forepeak and damaged cargo of the libelants. For the purpose of filling and pumping out the forepeak, a cast iron suction pipe runs into it from the engine room. Such pipes are constructed with occasional joints of lead so as to give elasticity and allow them some play in heavy seas. One of these joints was found to be broken in the middle showing a crack to the extent of about half its upper circumference. The water in tank No. 1 passed through this break into the forepeak. Without going into the particulars, it is enough to say that the trial judge found those in charge of the ship negligent in not discovering this leak when No. 1 tank was being filled nor for several days thereafter.

The general seaworthiness of the ship at the beginning of the voyage was established. But the libelants contend that the claimant is not protected by the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]) against liability for the damage to their goods, because, first, no examination of the suction pipe was proved to have been made within a year; second, that the act of tipping the ship was in no way connected with the cargo, but for the sole benefit of the ship. The trial judge dismissed the libel, and we think he was right in so doing.

On the voyage from Kobe to Shanghai the tank had been filled, and at Shanghai it was pumped out, but no water was found in the forepeak, from which it follows that the pipe was not broken then. After leaving Shanghai the tank was pumped out, and very rough weather with head seas was encountered for the rest of the voyage. There can be no doubt that the pitching and straining of the steamship caused the break. No examination of the pipe could have been made in New York because of the cargo in No. 1 hold on top of the tank. A plain and satisfactory explanation of the break of the pipe on the voyage having been given, and there being uncontradicted testimony that the appearance of the break showed that it was sudden and fresh and not the result of gradual deterioration, we cannot presume that, if an inspection had been made of the pipe before the voyage began, any indications of a coming break would have been discovered.

As to the second contention, it may well be that unnecessarily taking a laden vessel out of the water into a dry dock is such a deviation as will deprive her owners of the benefit of the Harter act for damage to cargo there happening or of the statute giving exemption from liability for fire, as in the case of *The Indrapura* (D. C.) 171 Fed. 929. But, because the tipping of the ship in this case had absolutely nothing to do with the discharge of the cargo, we think it was an act of management of the ship falling within the third section of the Harter act. The difference, as to the application of sections 1 and 3 of the statute, between an act done for the benefit of the cargo and one done for

the benefit of the ship was under consideration in the case of *The Germanic*, 196 U. S. 589, 597, 25 Sup. Ct. 317, 318 (49 L. Ed. 610). Mr. Justice Holmes said:

"And this consideration brings to light the limitation of the section, adopted by the court in *The Glenochil*, and sanctioned by this court in *Knott v. Botany Mills*, 179 U. S. 69, 73, 74 [21 Sup. Ct. 30, 45 L. Ed. 90], to faults 'primarily connected with the navigation or the management of the vessel and not with the cargo' (1896). Prob. 15, 19. In the case supposed the name given to the pigs of lead is not important in itself, to be sure, but may indicate a difference in the purpose and character of the change of place. If the primary purpose is to affect the ballast of the ship, the change is management of the vessel, but if, as in view of the findings we must take to have been the case here, the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not make it the less a fault of the class which the first section removes from the operation of the third. We think it plain that a case may occur which, in different aspects, falls within both sections, and, if this be true, the question which section is to govern must be determined by the primary nature and object of the acts which cause the loss."

The decree is affirmed, with costs.

THE FALCON.

In re HUGHES.

(Circuit Court of Appeals, Third Circuit. January 17, 1910.)

No. 79 (1,306.)

1. ADMIRALTY (§ 118*)—REVIEW ON APPEAL—PRESUMPTION IN FAVOR OF DECREE.

One to whom a decree in admiralty directs the payment of a fund is presumptively a party to the suit, or in court as a claimant of the fund, and evidence is required to rebut such presumption, where a denial of the fact is made a basis for impeaching the decree.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 767-769; Dec. Dig. § 118.*]

2. ADMIRALTY (§ 115*)—REVIEW ON APPEAL—QUESTIONS PRESENTED BY RECORD.

A decree in admiralty, adjudging a portion of the fund realized from the sale of a vessel libeled by a lienholder to the receiver in bankruptcy of the owner, on recitals that the vessel was in the custody of the bankruptcy court when seized, and that the receiver expended the sum allowed him for its benefit because of such custody, cannot be reviewed, where the record does not contain the evidence on which such recitals were based.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 743-745; Dec. Dig. § 115.*]

Appeal from the District Court of the United States for the District of New Jersey.

Suit in admiralty by one McWilliams against the barge *Falcon*. From the decree, libelant appeals. Affirmed.

For opinion below, see *In re Hughes*, 170 Fed. 809.

Percival G. Barnard, for appellant.

George S. Silzer, for appellee.

Before BUFFINGTON, Circuit Judge, and McPHERSON, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

J. B. McPHERSON, District Judge. This is an appeal from a decree in admiralty that deals with a complicated situation into the details of which we do not find it necessary to go. The appellant is a creditor holding a maritime lien against the barge *Falcon*, and his complaint is that the court has ordered a part of the fund arising from the sale of the vessel to be paid to the receiver (now the trustee) in bankruptcy of the owner, and has thus diminished his own share of the fund. The order objected to is based upon recitals in the decree which declare, in effect, that when the barge was seized under the appellant's libel it was already in the custody of the bankruptcy court, that certain expenses directly due to such custody were afterwards incurred by the receiver, and that the barge's share of these expenses amounts to the sum involved in this appeal.

As we think, the errors assigned may be disposed of in a few words. The third assignment complains because the decree directs a portion of the fund to be paid to "a receiver in bankruptcy who is not a party before the admiralty court, and an entire stranger to the proceedings in admiralty, and has never asked the admiralty court to protect his interests in any way." This assignment has nothing to support it. *Prima facie*, at least, a judicial decree does not order a fund to be paid to one who is neither party nor claimant, and in the present case no evidence was offered to rebut this presumption. The second assignment objects to "the opinion of the court upon which the final decree herein is drawn," in so far as that opinion holds "that any item of disbursement of the receiver in bankruptcy was for the benefit of the maritime fund realized from the sale of the *Falcon* in admiralty." The reply to this is two-fold: First, the opinion referred to was delivered in the bankruptcy proceeding, and in strictness cannot be regarded upon the present appeal. But, second, if the opinion be considered—and we have considered it—it appears to be simply a more extended statement of the fact that appears in conciser form in the decree from which the appeal is taken. The decree itself declares that the receiver's disbursements were for the benefit of the barge; and, as no evidence has been furnished us by which the correctness of this statement can be tested, we are bound to accept it as true. What it is based upon we do not know, but we must presume the foundation to be adequate. The first assignment adds nothing to the other two; it simply asserts in different language that the appellant should not have been charged with any part of the receiver's expenses.

The District Judge was evidently influenced throughout the whole proceeding—whether in bankruptcy or in admiralty—by an earnest desire to avoid expense and delay, and we have no doubt that his judicious handling of a difficult situation resulted advantageously to the creditors. It was probably impossible to avoid apparent conflict between the bankruptcy side and the admiralty side of the court, and it is easy to see that technical perplexities were almost inevitable. Fortunately, this appeal seems to present the only obstacle to a final adjustment of the numerous claims; and, as we have briefly indicated, this obstacle does not seem to be insurmountable.

The decree is affirmed, at the costs of the appellant.

BECKER v. EXCHANGE MUT. FIRE INS. CO. OF PENNSYLVANIA.

(Circuit Court of Appeals, Third Circuit. January 31, 1910.)

No. 63 (1,256).

INSURANCE (§ 349*)—POLICY—PREMIUM—FAILURE TO PAY.

Where a policy provided that, if the premium should not be paid on or before January 15, 1907, it should then lapse and become void without notice to the insured, and that no agent of the company had power to waive such condition, unless the waiver was in writing on or attached to the policy, failure to pay the premium within the time prescribed, or until after loss, forfeited the policy, in the absence of waiver.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 349.*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Action by Frances A. Becker against the Exchange Mutual Fire Insurance Company of Pennsylvania. Judgment for defendant (165 Fed. 816), and plaintiff brings error. Affirmed.

E. B. Seymour, for plaintiff in error.

H. B. Gill, for defendant in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

LANNING, Circuit Judge. This was an action by Frances A. Becker against the Exchange Mutual Fire Insurance Company of Pennsylvania upon a fire insurance policy. The jury gave a verdict for \$2,530.88 in favor of the plaintiff, subject to a question of law reserved by the trial court in accordance with the authorized practice in the state of Pennsylvania. Motion was then made by the defendant, also in accordance with the practice in that state, for the entry of judgment for the defendant notwithstanding the verdict. On consideration of the legal question involved judgment was entered for the defendant. The writ of error is prosecuted by the plaintiff in the court below.

The policy was dated December 20, 1906. It contained the following provisions:

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured, unless so written or

"If the assured fails to make the payment in full hereinbefore named (being the premium of \$62.50), on or before the 15th day of the month succeeding that in which this policy is dated, this policy shall be null and void, without any notice or other act or thing to be given or done by the company, anything hereinbefore to the contrary notwithstanding."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It follows that the premium of \$62.50 became due January 15, 1907. It was paid by the plaintiff to her own agents in New York on February 8, 1907. The fire occurred on February 22, 1907. In the statement of her claim the plaintiff alleges that the premium "was tendered to defendant, Exchange Mutual Fire Insurance Company of Pennsylvania, or its agents, on or about the 28th day of February, 1907, and was accepted by it." The proofs show that the premium had not been paid to the insurance company, or to any of its agents, on February 27, 1907; for on that date Arthur R. Drake, the insurance company's agent, wrote to the plaintiff's husband as follows:

"Your favor of the 25th received. The premium under your policy has not been paid, and therefore we are not interested in the reported loss."

The premium was evidently tendered to Mr. Drake after the plaintiff had received this letter. Mr. Drake refused to accept it. Neither is there any legal proof of waiver of the provision of the policy concerning the time within which the payment should have been made. There is nothing in any of the letters offered in evidence by the plaintiff, or in any of the other proofs, that shows, or even tends to show, that the plaintiff relied on any act or conduct of any agent of the insurer that could have rightfully induced the plaintiff to believe that time for the payment of the premium had been extended beyond January 15, 1907. By its terms the policy provided that if the premium should not be paid on or before January 15, 1907, it should then lapse and become void, without notice to the insured, and that no agent of the company had the power to waive that condition, unless the waiver should be written upon or attached to the policy. No waiver was written upon or attached to it. All its provisions, so far as the record shows, had their full operative effect against the insured.

The judgment of the Circuit Court must therefore be affirmed, with costs.

NATIONAL CONTRACTING CO. v. SEWERAGE & WATER BOARD OF NEW ORLEANS.

SEWERAGE & WATER BOARD OF NEW ORLEANS v. NATIONAL CON- TRACTING CO.

(Circuit Court of Appeals, Fifth Circuit. March 22, 1910.)

No. 1,531.

ARBITRATION AND AWARD (§ 85*)—RIGHT OF ACTION TO ENFORCE AWARD— WAIVER.

An agreement between the parties to an arbitration, made after the award, that the award should be carried out as to certain items, and that as to other items the party in whose favor it was made should resort to the courts, was not a waiver or abandonment by such party of the right to sue to enforce the award.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 484; Dec. Dig. § 85.*]

In Error and Cross-Error to the Circuit Court of the United States for the Eastern District of Louisiana.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by the National Contracting Company against the Sewerage & Water Board of New Orleans. Judgment for plaintiff, from which both parties bring error. Reversed in part, and affirmed in part.

Edgar H. Farrar, Ernest B. Kruttschnitt, and B. F. Jonas, for plaintiff in error and cross-defendant in error.

Omer Villere, for defendant in error and cross-plaintiff in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. Plaintiff's demand is based upon an award of arbitrators in its behalf and also upon a quantum meruit.

The questions at issue are whether the award is binding, and whether the work sued for was covered by and included within the contract between the parties.

After consideration of the case and the evidence submitted, we conclude that the Sewerage & Water Board of New Orleans is bound by the award of the arbitrators made in the case, and that the subsequent agreement between the parties, to the effect that the undisputed items of the award should be carried out, and that the National Contracting Company should resort to the courts on the disputed items, was not a waiver or abandonment by the National Contracting Company of its right to sue to enforce the award. And we are better satisfied with this conclusion, because our investigation of the evidence brings us to the same result the arbitrators reached.

In the court below the respective parties requested the court to give the general charge, and thereupon the court directed a verdict in favor of the National Contracting Company for the filling item in the sum of \$2,565.30, with interest from October 11, 1901, and against the National Contracting Company on the foundation claim, amounting to \$13,926.83, with interest from August 26, 1901.

From our views of the case, the direction of the verdict in favor of the National Contracting Company for \$2,565.30 was correct; but the direction to find against the contracting company on the foundation item was incorrect.

The National Contracting Company in the lower court entered a remittitur of $2\frac{1}{2}$ per cent. on the judgment obtained in its favor and remits in this court $2\frac{1}{2}$ per cent. upon the amount claimed for foundation, by reason of an outside contract between the parties.

For these reasons the judgment of the Circuit Court, in respect to the filling item in favor of the National Contracting Company for the net sum of \$2,500.17, with legal interest from October 11, 1901, is affirmed; and the judgment of the court below in regard to the foundation item is reversed, and the cause is remanded to the Circuit Court, with instructions to award a new trial as to said foundation item, and on such trial to instruct the jury to find in favor of the National Contracting Company in the sum of \$13,578.66, with legal interest from August 26, 1901.

JUILLARD et al. v. BARR.

(Circuit Court of Appeals, Second Circuit. March 10, 1910.)

No. 125.

1. REMOVAL OF CAUSES (§ 45*)—ACTION BY NONRESIDENT—COURT TO WHICH CAUSE WAS REMOVABLE.

Where plaintiff, a citizen of Pennsylvania, brought suit on contract in the Supreme Court of New York against citizens of that state, it was not removable to the Circuit Court of the United States sitting in New York, under Removal Act March 3, 1875, c. 137, § 2, 18 Stat. 470, amended by Act March 3, 1887, c. 373, § 1, 24 Stat. 552 (U. S. Comp. St. 1901, p. 509), providing that a suit pending in a state court, of which the Circuit Court is given jurisdiction, may be removed by the "defendant" therein, being a "nonresident" of that state.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 89; Dec. Dig. § 45.*]

2. REMOVAL OF CAUSES (§ 111*)—ERRONEOUS REMOVAL—JURISDICTION ACQUIRED.

Where a case was erroneously removed from a state to a federal court, the federal court acquired no jurisdiction, and a judgment therein would be reversed on a writ of error, and the cause remanded, with directions to remand the cause to the state court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 239; Dec. Dig. § 111.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by Augustus D. Juillard and others against Daniel M. Barr, doing business as the Barr Manufacturing Company. Judgment for defendant, and plaintiffs bring error. Reversed, with directions.

Boothby & Baldwin (John W. Boothby, of counsel), for plaintiffs in error.

Epstein Bros. (J. S. Epstein, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The plaintiff, a citizen of Pennsylvania, brought this suit on contract in the Supreme Court of the state of New York against the defendants, citizens of that state. They removed the cause to the Circuit Court of the United States where it was tried and a judgment entered for the plaintiff which is before us on writ of error. Act March 3, 1875, c. 137, § 2, 18 Stat. 470, as amended by Act March 3, 1887, c. 373, 24 Stat. 552 (U. S. Comp. St. 1901, p. 509), provides that a civil suit pending in a state court of which the Circuit Court is given jurisdiction by section 1, may be removed by the defendant or defendants therein being "nonresidents of that state." Section 5 of the same act makes it the duty of the Circuit Court to proceed no further when it shall appear that such suit does not involve a controversy within its jurisdiction. As the petition for removal states that the defendants are all residents of the state of New York, they were not entitled to remove and we are without jurisdiction. *Martin v.*

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Snyder, 148 U. S. 663, 13 Sup. Ct. 706, 37 L. Ed. 602; *Freeman v. Butler* (C. C.) 39 Fed. 1.

The judgment is reversed and the Circuit Court directed to enter an order remanding the cause to the state court; costs of the Circuit Court and of this court to be paid by the defendants.

LOUISVILLE & N. R. CO. v. ROBERTS.

(Circuit Court of Appeals, Fourth Circuit. February 26, 1910.)

No. 936.

1. TRIAL (§ 352*)—DIRECTION OF VERDICT—GROUNDS.

Under the federal practice, it is the duty of the trial court to direct a verdict when the evidence is undisputed, or is of such a conclusive character that the court would, in the exercise of a sound judicial discretion, be compelled to set aside a verdict rendered in opposition to it.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 352.*]

2. MASTER AND SERVANT (§ 286*)—ACTION FOR INJURY TO SERVANT—SUFFICIENCY OF EVIDENCE.

Where the only issue in an action against a railroad company to recover for the death of an employé who was killed by the caving in of a trench being dug under a fill along which both the railroad track and a highway were constructed was on an allegation of the complaint that defendant negligently caused a train to be run over the track without giving warning thereof, and causing the fill to cave in on the decedent, and the undisputed evidence showed that no train had passed for some time before the cave-in, and that the same was under the highway at some distance from the railroad track, defendant was entitled to a directed verdict on the ground of the insufficiency of the evidence to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.*]

In Error to the Circuit Court of the United States for the Western District of North Carolina, at Asheville.

Action by B. F. Roberts, administrator of the estate of John Wesley Roberts, deceased, against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

At or near McKays Station, in Tennessee, on May 1, 1906, decedent, Roberts, 18 years of age, and in the employ of the railroad company for some 3 months prior, was engaged with others under Lindsay, a section extra gang foreman, in constructing a second or additional viaduct under a certain fill or embankment, over which the track of the railroad and a public road ran side by side. To do this work required the digging of a trench across the fill something like 50 feet in length, 4 to 5 feet in width, and 8 to 12 feet deep. When this trench had been dug some 6 to 8 feet deep, one of its sides caved in upon the deceased, injuring him to such extent that he died on the following day. At the November term, 1906, in the superior court of Cherokee county, N. C., the plaintiff below, as administrator of the deceased, filed against the company his complaint, alleging substantially, such death to have been the result of its negligence in two particulars: First, because Lindsay, charged to be its vice principal, directed this trench to be dug with its sides perpendicular instead of sloping, and without supporting the same in any proper way necessary to render them safe; second, because the company caused its trains to run along its track above the excavation, without giving warning and without properly supporting the sides of the fill. The cause by proper proceedings,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was removed to the Circuit Court of the United States for the Western District of North Carolina, wherein, on August 29, 1907, an answer was filed to the complaint by the company, in which all negligence is denied generally, and it is charged that, (a) if negligence was the cause of the injury and death, it was that of decedent's fellow servant; (b) that decedent assumed the risk of this employment; (c) negligently contributed to his injury and death; (d) was killed by accident which could not have been reasonably foreseen; and (e) that the injury and death occurred in Tennessee, and the right of recovery must be governed by the laws of that state. When the case was called for trial and before the jury was impaneled, the defendant moved the court to dismiss it, because, first, the complaint on its face showed that the deceased was killed in Tennessee where the alleged negligence occurred, but did not show or allege any statute of Tennessee authorizing any cause of action to recover therefor; and, second, because the facts set forth in the complaint did not constitute a cause of action. This motion was overruled and exception taken. Upon trial, before the plaintiff closed his evidence, the court permitted him to file an amendment to the fifth paragraph of his complaint involving slight verbal changes, and inserting the words "intestate" and "when it was negligent and unsafe so to do" and "and causing same to cave in on" so that the complaint as amended would charge (amendments in italics) "That while plaintiff's *intestate* was so at work, as aforesaid, and unsuspecting of danger, the defendant company negligently caused its train to run along its track above the excavation where said work was going on *when it was negligent and unsafe so to do*, thereby enhancing the danger of causing a cave-in, *and causing same to cave in on* (of) said fill without giving warning thereof," etc. To this amendment the defendant objected, insisting that it presented a new and distinct cause of action, barred by the statute of limitation, which objection was overruled and exception taken. Thereupon, by leave of the court, the defendant filed an amendment to its answer, pleading thereby the statute of limitation. When the plaintiff had introduced his evidence and rested his case, the defendant moved the court to instruct the jury to return a verdict in its favor, for that no negligence on its part had been shown by the evidence, as charged by the complaint. This motion was overruled and exception taken. In the course of the trial, when counsel for defendant was making the concluding argument therein, the court permitted plaintiff to file a second amendment to his complaint setting forth in exact words sections 3130, 3131, 3132, and 3134 of the statutes of Tennessee (Milliken & V. Code), relating to death by negligence and wrongful act. Exception was taken to this action of the court. The trial resulted in a verdict and judgment for \$2,000 in favor of the plaintiff, to the rendering of which judgment defendant excepted and sued out this writ of error, assigning 22 grounds therefor.

James H. Merrimon and D. H. Blair, for plaintiff in error.

Locke Craig and Dillard & Bell, for defendant in error.

Before GOFF, Circuit Judge, and BOYD and DAYTON, District Judges.

DAYTON, District Judge (after stating the facts as above). In the view which we take of this case it becomes wholly unnecessary for us to consider in detail the numerous assignments of error. It is sufficient for us to say that, in the federal practice, it is well settled that it is the duty of the trial court to direct a verdict when the evidence is undisputed, or is of such a conclusive character that the court would, in the exercise of a sound judicial discretion, be compelled to set aside a verdict rendered in opposition to it. *Travelers' Ins. Co. v. Selden*, 24 C. C. A. (Fourth Circuit) 92, 78 Fed. 285; *Washington Mills v. Cox*, 85 C. C. A. (Fourth Circuit) 154, 157 Fed. 634. Or, as differently expressed, but to the same purpose, where the facts are such that

all reasonable men must draw the same conclusion from them, the question of negligence is one of law—for the court. *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Richmond & Danville R. R. Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642; *Southern Ry. Co. v. Carroll*, 71 C. C. A. (Fourth Circuit) 88, 138 Fed. 638; *Sealey v. Southern Ry. Co.*, 81 C. C. A. (Fourth Circuit) 282, 151 Fed. 736.

The learned judge presiding at the trial charged the jury that Lindsay was a fellow servant of deceased, that the company was not liable for the negligence involved in the manner in which he directed said trench to be dug, and he confined the issue solely to paragraph 5 of the complaint, as amended, charging the negligent running of trains over the fill as the direct and proximate cause of the injury and death. To this ruling and charge, no exception was taken, and no cross-error is assigned by plaintiff.

The defendant introduced no testimony, and it is undisputed that deceased, with others, was engaged in digging this trench, at the time of the cave-in, on the side of the fill along which the county road ran, and he was in the trench at a point near where the center of the road was, when the earth from the top, on one side, caved in from this road and injured him. It is also undisputed that the company had run an engine several times and one freight train over its track on this fill in the forenoon; that the men at work including deceased had been warned of such passages of the engine and train, and each time had gotten out of the trench; that at about 11:30 a. m. they knocked off for dinner, returning to work about 12:30 p. m. when deceased entered the trench and in a few minutes after the cave-in occurred; that the earth did not cave in from under the railroad track, but from the side of the trench out of the county road; that a small crack in the earth at this point had been noticed and called to the attention of Lindsay and others by one of the men immediately after the return from dinner; that no train or engine was crossing the fill, or had crossed for some time before the cave-in.

It will be perceived that there is absolutely no direct evidence that the running of the engine and train over this fill caused this cave-in from the county road, but that, to sustain this judgment, we must hold it to be a case of *res ipsa loquitur*, of the act itself necessarily being negligent, and the direct and proximate cause of the decedent's injury, instead of other causes reasonably accounting therefor, such as his own act of digging in the trench under the direction of his fellow servant, which we think from the evidence was the fact. The motion to direct a verdict for defendant should have been sustained. The judgment will therefore be reversed and the case remanded.

Reversed.

GUARANTY TRUST CO. OF NEW YORK v. METROPOLITAN ST. RY.
CO. et al.

(Circuit Court of Appeals, Second Circuit. February 28, 1910.)

No. 174.

STREET RAILROADS (§ 55*)—FORECLOSURE OF MORTGAGES—DECREE AND ORDER
OF SALE.

A decree of foreclosure and sale, entered on a mortgage given by a street railroad company covering a number of lines and their equipment, considered, modified, and affirmed.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 134; Dec. Dig. § 55.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by the Guaranty Trust Company of New York against the Metropolitan Street Railway Company, the Morton Trust Company, Adrian H. Joline, and Douglas Robinson, receivers, and others. From a decree of foreclosure (166 Fed. 569, and 168 Fed. 937), complainant and the Morton Trust Company appeal. Modified and affirmed.

Brainard Tolles, Julien T. Davies, and John C. Spooner, for Guaranty Trust Co.

Bronson Winthrop, for Morton Trust Co.

J. Parker Kirlin, for Metropolitan St. Ry. Co.

Arthur H. Masten, William M. Coleman, and William M. Chadbourne, for receivers of Metropolitan St. Ry. Co.

Dexter, Osborn & Fleming (Matthew Fleming, of counsel), for receivers of New York City Ry. Co.

James Byrne, Morgan J. O'Brien, and Charles E. Rushmore, for contract creditors.

Benjamin S. Catchings, for tort creditors.

Before WARD, Circuit Judge, and HOLT and HOUGH, District Judges.

WARD, Circuit Judge. This is an appeal from a decree of foreclosure under a mortgage dated February 1, 1897, from the Metropolitan Street Railway Company to the Guaranty Trust Company of New York. Many assignments of error have been filed by various parties in interest. The Morton Trust Company, trustee under a later mortgage dated March 21, 1902, upon the same property, together with other property not covered by the Guaranty Company's mortgage, objects that the decree directs the sale of certain items of property which it is claimed are not covered by the mortgage, viz., certain track-age agreements with other street railway companies and certain property, consisting principally of cars, electric cables and equipment, and stores acquired after the date of the mortgage, for use, as it is claimed, either wholly or partially on lines not covered by the complainant's mortgage, and fixtures on real estate covered by the mortgage to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Morton Trust Company, but not covered by the complainant's mortgage. We concur in the opinion of the court below (166 Fed. 569) that all this property is covered by the mortgage to the complainant except certain special work on hand, being crossings, yokes, cross-overs, turnouts, switches, etc., acquired solely for use on the Second avenue and Third avenue lines which the special master should not include in the property to be sold.

The other assignments of error concern questions of priority and distribution which cannot be determined, and we think were not intended to be determined, upon this record. In order to remove all doubt and to encourage the competition of persons not already interested in the premises, the decree will be modified by omitting article IX and altering certain other articles as follows:

"II. That under an order made and filed herein on June 2, 1908, receivers' certificates to the amount of three million five hundred thousand dollars (\$3,500,000) of principal, dated the 15th day of June, 1908, and payable one year from date, bearing interest at the rate of 5 per cent. per annum, payable semiannually, have been duly issued and are now outstanding and unpaid, and that said receivers' certificates are secured by a lien upon all the property of the Metropolitan Street Railway Company prior to the lien of the said mortgage to the complainant and by a lien upon the property of the New York City Railway Company. Certain of the defendants claim that resort should be had to the property of the Metropolitan Street Railway Company, subject to the mortgage to the complainant and to the mortgage to the Morton Trust Company hereinafter referred to, before resort is had to any other property for the payment of such certificates. And it is hereby ordered, adjudged, and decreed that the principal and interest of said receivers' certificates be in the first instance paid out of the proceeds of sale hereby directed to be made, but with the rights and privileges of claiming exoneration, contribution, or repayment or other equitable relief more specifically conferred upon the Guaranty Trust Company as mortgagee by the seventh article hereof."

"V. That an inventory shall be prepared by the special master and by him filed with the clerk of this court when and as directed by this court. This inventory will enumerate the rolling stock of the road in the possession of the receivers, stating the type and character of each item and giving its number. This inventory will also state the number and location of the various dynamos, transformers, and converters, and the number of horses. The inventory shall include such other articles of personal property in the possession of the receivers as in their opinion are of a value in excess of one hundred dollars each, and such additional articles as the special master shall think it wise to include. Such inventory and valuation shall be advisory only, and shall not, with respect to value or title or any other matter, be construed as a warranty, but all purchases shall be deemed to be made in reliance upon the purchaser's own knowledge or information as to the property purchased. The property, both real and personal, hereby directed to be sold, may be inspected by intending bidders at the sale hereunder, subject to such reasonable regulations as the receivers may prescribe.

"VI. That any purchaser of the property of the Metropolitan Street Railway Company at the sale hereby decreed may satisfy and make good the balance of his bid, above the sum required to be paid in cash, in whole or in part, by delivering to the special master appointed to conduct such sale bonds duly certified under the mortgage mentioned in paragraph I of this decree, or coupons thereto appertaining, or receivers' certificates mentioned in paragraph II of this decree, which securities, unless in negotiable form and payable to bearer, shall be duly endorsed or assigned in blank. Such bonds, coupons, or receivers' certificates, whether delivered to the said special master at the time of sale or subsequently, shall be received at such price or value as shall be equivalent to the sum which would be payable out of the net proceeds of

such sale, if made for money, to the holder or holders of said bonds, coupons, or receivers' certificates, for his or their just share or proportion in that character of such net proceeds, upon a due accounting and apportionment and distribution of such net proceeds. If there shall be realized on the sale and applied on the purchase price the entire amount due upon said bonds, coupons, or receivers' certificates, then and in that case the said bonds, coupons, and receivers' certificates, or such of them as are so paid in full, shall be canceled and retained by the special master; provided, that when all said bonds and coupons issued under and secured by said mortgage and remaining unpaid shall be canceled and held by the special master, he may deliver them to the trustee of the mortgage securing the same, upon receiving a satisfaction thereof. But, if said entire amounts are not realized on the sale and applied upon the purchase price, the special master shall stamp or write upon each bond, coupon, or certificate the amount which is so applied, and also the amount of the deficiency remaining after such application, and shall return such bonds, coupons, and certificates to the purchaser or purchasers, from whom the same were received.

"VII. That the fund arising from the sale of the properties above directed to be sold be applied as follows, namely: (1) To the payment of the costs of this cause and of all proper expenses attendant upon said sale or sales, including the compensation of the special master appointed to make the sale, and to the payment also of all charges, compensations, allowances, and disbursements of the complainant and its solicitors and counsel to the extent that said expenses, charges, compensations, allowances, and disbursements shall be allowed by this court. (2) To the payment of the principal and interest of the receivers' certificates hereinbefore specifically described in the second article hereof; but, such payment having been made in the first instance out of the fund produced by the sale herein directed, it is further ordered, adjudged, and decreed that this court reserves power and jurisdiction to entertain any application on the part of the mortgagee herein, the Guaranty Trust Company, its successor or successors, assign or assigns, to enforce against any party to this cause or against any property of the Metropolitan Street Railway Company or the New York City Railway Company, now in the possession of this court or hereafter to come into such possession, contribution towards such payment or exoneration from all or any portion of such payment, or otherwise to obtain from any such party or any such property any sums of money which ought lawfully and equitably to be applied to the partial or entire discharge and payment of said receivers' certificates and the interest accrued thereon. It is further ordered, adjudged, and decreed (3) that the balance of the fund arising from the sale of the properties hereinabove described and by this decree directed to be sold shall be distributed, together with the proceeds of the sale of all the remaining property of the Metropolitan Street Railway Company and the property of the New York City Railway Company now in the possession of the court or hereafter to come into such possession, among all creditors, claimants, and persons interested therein, including the officers of this court, their counsel, and the counsel of all parties interested in the said fund, proceeds, and property for distribution, or any part thereof, in accordance with their respective rights and priorities to be hereafter determined by the court.

"VIII. That the property hereby directed to be sold shall be sold subject to all taxes and assessments and to liens prior to the aforesaid mortgage to the complainant, existing in favor of any person or persons, corporation or corporations, not a party to this cause, except such liens as are herein specifically directed to be paid out of the proceeds of sale, or which are reserved for future adjudication under subdivision 3 of article VII hereof.

"IX (formerly X). That it shall be a condition of sale of the lines of railway, leasehold estates, and parcels of land separately enumerated and directed to be sold by article IV of this decree that the purchaser shall, as a part of the consideration for such sale, and in addition to the price bid, assume all pending uncompleted and not fully executed contracts in respect to the property of the Metropolitan Street Railway Company, whether leasehold or otherwise, theretofore made by the receivers of the New York City Railway Company or the receivers of the Metropolitan Street Railway Company for

the operation, maintenance, and betterment of the railway system operated by said receivers as a going concern, and shall also assume liability for all claims in tort, whether in suit or presented or not, arising during the period of operation of said railway system by receivers appointed by this court, which shall not have been paid and discharged by said receivers at the time of said sale. In the event that said purchaser or purchasers shall refuse, after demands made, to perform any such contract or discharge any such indebtedness, obligation, or liability the person or persons holding the claim therefor may, upon 15 days' notice to said purchaser or purchasers, their successor or successors, assign or assigns, file his or their petition in this court to have claim enforced against the property aforesaid in accordance with the usual practice of this court; and such purchaser or purchasers, and his or their successor or successors, assign or assigns, shall have the right to appear and make defense to any claim, debt, or demand so sought to be enforced, and either party shall have the right to appeal from any judgment, decree, or order made thereon. Jurisdiction of this cause is retained by this court for the purpose of enforcing the foregoing provisions of this decree; and the court reserves the right to retake and resell said property in case the purchaser or purchasers, his or their successors or assigns, shall fail to comply with any order of the court in respect to the performance of such contract or the payment of such indebtedness, obligation, or liability within thirty days after service of a certified copy of such order. No purchaser shall be held personally liable under this article of the decree for any unpaid indebtedness of the receivers, or for any work done or materials furnished under any unfinished contract, except such as shall have been done or furnished after the delivery of possession of the property sold to such purchaser and with his consent. Subject to that exception, the method herein provided for enforcing the liability of the purchaser for the unpaid indebtedness and other obligations of the receivers or for their unfinished contracts, shall be exclusive of all other remedies. Said receivers shall prior to the sale hereunder, and as soon as practicable, file with the clerk of this court and with the special master a statement in such detail as they shall find practicable, showing the principal items of indebtedness, obligations, and liabilities contracted or incurred by them remaining unpaid, and a list of the chief contracts to be assumed by the purchaser hereunder, and shall within two weeks prior to the time of sale file with the clerk of this court and the special master a further statement showing as definitely as they shall find practicable any additional indebtedness, obligations, or liabilities contracted and incurred and outstanding, and also the amount of the indebtedness, obligations, and liabilities included in such first statement which may have been discharged; but such statement shall be advisory only, and shall in no wise constitute a warranty, nor shall such statement constitute ground for a release from any bid because of any representation therein or omission therefrom.

"X (formerly XI). That all the property directed by this decree to be sold shall be sold by William L. Turner, Esq., who is hereby appointed special master for that purpose, at such date as may be fixed by the court and at an hour to be fixed by him, at the north main entrance of the county courthouse of the county of New York, in the city of New York, with power to adjourn said sale at any stage of the proceedings to any room in said courthouse which he may be permitted to use by the authorities having the custody thereof, and with power to adjourn said sale from time to time to a future day by oral announcement at the time appointed for the sale, upon consent of the solicitors for the complainant, or with the approval of the court, without prejudice to the notice of sale, and without the necessity of publishing any further notice; but the special master may, notwithstanding, give such notice of any such adjournment by publication or otherwise as he shall think fit. The special master shall give notice of such sale by publication once a week for not less than four consecutive weeks in one newspaper of general circulation printed and published in the city and county of New York, which notice shall contain a brief general description of the property to be sold, a statement of the time and place of the sale, and a reference to this decree for a more particular description of such property, and a state-

ment of the terms and conditions of sale. The special master shall give such further notice of such sale by publication or otherwise as he shall think fit. Any party to this cause, or any holder of any of the bonds, coupons, or receivers' certificates herein mentioned, may purchase at such sale and may hold the property purchased in his, its, or their own right, free from any trust or right of redemption.

"XI (formerly XII). That the special master shall invite bids upon all the property directed to be sold by this decree in one parcel as an entirety, including the interest therein of all parties to the cause, except such interest and right of resale as is expressly reserved by article IX of this decree, and shall provisionally accept the bid of the highest qualified bidder on said entire property, provided that said bid shall not be less than ten million dollars in cash. The special master shall report the bid so provisionally accepted to the court.

"XII (formerly XIII). That unless the court shall otherwise direct, for just cause shown, upon the petition of any person desiring to bid at such sale, no bids shall be received from any bidder for the entire property hereby directed to be sold, who shall not first deposit with the special master the sum of \$100,000, either in cash, or in a check certified by a national or state bank or trust company situate in the city of New York. The cash or check deposited by any bidder in order to qualify him to bid at the sale shall be held as a pledge that such bidder will make good his bid if accepted by the court. The cash or checks so deposited, except those deposited by any bidder whose bid shall be provisionally accepted, shall be returned by the special master at the conclusion of the sale to the bidder or bidders from whom they were received. The cash or checks so deposited by any bidder or bidders whose bid shall be provisionally accepted as provided in this decree shall be returned by the special master to the bidder or bidders from whom they were received, if such provisional acceptance shall thereafter not be confirmed by the court. The cash or check deposited by any bidder in order to qualify him to bid at the sale shall be forfeited and applied to the expenses of said sale and of the receivership of the property of Metropolitan Street Railway Company in the event that the said bidder shall not make good his bid. In the event that any successful bidder shall fail to make good his bid as the court shall direct upon confirmation to him of such sale, the court may order a resale of the property covered by such bid, and the said bidder shall be liable for all the expenses thereof and for any deficiency of price realized thereon.

"XIII (formerly XIV). That in addition to the cash deposited upon any bid at the time of said sale as hereinbefore required, which shall be received as a part of the purchase price, there shall also be paid in cash by the purchaser upon the confirmation of such sale and from time to time thereafter such further portions of the purchase price of said property, as the court may direct. All sums of money received upon any such sale shall be deposited by the special master in the Guaranty Trust Company of New York. The court reserves the right to reject any bid and to retake and resell the property purchased upon the failure of any purchaser to comply with the terms of sale or with any order of the court requiring payment within thirty days after service upon such purchaser of a certified copy of such order.

"XIV (formerly XV). That the enumeration in this decree or in the inventory hereby directed to be prepared of any lease or traffic or trackage or operating agreement, or other executory contract, to which the Metropolitan Street Railway Company, or any of its constituent companies, is a party, or by which it may in any manner be bound, shall not be deemed to constitute an adoption of such lease, agreement, or contract by the court or by the receivers, and the court reserves the right, notwithstanding this decree, or any sale hereunder, from time to time to direct the receivers whether or not to adopt any such lease, agreement, or contract. At any time after confirmation of the sale, and before delivery of possession to the purchaser of the property affected by any such lease, agreement, or contract, the court will direct the receivers to take such action in respect to the adoption or nonadoption of any such lease, agreement, or contract as may be requested by the accepted bidder for the same or the property affected thereby, upon receiving

such indemnity as the court shall deem necessary for the protection of the receivers. Any purchaser or purchasers of the entire property directed to be sold by this decree shall be allowed one year from the date of confirmation within which to elect to adopt and continue in force or to refuse to adopt any lease, traffic, or trackage or operating agreement, or other executory contract, which may be included in the property sold or may constitute an incident or appurtenance thereof. Such election shall be made by an instrument in writing subscribed by such purchaser or purchasers, and filed in the office of the clerk of this court, and no conduct or user of rights by any purchaser or purchasers, within such period of one year, unaccompanied by the filing of such written instrument, shall be deemed to conclude the purchaser or purchasers in respect of such election. In the event of the failure by such purchaser or purchasers to file a statement of election to refuse to adopt any such contract within the period of one year above allowed, he or they shall be deemed to have elected to adopt such contract, and to accept the same as part of the property purchased. In the event that such purchaser or purchasers shall elect not to adopt any such lease, traffic, or trackage or operating agreement or other executory contract, he shall reassign and retransfer all his right, title, and interest in the same to Metropolitan Street Railway Company or its receivers or assigns, without deduction, however, from the sum paid or payable by him on account of his purchase thereof. Pending such election by such purchaser or purchasers, Metropolitan Street Railway Company or its receivers or assigns shall have the right to make any payments which may be necessary to be made in order to preserve the rights acquired under such lease, traffic, or trackage or operating agreement or other executory contract, and any such payment so made by Metropolitan Street Railway Company, its receivers or assigns, shall be repaid to Metropolitan Street Railway Company, its receivers or assigns, by the said purchaser or purchasers, and such repayment shall be enforceable against said purchaser in the manner specified in paragraph X hereof. The court reserves power to direct the payment by the purchaser or by the receivers of such amounts as shall be found to be equitable upon an accounting or otherwise in respect to any lease, traffic, or trackage or operating agreement which the purchaser hereunder shall elect not to adopt, or which he shall require the receivers to elect not to adopt, and jurisdiction over the property hereby directed to be sold is reserved to enforce such payment."

Article XVI becomes article XV. Article XVII becomes article XVI. Article XVIII becomes article XVII. Article XIX becomes article XVIII.

With a view to prevent any avoidable misunderstandings the parties are invited to prepare and serve on each other within one week from the date of the handing down of this opinion, and to submit to the court within five days thereafter, any suggestions they think proper to make as to the wording of the mandate. The October term of this court will be extended until after the complete execution of the provisions of the decree appealed from and of any modification thereof.

The decree, as modified, is affirmed; no costs of this court to any party; the printing of the record to be paid out of the fund.

MORTON TRUST CO. et al. v. STANDARD STEEL CAR CO.

(Circuit Court of Appeals, Third Circuit. February 15, 1910.)

No. 87 (1,289).

1. PATENTS (§ 283*)—SUIT IN EQUITY FOR INFRINGEMENT—DEFENSES.

The defendant, in a suit in equity to enjoin the infringement of a patent is not entitled to a dismissal of the bill on the ground that on notice of the patent by commencement of the suit it dismantled the alleged infringing machine and had not since infringed, where it not only failed to allege in its answer that it did not have other and prior notice of the patent, but contested its validity by allegations and proofs, which was in effect an assertion of its right to use such machine, and entitles complainant to an injunction on a finding of validity and infringement by the discarded machine.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 283.*]

2. PATENTS (§ 328*)—INVENTION—BENDING MACHINE.

The Flinn patent, No. 736,834, for a bending machine, covers a new combination of elements in a machine, which is a marked improvement over any in the prior art, and discloses patentable invention.

3. PATENTS (§ 312*)—SUIT FOR INFRINGEMENT—PROOF OF INFRINGEMENT.

A combination claim of a patent is never infringed, except by the use of that which embodies every element of the combination, or its equivalent; and where the patent covers a complicated machine, infringement cannot be found alone on a blue print of the alleged infringing machine, introduced in evidence without explanation.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 312.*]

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

Suit in equity by the Morton Trust Company and the Pressed Steel Car Company against the Standard Steel Car Company. Decree for defendant (171 Fed. 672), and complainants appeal. Reversed.

Harry A. Knight and Cyrus N. Anderson, for appellants.

Robert D. Totten, for appellee.

Before GRAY and LANNING, Circuit Judges, and McPHERSON, District Judge.

LANNING, Circuit Judge. The patent in suit, No. 736,834, is for an improvement in bending machines, and was granted August 18, 1903, to Pressed Steel Car Company, assignee of Christopher Flinn. The bill of complaint was dismissed by the decree of the Circuit Court, and the defendant, the appellee here, insists that the decree should be affirmed, on the ground that the proofs show that, immediately upon receiving notice of the patent, which was by the commencement of this suit only, it dismantled the machine it had been using, and has not since used any machine embodying any of the combinations described in the claims of the patent. If the defendant's answer had set up as the sole defense no notice other than that contained in the bill of complaint, and that immediately upon the commencement of the suit it had dismantled the machine it had been using, the contention might, perhaps, be good. But not only is the answer silent as to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dismantling act, but it contains assertions that the defendant has a license to do the thing complained of, that the patent was fraudulently obtained, and that it is invalid for want of patentable novelty.

One of the contentions on the proofs in the court below was that the patent is invalid. That contention was in effect an assertion of its right to resume the use of the alleged infringing machine. In such a case, if the patent be valid, the complainant is entitled to an injunction, though he may not be entitled to an accounting for profits and damages. The Circuit Court, however, does not seem to have dismissed the bill on the ground above mentioned. While the decree does not state any specific reason for the dismissal, the opinion (171 Fed. 672) shows the conclusion of the court to have been that the combinations of the patent were the result of mere mechanical skill, and not of inventive genius. It is to that question, therefore, that we must address our attention.

The claims of the patent are:

"1. A bending machine, for use in connection with a blank, comprising essentially a table provided with transverse grooves, a head-block thereon, and a pressure-cylinder mounted upon said table and pivotally secured in one of said grooves and adjustable therein transversely of the table, clamps to hold the cylinder in adjusted position, a piston in said cylinder, and a former carried by said piston and adapted to act upon the blank at that portion thereof adjacent to which it has been placed by the pivotal and transverse adjustment of the cylinder, to bend said blank into shape.

"2. A bending machine, having a table provided with transverse grooves, a pressure-cylinder pivotally mounted upon said table and movable longitudinally in one of said grooves, clamps to hold the cylinder in adjusted position, a piston for said cylinder, a former mounted upon said piston, and means to secure the blank in position to be acted upon by the former, substantially as described.

"3. A bending machine, having a table provided with transverse grooves, a pressure-cylinder mounted upon said table and adjustably secured in one of said grooves, clamps engaging the other grooves and the cylinder to fix the cylinder in adjusted position, a former actuated by said cylinder, and a head-block on the table."

It is not suggested that any of the combinations of mechanical elements described in these claims is to be found in the prior bending machine art, or, indeed, in the prior art of any other branch of mechanics. The argument on behalf of the defendant, as to the validity of the patent, relates principally to the movable, adjustable feature of the pressure-cylinder. In their brief counsel say:

"The single question of invention, by which the validity of the patent is to be tested, is therefore limited to the question whether the use of old adjusting means, well known in many different machines, is patentable when applied to the adjustment of such a cylinder."

We cannot overlook the fact, however, that the claims are combination claims, containing, besides the adjustable cylinder, several other elements. The machine described in the patent is used in bending pipes or tubes required in the construction of cars and locomotives. There are bending machines in the prior art; but if the combination of elements described in the patent in suit furnishes a machine that bends pipes and tubes in a more rapid, economical, efficient, or advantageous way than any of the machines of the prior art, it is an im-

portant fact in solving the question of the validity of the patent. That it does so is not denied. The adjustability of the cylinder is certainly a most important feature of the combination, and the method by which it is adjusted is old. But that method had never before been applied to a bending machine, and the adjustable cylinder is but a single element in the combination. If there was invention at all, it is to be found in the conception of the machine as a whole—as a combination of its several elements—and not merely in the means by which the cylinder can be adjusted to its required work. That conception, it seems to us, involved more than mere mechanical skill. Reduced to practical use, it shows us a machine admittedly a marked improvement upon anything that preceded it. After giving careful attention to the record and the arguments, we have concluded that the patent should be sustained.

It is satisfactorily proven, however, that there was no notice of the patent given in conformity with section 4900, Rev. St. (U. S. Comp. St. 1901, p. 3388). The first notice the defendant had of the existence of the patent was by the commencement of the suit. It immediately ceased using the infringing machine and dismantled it. The last item of proof in the case is a blue print of the machine which the defendant is now using. It was voluntarily submitted to the complainants by the defendant, and was offered in evidence by the complainants as they closed their rebuttal proofs. The counsel for the complainants contend that it shows continued infringement by the defendant. There is not a line of testimony explaining the exhibit. It is a complicated drawing, and it would be highly presumptuous in us to say it shows infringement. A combination claim is never infringed, except by the use of that which embodies every element of the combination or its equivalent. The burden of proof was on the complainants. Infringement cannot be found on the blue print alone. It follows that the complainants are not entitled to an accounting.

The decree of the Circuit Court will be reversed, and the record remanded, with instructions to enter a decree adjudging the patent to be valid, and awarding a permanent injunction against future infringement. The complainants are entitled to costs in both courts.

INTERNATIONAL TIME RECORDING CO. v. W. H. BUNDY RECORD-
ING CO.

(Circuit Court of Appeals, Second Circuit. March 7, 1910.)

No. 152.

PATENTS (§ 328*)—INVENTION—WORKMAN'S TIME RECORDER.

The Bundy patent, No. 671,129, for a workman's time recorder, is void for lack of invention in view of prior devices in the same and analogous arts.

Appeal from the Circuit Court of the United States for the Northern District of New York.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit in equity by the International Time Recording Company against the W. H. Bundy Recording Company. Decree for defendant (167 Fed. 329), and complainant appeals. Affirmed.

Drury W. Cooper and John C. Kerr, for appellant.

Frederick G. Bodell, W. F. Hall, and Arthur E. Parsons, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The patent relates to time recorders adapted to make an impression of the time upon a removable card or other suitable record surface. The apparatus is of the type considered by this court in *International Time Recorder Co. v. W. H. Bundy Recording Co.*, 159 Fed. 464, 86 C. C. A. 494. It is operated by the workman, who inserts his individual card in a receptacle, pushing it down till its lower edge rests upon an abutment which moves upward at fixed intervals of time, and then by moving an operating handle releases the printing devices, so that an impression is made on the card at the proper place. The object of the patent is "to provide means for preventing the actuation of the impression mechanism until after the card * * * has been properly inserted in the machine and for releasing the impression mechanism when the card * * * has been properly inserted to permit a record to be made upon the card." The machine is very fully described in the opinion of the Circuit Court, which may be referred to for all details. Suffice to say that a stop is interposed normally in the path of the operating handle so that the latter cannot be moved until it is released by shifting the position of the stop. Such release is effected by the pressure of the lower edge—or part of the lower edge—of the card upon a latch located on the top of the movable abutment. In order to insure the placing of the card in correct position before it contacts with the latch, there is a rigid projection on top of the abutment which will prevent the descent of the card, unless the latter is in proper position. When in proper position a cut-out portion of the lower edge of the card registers with the rigid projection, straddling it, and thus allowing the rest of the lower edge to descend far enough to contact with the latch and the movable abutment.

The claims relied upon are for the combination of various parts; but the expert for complainant concedes that the prior art discloses the movable stop, its connections with the latch, and the latch itself located on the abutment so as to effect release when pressed upon by the lower edge of the card. All there is left on which to base the patent is the arranging of the contour of the card so that in all positions except the correct one it cannot pass an obstacle in its path, but when in correct position will pass by the obstacle.

A prior patent (Gale and others, No. 456,650) for a car-mileage indicator shows a similar arrangement for securing the insertion of a recording card in a receptacle so that it can be fully inserted therein only when a cut-out portion of its contour registers with a fixed ob-

stacle. These are analogous arts, and we cannot find invention in the mere adaption of the cut card of the Gale indicator to the receptacle of the time recorder.

The decree is affirmed, with costs.

JACOBS MFG. CO. v. T. R. ALMOND MFG. CO.

(Circuit Court of Appeals, Second Circuit. March 7, 1910.)

No. 170.

1. PATENTS (§ 39*)—INVENTION—APPLICATION TO USE IN DIFFERENT ART.

To add teeth and a key with cogs to effect motion of the operating sleeve of a drill-chuck, instead of using the fingers or a spanner, as previously done, does not involve patentable invention when such method of imparting motion was well known and used in many arts, although the device was one of utility.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 46; Dec. Dig. § 39.*]

2. PATENTS (§ 328*)—INVENTION—DRILL-CHUCK.

The Jacobs patent, No. 709,014, for a drill-chuck, *held* void for lack of invention.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

Suit in equity by the Jacobs Manufacturing Company against the T. R. Almond Manufacturing Company. Decree for defendant, and complainant appeals. Affirmed.

This cause comes here upon appeal from a decree of the Circuit Court, Eastern District of New York, dismissing the bill in an equity suit brought to enjoin the alleged infringement of United States patent No. 709,014, issued September 16, 1902, to Arthur I. Jacobs for a drill-chuck. A "chuck" is a device for holding a tool. It comprises several jaws which are opened to receive the tool and then closed on said tool to grip the same securely. The chuck described in the patent belongs to the type known as "sleeve chucks," in which the parts are operated by revolving a sleeve around the chuck. The Circuit Court held the patent invalid for want of invention. 169 Fed. 134.

George A. Hoffman (Heath Sutherland, of counsel), for appellant. Arthur von Briesen and Hans von Briesen, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The opinion of Judge Chatfield sets forth the facts with sufficient fullness. It is not necessary to repeat them. A brief statement of our conclusions is sufficient.

In 1876 Almond patented a chuck which commended itself to the trade and commanded a good market during the life of the patent. It was operated by revolving a sleeve in one or the other direction. Nothing was said in the patent as to how it should be thus revolved. In practice this was done either by the unaided fingers, the sleeve being

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

roughened to allow them to grip it, or a spanner was inserted in a hole in the sleeve, and a better purchase thus obtained. The patent in suit describes a chuck identical with the Almond with the addition of teeth to the edge of the sleeve, these teeth being adapted to mesh with the teeth of a key which may be used to operate the chuck, the end of the key being inserted in one or other of several holes in the body of the chuck. The specification does not indicate how much is new, or what is the improvement on the old art. The claims would indicate that the entire device was the product of Jacobs. It is fairly obnoxious to the criticism expressed of a similar obscure and misleading patent in *Evans v. Eaton*, 7 Wheat. 356, 5 L. Ed. 472. But passing that technical objection we have the question: Is it invention entitling a person to the monopoly of a patent to add teeth and a key with cogs to effect motion to the operating sleeve of a drill-chuck—when such device for imparting motion is well known in many arts, and in this very art had been applied to move the operating parts of chucks of another type (as in *Whiton and Washburn*)? We are clearly of the opinion that it is not and do not find the circumstance that the improvement has had large sales persuasive to the contrary. The toothed key is, no doubt, bought because it is more useful and convenient than the fingers or a spanner; but utility alone is not enough to establish invention.

Much is said in argument of the "Jacobs chuck" making better sales and being substituted in many workshops for the "Almond chuck." This is not quite accurate. What complainant is selling is in reality the Almond chuck—a Chinese copy of the old one which the trade has known favorably for many years. It is equally well made and sells as cheaply; indeed, there is some evidence from which it might be inferred that a larger discount is offered to the trade. It is not surprising that the trade prefers to get the Almond chuck operated with a toothed key rather than the same chuck operated with a spanner; but that fact alone does not establish invention.

The decree is affirmed, with costs.

CHOSTKOV et al. v. CITY OF PITTSBURGH et al.

(Circuit Court, W. D. Pennsylvania, March 24, 1910.)

No. 12.

1. MUNICIPAL CORPORATIONS (§ 112*)—ORDINANCES—TITLE—SINGULAR SUBJECT.

Pittsburgh City Ordinance, No. 245, enacted September 25, 1909, authorizing submission to the electors of the question of increasing the city's indebtedness in an amount not exceeding \$6,775,000 for certain specified purposes, did not violate Act Pa. May 23, 1874 (P. L. 231) § 3, as containing a plurality of subjects not clearly expressed in its title.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 112.*]

2. MUNICIPAL CORPORATIONS (§ 918*)—CITY DEBT LIMIT—ELECTION.

An ordinance submitting to the electors the question of increasing the city's indebtedness was not invalid under the Pennsylvania law for fail-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ure to authorize the electors to vote on the application of the moneys to be realized by the increase of the debt.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 918.*]

3. MUNICIPAL CORPORATIONS (§ 918*)—CITY'S INDEBTEDNESS—EXTENSION—ELECTION—NOTICE.

Where a notice of election to authorize an extension of a city's indebtedness correctly stated the percentage in figures as 953+ of 1 per cent., it was not fatally defective because the amount in words was erroneously stated as "nine hundred fifty-three ten thousandths of one per centum plus," it appearing, also, that there was no statute requiring that the percentage shall appear on the ballot.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 918.*]

4. MUNICIPAL CORPORATIONS (§ 918*)—INDEBTEDNESS—INCREASE—ELECTION.

Neither the Pennsylvania Constitution nor Act Pa. April 20, 1874 (P. L. 66) § 3, as amended by Act June 9, 1891 (P. L. 252) § 1, as amended by Act May 1, 1909 (P. L. 317), providing for an election to authorize an extension of a city's indebtedness, requires that the elector shall pass on the purpose of the contemplated loan.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 918.*]

5. MUNICIPAL CORPORATIONS (§ 918*)—MUNICIPAL INDEBTEDNESS—INCREASE—ELECTION BALLOT.

Whether municipal indebtedness should be increased was properly printed on the general ballot to be voted at the election at which the question was submitted in the form prescribed by Act Pa. April 29, 1903 (P. L. 338), notwithstanding Act May 1, 1909 (P. L. 317), relating to the same subject.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 918.*]

Constitutional and statutory limitations of municipal indebtedness, see note to *City of Helena v. Mills*, 36 C. C. A. 6.]

6. MUNICIPAL CORPORATIONS (§ 918*)—STATUTES—INCREASE OF INDEBTEDNESS—BALLOT.

Act Pa. June 12, 1893 (P. L. 454) § 3, providing that, where it is necessary to obtain the assent of electors to a city bond issue, the question of increasing the city's debt shall be so submitted that the electors may vote for or against a bond issue for the improvement of any particular street or alley, separately and apart from the question of increasing the indebtedness for the improvement of any other street or alley, is a specific act providing a system for street improvements and for increasing the city's indebtedness by issuing bonds and collecting the cost of the improvement from the property benefited by a special assessment and has no application to the increase of municipal indebtedness, generally as provided by Act Pa. April 20, 1874 (P. L. 65), and its amendments and supplements.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 918.*]

7. MUNICIPAL CORPORATIONS (§ 323*)—IMPROVEMENTS—ESTIMATE OF COST—TAXPAYERS' SUIT.

Where a city had power to construct a certain improvement in the exercise of discretion, a taxpayer could not enjoin the proceedings because the cost would exceed the city's estimate, nor because the proposed improvement was unnecessary.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 842; Dec. Dig. § 323.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

8. MUNICIPAL CORPORATIONS (§ 918*)—DEBT LIMIT—INCREASE.

Where a city's debt limit is more than 2 per cent. of the assessed value of its taxable property, and part of the debt has been authorized by vote of the electors, such part may be deducted from the gross amount, and the remainder, if under 2 per cent. may be increased to that amount without special authorization by the electors.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 918.*]

9. MUNICIPAL CORPORATIONS (§ 994*)—IMPROVEMENTS—TAXPAYERS' SUIT.

A taxpayer could not maintain a suit to enjoin the city from increasing its indebtedness to pay for certain improvements on the theory that the board of assessors was illegally constituted and not authorized to assess complainant's land for taxes for the proposed indebtedness, quo warranto being the only remedy in Pennsylvania to try title to office.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 994.*]

In Equity. Taxpayers' bill by Sarah Chostkov and others against the City of Pittsburgh and others. On demurrer to bill. Sustained.

Frank H. Kerr and A. E. Anderson, for plaintiff.

Chas. A. O'Brien, City Sol., for defendant.

ORR, District Judge. The plaintiff, who is a citizen of the state of Ohio, has filed a bill as a taxpayer of the city of Pittsburgh, to restrain the city and the officers thereof from issuing bonds to secure an increase of the city's debt. Plaintiff has sought the jurisdiction of this court not because of the involution of any federal question, but solely because of the diversity of the citizenship of the plaintiff and the defendants. Relief is sought not because of any alleged want of power in the city to increase its debt and to issue bonds, but because, as is alleged, the defendants have failed to comply with certain constitutional and statutory provisions by which such power became vested in and should be exercised by the municipality.

Briefly, the plaintiff contends (a) that the city ordinance providing for the submission to a vote of the people of the question of increasing the indebtedness is invalid; (b) that the notice of such election contained a material error; (c) that the election was not conducted in the manner prescribed by law; (d) that the cost of removing the hump will greatly exceed the city's estimate and the portion of the proposed indebtedness intended to be applied thereto, and that such excess will cause a debt in excess of the constitutional limit; (e) that the board of assessors is illegally constituted, and cannot assess the taxpayers' land for taxes for the proposed indebtedness. In the consideration of these several contentions hereafter the material facts on which plaintiff relies will appear. The demurrer filed by the defendants denies that any act or contemplated act on the part of the defendants requires the interference of the court; that no right of the plaintiff as a taxpayer has been violated; and further insist that the bill is multifarious.

At the outstart the provisions of the Constitution of Pennsylvania relating to municipal indebtedness should be noted. Section 8 of article 9 provides that the debt of a municipality shall never exceed 7 per centum upon the assessed value of the taxable property therein,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and that it shall not exceed 2 per centum, "without the assent of the electors thereof at a public election in such manner as shall be provided by law." Section 10 of article 9 provides that such municipality, at or before the time of increasing its debt, shall "provide for the collection of an annual tax sufficient to pay the interest and also the principal thereof within thirty years." Section 4 of article 8 of the same Constitution provides that all elections shall be by ballot or by such other method as may be prescribed by law.

The city of Pittsburgh is a city of the second class in Pennsylvania, and as such is specifically subject to all the provisions of an act of the General Assembly of that state, approved March 7, 1901 (P. L. 20), and commonly known in Pittsburgh as the "City Charter." By this act the city is empowered to enact ordinances for the purpose of borrowing money on the credit of the city, and of pledging the credit and revenue thereof for the payment of the same to the limits, and in the manner expressed in the constitutional provisions aforesaid. In pursuance of the powers thus possessed, the city on September 25, 1909, duly enacted an ordinance, of which the following is the title:

"No. 245. An ordinance authorizing the submission to a vote of the electors of the city of Pittsburgh the question of increasing the indebtedness of said city in an amount not exceeding six million, seven hundred and seventy-five thousand (\$6,775,000.00) dollars, for the following purposes, to wit, \$3,000,000.00 thereof for additions and improvements to the plant and system used in the supply and distribution of water; \$1,500,000.00 thereof for the regrading, repaving and otherwise improving the streets of said city; \$700,000.00 thereof for the purchase and improvement of parks and public playgrounds; \$300,000.00 thereof for the acquirement of public toll bridges crossing the Allegheny river; \$850,000.00 thereof for the construction and reconstruction of public bridges and sewers; \$75,000.00 thereof for the construction of a bridge on the line of Southern avenue; \$250,000.00 thereof for the purchase of land and the construction of a Tuberculosis Hospital; and \$100,000.00 thereof for garbage and rubbish disposal or incineration."

(a) Plaintiff's first contention that this ordinance is invalid is based on two grounds: First, that it violates section 3 of the act of Assembly of Pennsylvania approved May 23, 1874 (P. L. 231), which provides that no ordinance shall be passed by city councils "containing more than one subject which shall be clearly expressed in its title. Second, that it deprives the electors of a right to vote upon the several intended applications of portions of the moneys derived from such increase. There is nothing in the ordinance which is not expressed in its title. There is nothing in the title but the one subject; that is, the increase of debt to the amount of \$6,775,000 to meet the expense of certain contemplated improvements therein mentioned. The ordinance does not pretend to authorize those improvements, but only to provide for a definite increase of the city's debt. There is but one subject, and that is clearly expressed in the title. Nor is the ordinance void because it does not provide that the electors shall vote upon the application of the moneys to be realized by the increase of the city's debt. These views are expressly held by the courts of last resort in Pennsylvania. *Morrellville Borough's Annexation*, 7 Pa. Super. Ct. 532; *Barr v. Philadelphia*, 191 Pa. 438, 43 Atl. 335; *Major v. Aldan Borough*, 209 Pa. 247, 58 Atl. 490. That such views not being plainly

wrong should be respected by this court is clear from abundance of authority. One of the late cases on the subject is *Welch v. Swasey*, 214 U. S. 91-106, 29 Sup. Ct. 567, 53 L. Ed. 923.

(b) Plaintiff's second contention is that the notice of election was insufficient in that there was a material error in stating the percentage of the proposed increase. The Pennsylvania Act of April 20, 1874 (P. L. 66) § 3, as amended by Act June 9, 1891 (P. L. 252) § 1, as amended by Act May 1, 1909 (P. L. 317), provides as follows:

"The indebtedness of any county, city * * * may be authorized to be increased to an amount exceeding two per centum, and not exceeding seven per centum, upon the last preceding assessed valuation of the taxable property therein, with the assent of the electors thereof, duly obtained at a public election to be held in said district or municipality. Whenever the corporate authorities of any county, city * * * by their ordinance or vote shall have signified a desire to make such increase of indebtedness, they shall give notice * * * of an election to be held at the place or places of holding the municipal elections * * * on a day to be by them fixed, for the purpose of obtaining the assent of the electors thereof to such increase of indebtedness. Said notice shall contain a statement of the amount of the last assessed valuation, of the amount of the existing debt, of the amount and percentage of the proposed increase, and for the purposes for which the indebtedness is to be increased. Such election shall be held at the place, time and under the same regulations as provided by law for the holding of municipal elections, and it shall be the duty of the inspectors of such elections to receive tickets, and to deposit said tickets in a box provided for that purpose, as is provided by law in regard to other tickets received at said election; and the tickets so received shall be counted and a return thereof made to the clerk of the court of quarter sessions of the proper county. * * * In receiving and counting, and in making returns of the votes cast, the inspectors, judges, and clerks of said election shall be governed by the laws of this commonwealth regulating municipal elections."

The notice given by the city of the election apparently contained all the information required by said legislation to be given. The "percentage" was stated in words as "nine hundred fifty-three ten thousandths of one per centum plus," instead of "nine hundred fifty-three one thousandths of one per centum plus," which it should have been. It was stated in figures correctly. That variation would be apparent to the voter who carefully studied the notice. Such voter had before him a correct statement of the amount of the proposed increase and the amount of the last assessed valuation, from which only the correct percentage can be ascertained. The careless reader of the notice would observe the figures. It is true that in commercial transactions as a general rule the law is that words control the figures, yet percentage is more often expressed in figures than in words. Another reason why such variation is immaterial is that the material thing which is submitted to the voters is the mere question of the amount of the increase in dollars and cents. In no act of Pennsylvania was it ever provided that the percentage shall appear upon the ballot which is a direct and final notice to the elector.

(c) Plaintiff's third contention is that the election was not conducted in the manner prescribed by law in that no tickets were provided at the polling places whereon the electors could express their assent to or dissent from any of the several purposes or the proposed increase as a whole, but that the question as a whole was unlawfully printed on

the general ballot used at the general election which took place at the time of the vote upon the increase of the debt. What has been said above with respect to plaintiff's second objection to the ordinance providing for the election is applicable to the first part of this objection to the election. Neither the constitution nor any statute of Pennsylvania provides that the elector shall pass upon the purpose of the loan. The statutory provision that the purpose and amount of the increase shall be written or printed upon the inside of the ticket is simply for the information of the voter that he may vote intelligently on the question submitted. *Major v. Aldan Borough*, supra.

But little consideration is needed to arrive at the conclusion that the question was properly printed upon the general ballot. If it were not for the act of May 1, 1909 (P. L. 317), there could be no question about it, because on April 12, 1909, the Supreme Court of Pennsylvania in *McLaughlin v. Summithill Borough*, 224 Pa. 425, 73 Atl. 975, expressly decided that the ballots to be used at an election to ascertain whether a municipal indebtedness should be increased must be official ballots and must be in the form prescribed by the act of April 29, 1903 (P. L. 338), called the "General Ballot Act." The portions of the act last mentioned necessary for present consideration are the following:

"Whenever the approval of a constitutional amendment, or other question, is submitted to a vote of the people, such question shall be printed upon the ballot in brief form, and followed by the words 'Yes' and 'No,' and if such question be submitted at an election of public officers, it shall be printed after the list of candidates.

"The ballots shall be so printed to give to each voter a clear opportunity to designate his choice of candidates by a cross-mark (X), in a square of sufficient size, at the right of the name of each candidate, and inside the line inclosing the column, and, in like manner, answers to questions submitted, by similar marks, in squares at the right of the words 'Yes' and 'No.'"

The act of May 1, 1909, and the General Ballot Act of 1903 are not in any way inconsistent. There is no possible suggestion of an implied repeal of the former by the latter act. It follows, therefore, that that act does not change the law as laid down by the Supreme Court in the case last cited. The city complied with the provisions of the general ballot act, and the voters had an opportunity to designate their answers, yes or no, to the question submitted to them. No objections which have been presented by the plaintiff have led the court to any other conclusion than that the election was according to law.

At this point it is well to consider plaintiff's reference to the provisions of section 3 of the Act of Assembly of Pennsylvania approved June 12, 1893 (P. L. 454), of which act the following only has been printed in the bill and relied upon:

"In all cases where it may be necessary to obtain the assent of the electors to an issue of bonds, the question of thus increasing the city debt shall be so submitted to the electors that they shall have the opportunity of voting for or against the issue of bonds for the improvement of any particular street or alley, separately and apart from the question of increasing the city debt for the improvement of any other street or alley."

This reference is disingenuous to say the least. That portion of the act taken by itself and away from its context suggests one thing, but with its context it suggests anything but support for the plaintiff's con-

tention in this case. The act has nothing to do with the increase of municipal debt under the provisions of the act of April 20, 1874 (P. L. 65), and its amendments and supplements. The act of 1874 is a general act relating to the indebtedness of municipalities. This act of 1893 is a specific act providing a system whereby cities may pave streets and increase the indebtedness of the city by issuing bonds and collecting the costs of the improvement from property benefited by such improvement. The entire act is to be considered as an additional method provided for the paving of streets where the city intends to collect the costs out of abutting property specially benefited. It does not and cannot refer to any proceeding where a city intends to make public improvements at its own expense.

(d) The plaintiff's fourth objection is that the cost of removing the hump will greatly exceed the city's estimate, and that the proposed removal is unnecessary. It is a complaint against alleged reckless waste of the city's moneys. If courts of equity were always responsive to the taxpayer's complaint that municipal authorities were unwisely contemplating municipal improvements, suits in equity would be most frequent. The courts afford relief in such cases only when the municipal authorities are exceeding the powers vested in them. It is a well-settled equitable doctrine that courts of equity will not interfere with the exercise of discretionary powers vested in municipal bodies. Abbott on Municipal Corporations, vol. 3, p. 2511. No one doubts that the city of Pittsburgh has the power to fix and change the grades of streets, to widen them and to pave and repave them, and this power may be exercised whether one street only is to be affected or a number of streets and alleys at the same time as in the case of the proposed removal of the hump.

Further it does not appear that the cost of these improvements will increase the debt of the city beyond the constitutional limit. That may eventually be the fact, but to interfere now will be to control the exercise of the discretion vested by law in the municipal authorities, which this court cannot do. If the contemplated improvements cost more than the portion of the proposed debt applicable to that purpose the city has other resources which may be applied thereto. As long as the indebtedness will not exceed 7 per centum, the city has a right to incur indebtedness to the 2 per centum limit without the vote of the electors. This is stated more at length and perhaps more clearly in *Keller v. Scranton*, 202 Pa. 586, 52 Atl. 26, syllabus:

"Where the debt of a municipality is more than 2 per cent. of the assessed value of taxable property therein, and it appears that a part of the debt had been duly authorized by a vote of the electors, such part may be deducted from the gross amount, and the remainder, if under 2 per cent. of the assessed value, may be increased to 2 per cent. without special authorization by the electors."

The city still has a margin to its credit with respect to the 2 per centum limit. It has its ordinary taxing power. In addition, there is a possibility that local assessments upon such properties as may be benefited by changes of grade, or by widening, may reduce the cost to which the city may be put.

(e) Plaintiff's fifth contention, that the board of assessors is illegally constituted and cannot assess the taxpayer's land for taxes for the proposed indebtedness, is not tenable. It is well said that the only proper method of trying title to office in Pennsylvania is by quo warranto, and if plaintiff were dissatisfied with the assessment of her real estate, she should have sought the relief which the statutes of Pennsylvania provide for the taxpayers.

This opinion need not be extended further to show why there is no federal question involved, because that was admitted by plaintiff's counsel at the argument; nor to show why the bill is multifarious, for that is plain. What has already been said shows sufficiently that no legal rights of the plaintiff have been or are likely to be violated.

The demurrer must be sustained.

CHIRURG v. KNICKERBOCKER STEAM TOWAGE CO.

(District Court, D. Maine. January 31, 1910.)

Nos. 104-106.

1. ADMIRALTY (§ 64*)—INTERROGATORIES—SCOPE.

Where, in a suit in admiralty to recover possession of vessels of which libellant claims to be the owner, the answer alleges ownership in respondent, and that libellant is claiming under fraudulent bills of sale, thus raising a distinct issue of fraud, respondent is entitled, under admiralty rule 32, to attach interrogatories to the answer bearing a wide range in relation to the transaction by which the bills of sale were obtained and its good faith.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 511-514; Dec. Dig. § 64.*]

2. ADMIRALTY (§ 64*)—INTERROGATORIES—EXCEPTIONS.

Exceptions to interrogatories attached to an answer in admiralty considered.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 64.*]

In Admiralty. Suit by Michael Chirurg against the Knickerbocker Steam Towage Company. On exceptions to interrogatories. Sustained in part.

See, also, 174 Fed. 188.

B. L. Fletcher, for libellant.

Benj. Thompson, for respondent.

HALE, District Judge. Thirty interrogatories are attached to the respondent's answer, and are propounded to the libellant, with the usual prayer for the personal answer of the libellant, under oath, to each interrogatory. Exceptions have been filed by the libellant to all the interrogatories except the second and third. The case now comes before the court upon exceptions to 28 interrogatories.

In *The Baker Palmer* (D. C.) 172 Fed. 154, Judge Dodge has lately discussed the extent to which interrogatories may go, and has considered their usefulness in admiralty causes. In passing upon the rights of a claimant under rule 32, he says:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"He is entitled to compel his adversary to amplify the allegations of the libel, * * * for the purpose of dispensing with the taking of proofs regarding them, or for the purpose of bringing distinctly before the court the points relied on in defense, or for the purpose of obtaining evidence in support of the defense from the personal answers of his adversary. *The David Pratt*, 1 Ware, 495, 509, Fed. Cas. No. 3,597; *The Serapis* (D. C.) 37 Fed. 436, 442; *The Mexican Prince* (D. C.) 70 Fed. 246; *Benedict*, Adm. Practice (3d Ed.) § 519.

"The extent to which the process of interrogation may properly be carried will necessarily vary according to the circumstances of each case, and must be regulated, when it is in dispute, by the court in its discretion. The purposes for which it is allowed, as above stated, are to be kept in view; and it is also to be remembered that the matters regarding which interrogatories may be put are, by the language of rule 32, only the matters alleged in the libel or set up in defense by the answer, and that interrogatories are not to be used for such purposes merely as those of finding out in advance what the adversary's evidence will be, or who his witnesses are, or of obtaining the production of letters or documents not in issue, or of cross-examining the adverse party regarding the truth of the allegations made in his pleadings. *The Intrepid* (D. C.) 42 Fed. 185; *Havermeyer's, etc., Company v. Compania Transatlantica* (D. C.) 43 Fed. 90; *Bock v. Navigation Company* (D. C.) 124 Fed. 711. It is, however, not necessarily an objection to an interrogatory, otherwise permissible under rule 32, that some of the purposes above referred to may be incidentally accomplished by it."

This opinion of Judge Dodge presents a comprehensive statement of the rule of admiralty practice in regard to interrogatories. The right to submit interrogatories was recognized by Judge Story and Judge Ware. It has existed under the admiralty rules since their adoption under the act of August 23, 1842 (5 Stat. 516, c. 188). In fact, these early rules are said by the Supreme Court to be "little more than a recognition and formulation of the previous practice of courts of admiralty in this country and in England." *The Corsair*, 145 U. S. 335, 342, 12 Sup. Ct. 949, 36 L. Ed. 727.

In *Gammell v. Skinner*, Fed. Cas. No. 5210, Judge Story said:

"And in point of convenience this practice (of interrogatories) should be adhered to; for it brings distinctly before the court the points, on which the defense is intended to be rested."

See *Havermeyers & Elder Sugar Refining Company v. Compania Transatlantica Espanola* (D. C.) 43 Fed. 90; *La Bourgogne* (D. C.) 104 Fed. 823.

In the case at bar, the libel states that the libellant is the owner of the steamers of which possession is sought. In the answer, the respondent says that it is the owner; that it has the lawful possession; that, by fraudulent bills of sale, the libellant is seeking to defeat such ownership, and to deprive the respondent of possession; that Morse, through whom the libellant claims, had neither title nor possession of the steamers, and did not, and could not, convey any title. I have already found that the allegations of the answer present issues of fact cognizant in the admiralty. It will be seen, then, that a plain issue of fraud is distinctly raised by the pleadings. In all cases of fraud, a wide range, both of direct and circumstantial evidence, must necessarily be allowed. For fraud is essentially a matter of motive and intention, and is often to be gathered from a great variety of circumstances. *Wood v. United*

States, 16 Pet. 342, 360, 10 L. Ed. 987; *Holmes v. Goldsmith*, 147 U. S. 150, 164, 13 Sup. Ct. 288, 37 L. Ed. 118.

With an issue embracing so wide a range of testimony, it seems clear that the duty of the court is to allow the claimant to interrogate upon matters relating to the good faith of parties to the bill of sale. The title to valuable property is at issue. To whom does the property belong? Was the bill of sale made in good faith? Does it convey the title to the property? or was it fraudulent? In order to pass upon these questions, testimony is admissible showing the whole relations of the parties to the bill of sale, together with all facts which bear in any way upon the question of good faith. The interrogatories are addressed to the issues in the case. A party should not be allowed to interrogate merely for the purpose of prying into the affairs of the other party, or to place him in an ambiguous position, or to cross-examine him. It is inquiry, and not inquisition, that is sought by interrogatories. But, as Judge Dodge has pointed out, it is not necessarily an objection to an interrogatory, otherwise permissible, that some of these purposes may be incidentally accomplished. It is not an objection that the answer may disclose the weakness of the case of the party interrogated. Judge Addison Brown has adverted to this view in the *Bourgonne Case*, *supra*.

The first question asked by the respondent is:

"Do you understand that under the laws of the United States you are liable to criminal prosecution for any false statement contained in your answers to the interrogatories attached to the claimant's answer, of which this interrogatory is one?"

It seems to me that this question may be held to be objectionable. The court may assume that the libellant realizes the serious consequence of making false answers to questions which have been propounded under the admiralty rules. I will not compel the libellant to answer interrogatory 1. This exception is adjudged good.

Interrogatory 18 is as follows:

"Prior to the taking of bills of sale from said James T. Morse of any of said steamers, did you consult any attorney, or any other person, for the purpose of ascertaining how far such record title in the custom house determined the ownership of vessels of that character; and if you answer in the affirmative state the person consulted and the information received on that subject?"

The court will not require an answer as to any matter upon which there can be a claim of privilege. The libellant will answer as to whether he consulted an attorney, and who the attorney was. I rule that he need not answer as to what information he received from the attorney, or as to what took place between him and his attorney. This exception is adjudged good.

Interrogatory 27 is as follows:

"If you say in answer to the preceding interrogatory that you did not communicate with any representative of the Knickerbocker Steam Towage Company prior to the recording of the bills of sale, state why, if you claimed to be the owner of said steamer Delta or any of the other steamers referred to, you held said bills of sale for that length of time without so communicating with said company?"

In this interrogatory the libelant is asked why he acted as he did in relation to a certain transaction. I think it possible that I might be establishing a dangerous precedent if I should direct an answer to this question. It might be held that an undue attempt was being made to pry into a man's reasons, in an inquisitorial manner, and for no other purpose than to put him in some unfair position before the court. I will not compel the libelant to answer interrogatory 27. This exception is adjudged good.

With reference to the other interrogatories, it seems to me that they relate to the course of dealing of the parties, and bear upon the good faith of the transaction at issue. The fact that some of them assume a wide range of inquiry does not seem to me a reason for excluding them. I think that they are all material to the issue, which opens a broad range of inquiry. The court overrules exceptions to interrogatories 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, and 30. The libelant will answer each of said interrogatories on or before February 21, 1910.

DOVER et al. v. GREENWOOD et al.

(Circuit Court, D. Rhode Island. March 7, 1910.)

No. 2,664.

1. EVIDENCE (§ 575*)—EVIDENCE GIVEN IN FORMER CASE.

On both principle and authority, in a court of chancery as in a court of law, testimony given in a former trial is regarded as secondary evidence, and is incompetent unless a foundation for its admission is laid.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2407-2409; Dec. Dig. § 575.*]

2. PATENTS (§ 114*)—SUIT IN EQUITY TO OBTAIN PATENT—EVIDENCE.

A suit brought under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), to obtain the issuance of a patent, is a plenary suit in equity, to which all the rules of practice and evidence in such suits apply, and a party cannot be deprived of the right given him by equity rule 67 to cross-examine opposing witnesses by the introduction of the proofs taken in interference proceedings, unless a showing of necessity is made for their introduction as secondary evidence.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 166; Dec. Dig. § 114.*]

3. EVIDENCE (§ 581*)—EVIDENCE GIVEN IN FORMER CASE—GROUNDS FOR ADMISSION.

The testimony of a party that he does not know the whereabouts of a desired witness, without showing any effort to ascertain, or to procure his testimony, is insufficient as a basis for the introduction of the testimony of such witness in a former case as secondary evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2416; Dec. Dig. § 581.*]

4. PATENTS (§ 91*)—SUIT IN EQUITY TO OBTAIN PATENT—EVIDENCE CONSIDERED.

Evidence considered in a suit under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), to obtain the issuance of a patent, and held to establish complainant's claim to priority of invention and his right to a patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 123; Dec. Dig. § 91.*]

In Equity. Suit by George W. Dover and others against Thomas F. Greenwood and others. On final hearing. Decree for complainants. See, also, 154 Fed. 854.

Horatio E. Bellows and Alex. P. Browne, for complainants.
Wilmarth H. Thurston, for respondents.

BROWN, District Judge. This is a bill in equity under section 4915, Rev. St. (U. S. Comp. St. 1901, p. 3392).

On demurrer the defendants contended that section 4915 had been repealed by Act Feb. 9, 1893 (27 Stat. 436), creating the Court of Appeals of the District of Columbia. This contention was overruled by the opinion of this court, reported in 143 Fed. 136. See, also, *Appert v. Brownsville Co.* (C. C.) 144 Fed. 117, and the opinion of the Circuit Court of Appeals for this circuit in *Prindle v. Brown*, 155 Fed. 531, 84 C. C. A. 45.

Upon the overruling of the demurrer, the complainants proceeded to take testimony pursuant to equity rule 67. Thereafter the defendants moved that an order be entered directing that evidence taken in interference proceedings in the Patent Office be made part of the evidence in this case, stating that the purpose of the motion was:

"That the defendants may be advised whether it will be necessary for them to retake for the purposes of this case the testimony of witnesses already fully taken in said interference case."

This motion was denied, and an opinion handed down to the effect that the testimony offered was secondary evidence, and could not be used unless upon a showing that the testimony of the witnesses was not obtainable in the present case. This opinion is reported in 154 Fed. 854.

At the final hearing the complainants submitted their case upon the proposition that Dover's application, filed in the Patent Office September 11, 1901, establishes for Dover a date of invention earlier than any date proven as the date of Greenwood's invention. The defendants at the hearing still insisted upon their right to prove their case by evidence taken on behalf of Greenwood in the interference proceedings. They rely upon the proposition that it is the general rule to admit in evidence in a case between the same parties or their privies, and involving the same subject-matter, depositions taken in a previous case. In support of this proposition they cite 3 Greenleaf on Evidence, pp. 343-354; 16 American Dig. p. 1271, § 288, and cases cited; also, *Atkins v. Anderson*, 63 Iowa, 739, 19 N. W. 323; *McCormick v. Howard*, 15 Fed. Cas. 1306-1308.

The defendants' brief, however, does not give due consideration to the question whether such evidence will be received without a showing that the witnesses are not available in the present suit. *Ecaubert v. Appleton*, 67 Fed. 917, 15 C. C. A. 73, was a suit in equity, in which the Circuit Court of Appeals for the Second Circuit sustained an objection to the admission of testimony given in interference proceedings, without proof that the witnesses were dead or unavoidably absent.

In *Stonemetz v. Brown Co.* (C. C.) 57 Fed. 601, it was held that in a suit in equity certain testimony taken in interference proceedings was

inadmissible. *Clow v. Baker* (C. C.) 36 Fed. 692, was also a suit in equity, in which a motion to use depositions taken in interference proceedings was denied.

Each of these cases is directly in conflict with the defendants' proposition that it is the general and unqualified rule to admit in a case between the same parties evidence taken in a previous case. The defendants attempt to distinguish these cases upon the ground that they were not upon bills in equity under section 4915. The rules governing the admissibility of evidence in equity are general rules, and the defendants to support the contention as to the general rule cite cases which were not upon bills in equity under section 4915.

The defendants' second proposition, that there are special considerations pertaining to a bill under section 4915, is a distinct proposition, and should not be confused with the first proposition advanced by defendants as to the general rule of evidence. The limitations upon the right at common law to use such testimony are stated in the opinion in *West v. Louisiana*, 194 U. S. 258, 24 Sup. Ct. 650, 48 L. Ed. 965.

In the discussion of the topic "Former Evidence," in 16 Cyc. 1088, it is stated that one of the necessary conditions is that a sufficient reason is shown why the original witness is not produced, and that this is necessary to justify the court in receiving it. See, also, our former opinion (154 Fed. 854).

The important question is whether under the rules and practice of the chancery court a different rule prevails, so that such former testimony is receivable, irrespective of the ability of the party offering it to produce the witnesses in the present cause.

There is no question of the defendant's right to use any part of the interference record to prove admissions of the complainants or inconsistencies between the testimony given by the complainants' witnesses in this proceeding and their testimony given in the interference proceedings. See *Dover v. Greenwood* (C. C.) 154 Fed. 854, 855.

The question arises concerning the defendants' attempt to prove its case or portions thereof by testimony taken in their behalf in a former case.

Section 4915, Rev. St., provides a "remedy by bill in equity."

Section 862, Rev. St. (U. S. Comp. St. 1901, p. 661), provides:

"The mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided."

The sixty-seventh equity rule contains the provision:

"Such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, all of which shall be conducted as near as may be in the mode now used in common-law courts."

It is apparent that, if the defendants be allowed to rely upon the proofs taken in interference, the complainants will be deprived of the opportunity to make such cross-examination of the witnesses as they may desire, or as may be competent in the present cause.

The suggestion of the hardship of compelling the defendants to call upon their own behalf in the present suit witnesses whose testimony has

already been taken in interference proceedings is met by the consideration that the complainants ought not to be deprived of the ordinary rights of a complainant in equity, unless from necessity. *Clow v. Baker* (C. C.) 36 Fed. 692, is directly in point upon the question whether a mere suggestion of inconvenience or of expense is a sufficient ground for permitting the use of the record in the interference case in a subsequent suit in equity.

So far as I have been able to investigate this subject, it seems that both upon principle and authority, in the court of chancery as well as in the court of law, testimony given in a former trial is regarded as secondary evidence. See *Gresley's Equity Evidence*, 131-174, 184; *Taylor on Evidence*, 464-471 (9th Ed.) 1897.

The contention that upon a motion for leave to read such testimony the ability of the party to produce the witnesses in the cause is immaterial seems both contrary to principle and to the weight of authority. *Taylor on Evidence*, § 471; *Blagrove v. Blagrove*, 1 De G. & Sm. 252; *Llanover v. Homfray*, 19 Ch. D. 224; *Carrington v. Cornock*, 2 Sims, 567.

The defendants' brief states, however, that Thomas F. Greenwood, one of the parties to the interference and a defendant in this case, was unavailable, being outside the jurisdiction of this court. The defendant Frederick H. Watkins was asked:

"Q. Have you made any effort to find out whether said Thomas F. Greenwood is now in the city of Providence or in the state of Rhode Island?

"A. Yes.

"Q. And have you been able to locate him anywhere in the state of Rhode Island?

"A. No. * * *

"Q. And do you know whether said Thomas F. Greenwood left the state of Rhode Island about that time; that is, nearly three years ago?

"A. He did.

"Q. And have you ever heard of his returning to Rhode Island within that time?

"A. No.

"Q. And do you know where said Thomas F. Greenwood now is?

"A. No."

The witness also stated that he last saw Greenwood in Rhode Island nearly three years ago, had not since seen him, nor known where he was.

There was no testimony from the other defendant, David M. Watkins, copartner of the previous witness, as to any efforts to secure the testimony of Greenwood or as to knowledge of his whereabouts.

This testimony is an insufficient basis for the introduction of secondary evidence. *Stein v. Bowman*, 13 Pet. 209-223, 10 L. Ed. 129; 16 Cyc. p. 1098. The testimony as to the availability of the witness Howard P. Chase is also insufficient as a basis for the introduction of his former testimony.

The defendant further contends that, even if under the general rules of evidence the testimony is inadmissible, it is yet admissible on the ground that there are special considerations pertaining to a bill in equity under section 4915 of such a character as to make it not only proper, but necessary, that the record and evidence in the interference should be made a part of the record in such bill in equity:

First. Because a bill in equity under section 4915 constitutes a step in the prosecution of an application for a patent. *Gandy v. Marble*, 122 U. S. 439, 7 Sup. Ct. 1290, 30 L. Ed. 1223; *In re Hien*, 166 U. S. 438, 17 Sup. Ct. 624, 41 L. Ed. 1066.

Second. A suit under section 4915 is in the nature of a suit to set aside a judgment. *Morgan v. Daniels*, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657.

Third. It is important and essential that the court should have before it in a suit under section 4915 the preliminary statement which the complainant made in interference proceedings.

This third point is disposed of by our former statement that no question is made of the defendants' right to use any part of the interference record to prove admissions or inconsistencies between present and former testimony, and this has no bearing upon the question of the defendants' right to prove their own case by secondary evidence.

As to the first point, the fact that one of the statutory steps provided as a part of the means for securing a patent is a "suit according to the ordinary course of equity practice and procedure" (see *Gandy v. Marble*, 122 U. S. 439, 7 Sup. Ct. 1290 [30 L. Ed. 1223]), is wholly insufficient to indicate an intention of Congress to permit a course of practice and procedure contrary to the ordinary course of equity. When Congress in section 4915 provided "a remedy by bill in equity," it thereby by necessary implication adopted the mode of proof provided for all causes in equity by section 862, Rev. St.

As to the second point founded on the suggestion in *Morgan v. Daniels*, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657, concerning a suit under section 4915, "it is something in the nature of a suit to set aside a judgment," if the defendant means to contend that this language implies that it is therefore necessary that the court must review the grounds and the evidence upon which that judgment was rendered, the decisions *In re Hien*, 166 U. S. 432, 17 Sup. Ct. 624, 41 L. Ed. 1066, and *Prindle v. Brown*, 155 Fed. 531, 84 C. C. A. 45, should be a sufficient answer. See, also, our former decision, 154 Fed. 854.

A case under section 4915 "is prepared and heard upon all competent evidence adduced and upon the whole merits." The evidence must be adduced and its competency passed upon according to the practice of a court proceeding in the exercise of original jurisdiction. *In re Hien*, 166 U. S. 439, 17 Sup. Ct. 624, 41 L. Ed. 1066.

When Congress by section 4915 transferred from the Patent Office to a court of equity the determination of questions of fact and law in the exercise of original jurisdiction, it clearly manifested an intention to give the parties a strictly judicial trial, and clearly did not intend to create a "special and anomalous" proceeding in equity so far as the modes of proof and procedure are concerned.

It is further argued that section 4915 applies equally to two classes of cases, *ex parte* cases and *inter partes* cases—i. e., cases of interference—that in both classes of cases the question to be determined is the same, viz., whether the commissioner or the Court of Appeals, as the case may be, was right in rejecting complainant's application, or whether said complainant upon the record is entitled to receive a patent.

It is further urged that it is the purpose of section 4915 to secure "a review by a court of equity of the decision of the Commissioner of Patents or of the Supreme Court of the District of Columbia, as the case may be, and the judgment of such court of equity as to the correctness of the decision of the commissioner or the Supreme Court of the District of Columbia." This is practically a reiteration of the defendant's original argument on demurrer. It was then argued that, because the proceeding under section 4915 was of the nature of a review, it had been repealed by the act of February 9, 1893, which gave appellate jurisdiction to the Court of Appeals for the District of Columbia.

But it has been decided that section 4915 is still in force, because it is not of the nature of an appeal, but is "wholly different from the proceeding by appeal."

What seems to me the fundamental error in the defendant's argument is the persistent refusal to accept the full force of the very definite decisions of the Supreme Court as to the difference between proceedings under section 4915 and section 4914.

In the defendants' brief it is said of certain witnesses:

"The testimony given by them in this case is not properly additional to, or supplemental of, the testimony given by them in the interference, but, instead, each of said witnesses * * * testifies to an entirely different state of facts from what he testified then."

If we have before us an entirely different state of facts, why should this court be compelled to consider whether previous decisions on different facts were right or wrong?

As we have before observed, the right of the defendants to use former testimony to show admissions and contradictions is not in question. No evidence offered by the defendants for this purpose has been excluded.

If the complainants have made a new case, they have the right to do so, and also the right to such cross-examination of witnesses for the defendants as may be required by the new case, without restriction by the rules governing interference proceedings.

The question whether the commissioner or the Court of Appeals was right or wrong is only in a very loose sense involved in proceedings under section 4915. Neither in ex parte or inter partes proceedings under section 4915 is it essential to determine this. Even if the decision on the former record were correct, the Circuit Court may reach a contrary conclusion on the new record; or, even if the decision were wrong on the former record, the Circuit Court may reach the same conclusion on the new record.

Section 4915 provides a proceeding in the nature of a trial de novo upon the merits. Upon such new trial a contrary conclusion may be reached, or the same conclusion. It does not follow, however, in point of law, that it is any part of the duty of the Circuit Court to adjudge whether the former conclusion is consistent or inconsistent with its own independent judgment.

The question whether the decisions in the Patent Office were correct has been passed upon by the final court of review, the Court of Appeals of the District of Columbia:

The defendants argue that in *ex parte* proceedings the record upon which the application was rejected must necessarily be before the court, and that, as section 4915 applies to both *ex parte* and *inter partes* cases, the rules of procedure must be the same; and therefore it necessarily follows that in *inter partes* proceedings the record and evidence must likewise form part of the record. But neither in *ex parte* proceedings nor in *inter partes* proceedings is the complainant restricted to the case originally presented in the Patent Office or bound by the rules of the Patent Office in the matter of proofs, and in neither class of cases is it necessary to determine the case merely upon the evidence produced before the commissioner. Both classes of cases are tried *de novo*, and, though the Circuit Court may reach a conclusion different from that of the commissioner or of the Court of Appeals, such difference of conclusion involves neither an affirmance nor a reversal of that conclusion, but simply affords a later adjudication which "shall authorize the commissioner to issue such patent" on compliance with the statute.

Of course, upon a bill under section 4915 the complainants must bring before the Circuit Court such records of the Patent Office or Court of Appeals as are necessary to make a case within the statute, but this is merely for the establishment of rights under section 4915, and in no sense for the purpose of securing a review and a reversal of any previous finding.

The expression in *Re Hien*, Petitioner, 166 U. S. 439, 17 Sup. Ct. 626 (41 L. Ed. 1066), is:

"The bill in equity provided for by section 4915 is wholly different from the proceeding by appeal from the decision of the commissioner, etc. The one is the exercise of original, the other of appellate, jurisdiction."

The defendant does not duly consider the force of the expression "original jurisdiction" when he contends that, under section 4915, the court is compelled to perform the task of determining whether the former decision was correct.

The fact that the whole subject of review and of appellate jurisdiction is provided for in section 4914 renders the argument that under section 4915 the court must exercise the same jurisdiction as under section 4914, together with some further jurisdiction of an original nature, untenable. It is clearly not the intention that, when the appeal has been fully heard and determined under section 4914, the same question of the correctness of the former decision is to be re-examined and re-tried in an original suit under section 4915.

The defendants also contend that, according to the practice and procedure in bills in equity under section 4915, the record and evidence in the interference has always been received. Great reliance is placed upon the expression used in *Butterworth v. Hoe*, 112 U. S. 50-61, 5 Sup. Ct. 25, 31 (28 L. Ed. 656):

"It is not a technical appeal from the Patent Office like that authorized in section 4911, confined to the case as made in the record of that office, but is prepared and heard on all competent evidence adduced and upon the whole merits."

In *Gandy v. Marble*, 122 U. S. 439, 7 Sup. Ct. 1290, 30 L. Ed. 1223, the same language is repeated.

The argument that, because proceedings under section 4915 are not like those under 4914 confined to the former record, yet they must still contain the entire former record, is both grammatically and logically unsound.

Upon this unsound interpretation the defendants base their next proposition, that the Supreme Court has established the practice and procedure, and that *Morgan v. Daniels* is a direct authority for the position that the interference record should be before the court.

The defendant also cites *Davis v. Garrett* (C. C.) 152 Fed. 723. This case, however, relates solely to action taken by the court upon a bill taken pro confesso.

The proper practice in equity under such conditions is stated in *Thomson v. Wooster*, 114 U. S. 113, 5 Sup. Ct. 788, 29 L. Ed. 105, and *Central Railroad Co. v. Central Trust Co.*, 133 U. S. 83, 10 Sup. Ct. 235, 33 L. Ed. 561. The decree should be made by the court "according to what is proper to be decreed upon the statements of the bill assumed to be true."

It may be questioned whether, if the court should proceed of its own motion to call for proofs made by a defendant in another court, such action could be justified or reconciled with the decisions of the Supreme Court as to proper procedure on bills taken pro confesso. But, as we said in our former opinion, the question of the right of a defendant to prove its case by secondary evidence was not involved in the case of *Davis v. Garrett*. Where the interference record has been introduced by stipulation, the fact that the court has considered it is of no consequence.

In *Morgan v. Daniels*, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657, the case was submitted upon the testimony taken in the interference. It follows, of course, that the decision cannot have the slightest weight upon the question of the right of a defendant to prove his case by secondary evidence which is objected to.

It is quite true that the rule was declared:

"That, where the question decided by the Patent Office is one between contesting parties as to priority of invention, the decision there made must be accepted as controlling upon that question of fact in any subsequent suit between the same parties, unless the contrary is established by testimony which in character and amount carries thorough conviction."

There is nothing in this which supports the contention that the court must review the grounds upon which that decision was reached. On the contrary, it is the fact that a decision has been made after a contest, and that the defendant has been given a patent, that casts upon the complainant the burden of establishing the contrary by testimony that carries conviction.

The patent is *prima facie* evidence. The court says (page 123, of 153 U. S., page 773 of 14 Sup. Ct. [38 L. Ed. 657]):

"The plaintiff in this case, like the defendant in these cases, is challenging the priority awarded by the Patent Office, and should we think be held as strict proof.

"There is always a presumption in favor of that which has once been decided, and that presumption is often relied upon to justify an appellate court in sustaining the decision below."

It does not follow, however, that, to apply this presumption, the court must have before it the evidence in the former case, or that it must review that testimony.

The complainants stand upon the case made by the bill, answer, and proofs, and that case must be strong enough to carry conviction that Dover was a prior inventor of the combination in issue.

The presumption in favor of that which has been once decided is applied in courts of original jurisdiction as well as in courts having a revisory jurisdiction. Therefore no argument can be drawn from *Morgan v. Daniels* to the effect that it is necessary that this court have before it the evidence given in interference proceedings in order that it may give proper weight to the fact that a decision has already been rendered in favor of the defendants.

To apply that presumption, and to enforce that rule of proof, it is only necessary that we should know that a decision was reached, and it is not necessary to examine the evidence upon which it is based. It is the decision itself which evokes the rule.

It is also urged that the public interest requires that the court should receive and review the testimony taken for Greenwood in the interference record. That the court may go beyond the issues raised by the parties seems established by the decisions of the Supreme Court referred to in *Davis v. Garrett*.

It will go beyond the question of priority to that of invention.

How far is it true that the public interest is so affected that this court for the public interest should undertake an independent investigation of the question of priority? How far is it consistent with the rights of a complainant under section 4915 that the court should proceed to try the merits of the question of priority upon former testimony taken in interference? Can a defendant say: "Well, irrespective of my own right to prove my case by secondary evidence, the court cannot, unless it disregards the public interest, decide this case without itself calling for that testimony which it has denied the defendant the right to produce." If the court of its own motion can decide upon this testimony, then the court itself must violate the rule against secondary evidence, in disregard of the complainants' present right of cross-examination. I am of the opinion that upon this question of priority the public interest does not compel the court to receive the secondary evidence offered by the defendant.

The case then stands for decision upon bill, answer, and the proofs taken and admitted in the present cause. The oath is not waived, and the answer denies that Dover was "the true, original, and first inventor," and asserts that Greenwood was. Has the evidence of the complainant overcome this? Dover's application is dated September 11, 1901. The defendant has produced evidence to show that prior to January 1, 1900, a certain exhibit was in the possession of Greenwood. Excluding the interference record, however, there is no evidence as to the origin of that exhibit, or that it was made by Greenwood. If we assume that this exhibit is proved to have been in the possession of Greenwood as early as January 1, 1900, and that this fact accompanied by Greenwood's sworn answer that he was the first inventor of the combination in issue is sufficient to show that Greenwood had

made this exhibit prior to Dover's application date, this is still insufficient to show Greenwood's prior invention of the combination in issue. This exhibit discloses a "pin-tongue" of a construction similar to that of Dover, but this is but one element of the combination.

The claim now in issue is as follows:

"In a device of the character described, the combination of a pin having a hook-shaped portion at one end inclosing a substantially cylindrical bore; a pivot secured at its middle part in said bore of the pin by pressure; a plate; and a cup mounted on the plate and arranged to loosely engage the ends of the pivot."

Of this exhibit the Court of Appeals said:

"We cannot accept this exhibit in its present condition, as an actual reduction to practice of the invention of the issue."

The examiner of interferences was of the opinion that this exhibit was a reduction to practice. The examiners in chief, however, said:

"Although the pin-tongue has a hook-shaped portion at one end inclosing a substantially cylindrical bore, said cylindrical bore is larger than the pin which constitutes the pivot. It cannot, therefore, be said that the pivot pin is secured in said bore by pressure."

They also considered the contention now made in the case, that the manipulation of the parts of the exhibit has resulted in a loosening of the joint between the pivot pin and the hooked end of the pin-tongue, saying,

"We have duly considered this suggestion, but without being able to find therein any reason for holding that the exhibit ever contained the precise invention which is here in controversy."

The commissioner was also of the following opinion:

"Whether or not it was Greenwood's intention to make a pin having the specific pivot and tongue construction of the issue at the time he made 'Exhibit No. 1' cannot be determined with any certainty from the testimony offered in his behalf or from the device itself, and it must be held, therefore, that Exhibit No. 1 cannot avail Greenwood as a reduction to practice."

• The invention is thus described upon defendant's brief:

"A certain peculiar combination of pin-tongue and joint, a chief feature of novelty consisting in the particular way in which the pin-tongue and joint are combined."

An examination of the exhibit leads to the same conclusion that was reached by the examiners in chief, the commissioners and the Court of Appeals in respect thereto.

Upon the defendants' brief it is said:

"The characteristic feature of the structure referred to, and which distinguishes it from the prior art, resides in the construction whereby the pivot is secured in the bore of the pin-tongue and is loose in the ears of the cup."

The difficulty with Exhibit 1 is that it is lacking in just this characteristic feature. There is nothing to indicate that the maker of Exhibit 1 did not intend that his pin-tongue should turn on a fixed pivot, as in the prior art. The defendant has introduced a considerable amount of evidence to show that the pin which held together the pin-tongue and the cup was formerly quite tight. This testimony is,

however, too unconvincing to establish for this exhibit any greater weight than was given it by the Court of Appeals, the examiners in chief, and the commissioner. The consideration of the exhibit by the examiners in chief and by the commissioner was most careful, and their conclusions thereon were not reversed by the Court of Appeals.

The long pin used as a pivot was a mere temporary expedient—not so fashioned or proportioned as to show that it was designed to be gripped by the bore of the pin or to turn in the ears of the cup. The difference between a firm grip and a loose grip might depend entirely upon the force used by the hand of the person adjusting it.

The defendant has produced entirely credible testimony to the effect that at a certain time during the taking of testimony in interference the pin was so firmly driven in as to require considerable force to remove it. But the evidence as to a special adjustment of a removable pin of varying diameters and with a corrugated or threaded part at a time after interference proceedings had been begun is of very slight weight, and is far from sufficient to show that Greenwood had ever constructed a device in which the parts were so proportioned as to exhibit the characteristic feature of the claim. This matter was carefully considered by the examiners in chief, and their opinion seems entirely sound.

It is to be understood, of course, that in making use of the opinions of the examiners in chief and of the commissioner we refer to them not as evidence in this case, but merely for the purpose of showing the views of expert officials as to the sufficiency of this exhibit to prove the making of the invention of the claims.

Recognizing the necessity of supplementing this exhibit by proof of its actual condition in the hands of Greenwood, the defendant has offered the testimony of Greenwood's wife and daughter as to the precise adjustment of this pin. The declaration of interference was made April 12, 1902. The testimony of these witnesses was given in May, 1909, and refers to the condition of the exhibit prior to January 1, 1900. These witnesses were asked to take the exhibit and locate the pivot in the position it was in when they first saw it. Mrs. Greenwood's adjustment of the pin is thus described:

"The pivot pin is so located that the pin-tongue comes about half way between the corrugated or threaded part and the pointed end, and with the pointed end of the pivot pin inside the edge of the brass plate."

A similar adjustment was made by Miss Greenwood. It is impossible to attach any weight to this testimony. That these witnesses more than nine years before giving their testimony observed a matter whose importance seems to have escaped the attention of all parties to the interference is too improbable for belief.

In the opinion of the Court of Appeals is quoted the language of the examiners in chief:

"The interferants and their attorneys appear to have disregarded this limitation of the issue, since none of the witnesses in the case were called upon to testify, and did not testify, concerning any disclosure to them by either interferant of a pin device having as an essential feature thereof a pin-tongue rigidly secured by pressure to its pivot."

This seems to be also the opinion of the Court of Appeals.

Assuming the good faith of these witnesses, they have clearly mistaken the period at which the exact position of the pin became a matter so important as to attract attention. Their present very precise recollection of what they observed in 1900 is obviously but a mere reflection of ideas acquired by them at a much later date. Furthermore, even if their testimony as to the adjustment of the pin be accepted at its face value, we agree with the opinion of the examiners in chief that this exhibit would still fail to disclose the construction called for by the claim.

Upon the testimony in the present case there is no proof that Greenwood had ever reduced to practise, or had ever conceived the combination of the claim, until after the filing of Dover's application. The same conclusion was reached by both the examiners in chief and the commissioner upon the interference record.

There remains to consider what effect this court should give to the opinion of the Court of Appeals for the District of Columbia. Considering the interference record the court says:

"The testimony throughout lays stress upon the new pin-tongue as the thing invented. Evidently it was that which each party thought he had invented. But it must be remembered therewith that the novel pin-tongue of the issue, with its hook-shaped portion at one end inclosing and firmly gripping with its spring pressure the cylindrical pivot so that the latter can only turn with the movement of the pin, is the central, essential feature of the invention. The arrangement of the familiar cup attachment to the plate, and the loose engagement of the ends of the pivot therein, are necessary and obvious incidents of the construction and operation of the new pin."

According to my understanding of this opinion, the finding that Greenwood had a prior conception of the invention of the claim is based upon a finding that he had conceived and disclosed the pin-tongue before the earliest date found for Dover, and that the conception of the pin-tongue was substantially a conception of the combination of the claims. In view of the concession "that the evidence of neither party goes sufficiently into details to show the specific disclosure of a complete conception of the particular combination that constitutes the invention of the issue," I am able to find no other ground for the decision in Greenwood's favor than the opinion that the real invention was the pin-tongue, and that this embraced the invention of the combination now in issue, so that no specific disclosure of that combination was necessary. But, in view of the very careful and painstaking opinions of the examiners in chief and of the commissioner, there is great difficulty in accepting the view that the conception of the pin-tongue alone was equivalent to the conception of the combination in issue. The statement in the opinion that "the arrangement of the familiar cup attachment to the plate and the loose engagement of the ends of the pivot therein, are necessary and obvious incidents of the construction and operation of the new pin," is true only upon the assumption that there was a pre-existing combination of pin-tongue and pivot, whereby the pivot was so held that it must turn with the pin. Evidence of the construction or conception of the pin-tongue alone would not warrant that assumption, for the pin-tongue is quite as well adapted to co-operate with a pivot upon which it turns as with a pivot that

turns with it. Evidence of the prior conception or construction of the pin-tongue alone is insufficient to anticipate Dover. Evidence that Greenwood before Dover's date had so combined a pin-tongue and a pivot that the pin could not turn on the pivot, and that the pivot must turn with the pin, might perhaps be regarded as a practical completion of the combination, for the reason that a loose engagement of the ends of the pivot would then be a mechanical necessity and a necessary incident. We may accept the view of the Court of Appeals that these two parts so combined would constitute "the central essential feature of the invention," but it does not follow from the construction of the pin-tongue itself that the pivot is intended to be combined with the pin in this novel and peculiar manner. From the Greenwood exhibit in its present condition it is quite apparent that a pin-tongue of this peculiar shape, a pivot, and a cup may be so combined as to constitute an operative pin with some advantages of cheapness in manufacture, and yet not contain the very limited and very specific combination of the claim in issue.

Whether the pin-tongue of the exhibit was new with Greenwood and disclosed by him to Dover, or whether Dover found it in the art prior to Greenwood, or constructed it himself, does not seem material. The pin-tongue itself does not disclose the combination of the claim, and this combination is not a necessary and obvious incident of the construction of the pin-tongue.

Assuming that the excluded testimony taken on behalf of Greenwood in the interference has the limited scope given to it in the opinions of the Court of Appeals, the commissioner, and the examiners in chief, and is restricted to proof of the making of the Greenwood exhibit and to disclosures of the pin-tongue alone to Dover and others, it would, if admitted, be insufficient in my opinion to show that at any time prior to Dover's application date Greenwood had invented the very narrow and limited combination of the claim in issue.

With due respect to the opinion of the Court of Appeals, I am of the opinion that it states no satisfactory reason for a reversal of the conclusion of the commissioner and of the examiners in chief.

A decree for the complainant may be presented accordingly.

SOUTHERN PAC. CO. v. CITY OF PORTLAND.

(Circuit Court, D. Oregon. April 4, 1910.)

No. 3,407.

1. RAILROADS (§ 75*)—RAILROAD ORDINANCES—CONDITIONS.

Where at the time a city passed an ordinance authorizing a railroad company to operate its trains over a street, the city had power under B. & C. Comp. Or. §§ 5077-5078, to designate the street on which the railroad company should locate its road, such power carried with it power to impose reasonable conditions to such permission, which, when accepted by the railroad company, became binding on it.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 183-191; Dec. Dig. § 75.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CONSTITUTIONAL LAW (§ 134*)—STREETS—RIGHT TO USE—CONTRACT.

Where a city passed an ordinance granting a railroad company the right to use a street for a right of way on certain terms, such ordinance, when accepted, became in effect a contract between the city and the railroad company, whether it be regarded as a franchise, license, or mere permission, and the city could not subsequently revoke, impair, or destroy the rights conferred.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 344; Dec. Dig. § 134.*]

3. RAILROADS (§ 77*)—POLICE POWERS—EXERCISE—EFFECT.

The passage of an ordinance granting a railroad company the right to operate its railroad along certain streets subject to the reserved power to make and alter regulations, etc., did not deprive the city of its police powers, nor of the right to exercise the authority expressly reserved.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 197, 198; 1315; Dec. Dig. § 77.*]

4. RAILROADS (§ 223*)—USE OF STREETS—REGULATORY ORDINANCES.

A city ordinance authorizing a railroad company to use a street, and reserving to the city the right to make and alter regulations governing the conduct of the road within the limits of the city, to regulate the speed of the cars and locomotives within such limits, and to restrict the running of locomotives at such times and in such manner as might be deemed necessary, reserved to the city the right to make such rules and regulations covering the operation of the road as might be deemed necessary, even to the extent of prohibiting the use of steam locomotives or freight cars on the street.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 725-729; Dec. Dig. § 223.*]

5. RAILROADS (§ 223*)—USE OF STREETS—MUNICIPAL ORDINANCES—CONSTRUCTION.

Reserved power to a city to regulate the operation of railroads granted the right to use certain streets if involved or doubtful should be construed in favor of the city and against the grantee.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 223.*]

6. RAILROADS (§ 77*)—REGULATION—POLICE POWER.

A city ordinance, granting a railroad company the right to operate its road along certain streets of a city on certain terms, was necessarily made and accepted subject to the city's right to the exercise of its power to make such regulations concerning the operation of the road as public safety and welfare might from time to time require, which power could not be contracted away.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 77.*]

7. CONSTITUTIONAL LAW (§ 101*)—MUNICIPAL CORPORATIONS (§ 625*)—FRANCHISES—REGULATION—MUNICIPAL ORDINANCES—POLICE POWER.

A city ordinance prohibiting a railroad from operating steam locomotives and freight cars along a street on which the company had been authorized to construct its road, subject to regulatory provisions subsequently adopted, did not impair any of the railroad's vested rights, and was not objectionable as an arbitrary exercise of the city's police power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 209-211; Dec. Dig. § 101; * Municipal Corporations, Cent. Dig. §§ 1378, 1379; Dec. Dig. § 625.*]

In Equity. Suit by the Southern Pacific Company against the City of Portland. Bill dismissed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Wm. D. Fenton, Ben C. Dey, R. A. Leiter, and James E. Fenton, for plaintiff.

John P. Kavanaugh and W. C. Benbow, for defendant.

BEAN, District Judge. This is a suit to enjoin the city of Portland from enforcing ordinance No. 16,491, adopted in May, 1907, making it unlawful for the Oregon Central Railroad Company, "its successors, assigns or their lessees, or any other person, firm or corporation, to run or operate steam locomotives or freight cars over, upon or along Fourth street between Glisan street and the southerly limits of the city of Portland, from and after 18 months from the final passage or approval of this ordinance, excepting freight cars for the reconstruction, repair or maintenance of the railway lawfully and rightfully on said street." The plaintiff is occupying and using the street in question for railway purposes, as the assignee, lessee, or successor in interest of the Oregon Central Railroad Company, which, by ordinance No. 599, approved January 6, 1869, was "authorized and permitted to lay a railway track and run cars over the same along the center of Fourth street, from the south boundary line of the city of Portland to the north side of 'G' (now Glisan) street, and as much farther north as said Fourth street may extend or be extended upon the terms and conditions" as therein provided. By section 3 of the ordinance:

"The common council reserve the right to make or alter regulations at any time as they deem proper for the conduct of the said road within the limits of the city, and the speed of railway cars and locomotives (within said limits) and may restrict or prohibit the running of locomotives at such time and in such manner as they may deem necessary."

The terms and conditions of the ordinance were accepted by the grantee, and it proceeded to construct its road along the street, and such road has ever since been used and operated by it and its successors in interest for railway purposes, and numerous freight and passenger trains propelled by steam locomotives now pass over the road daily.

At the time of the passage of ordinance No. 599, the city had no express authority given it to grant franchises for the construction or operation of railroads on its streets. Under the general law of the state, however, a railroad corporation was authorized, when necessary and convenient in the location of its road, "to appropriate any part of any public road, street or alley or public grounds"; but, if it desired to appropriate a street within the limits of an incorporated town or city, the company was required to locate its road upon such street as the local authorities might designate. Section 5077-5078, B. & C. Comp. Or.

The plaintiff contends that this legislation and the ordinance of the city designating the street upon which its grantee should locate its road gave to the grantee and its successors or assigns a perpetual right or franchise to use the street for railway purposes, which cannot be revoked or impaired by subsequent legislation, and that ordinance No. 16,491 is void, so far as it prohibits the use of steam locomotives or freight cars on or along the street because: First, it impairs the obligation of the contract under which the road was located, and inter-

feres with vested rights of property; second, it deprives the plaintiff of its property without due process of law; third, it deprives it of the equal protection of the laws; and, fourth, it is an unlawful interference with interstate commerce.

The position of the city, on the other hand, is: First, that at the time of the passage of ordinance No. 599 the city had no power or authority to grant franchises for the use of its streets for railway purposes; second, that such ordinance was merely a license or permission on the part of the council to the grantee named therein to use the street, revocable at any time; third, that the grant was personal to the grantee, and it had no power or authority to assign or transfer the rights thereby granted without the consent of the city; and, fourth, that by the terms of the ordinance the city reserved the right to regulate the use of the street for railway purposes to the exclusion of steam locomotives and freight cars therefrom whenever in the judgment of the council such legislation was necessary or advisable.

I do not deem it necessary to consider all of these questions at this time. In any view, the city was vested with the right and power at the time ordinance No. 599 was passed to designate the street upon which the company should locate its road, and this carried with it the power to impose reasonable conditions to such grant or permission which, when accepted by the grantee, became binding upon it. *Pittsburg, C. & St. L. Ry. v. Hood*, 94 Fed. 618, 36 C. C. A. 423; *Southern Bell Tel. & Tel. Co. v. City of Mobile*, 162 Fed. 523.

Whether the ordinance is considered a franchise, license, or mere permission, it gave the consent of the city to the use of the street for railway purposes upon certain terms and conditions, and when accepted became in effect a contract between the city and the company. It may be conceded for the purposes of this case that the city could not subsequently revoke the permission thus given or impair or destroy the rights thereby conferred. No attempt is made to do so by ordinance No. 16,491. Its only purpose is to regulate the use of the railroad. The passage of ordinance No. 599 did not deprive the city of its police powers (*N. P. v. State of Minnesota*, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630; *Beer Co. v. Mass.*, 97 U. S. 25, 24 L. Ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205), nor of the right to exercise the power and authority expressly reserved and stipulated in the contract between it and the railroad company. The grant or permission was made or given by the city and accepted by the company upon the terms and conditions therein specified, which, among other things, included the right of the city to make regulations for the conduct of the road at any time the common council might deem proper, to regulate the speed of the cars and locomotives, and to restrict and prohibit the running of locomotives at such times and in such manner as the council may deem necessary. The authority thus reserved is broad and general in its terms, and, while a technical construction of some of the language may support the argument of the plaintiff that it was thereby intended to reserve the power to regulate and not prohibit the use of steam locomotives, I think the plain intention was to reserve the right to make such rules and regulations covering the operation of the road as might, from time to time, be nec-

essary even to the extent of prohibiting the use of steam locomotives or freight cars whenever such legislation might be necessary for the safety or convenience of the public. If, however, the language of the ordinance is involved or doubtful, it should be construed against the grantee and in favor of the public, for, as said by the Supreme Court in *O. R. N. v. Oregonian Ry.*, 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837:

"When a statute makes a grant of property, powers, or franchises to a private corporation or to a private individual, the construction of the grant in doubtful points should always be against the grantee, and in favor of the government."

See, also, to the same effect, *Freeport Wtr. Co. v. Freeport City*, 180 U. S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679; *Burns v. Multnomah Ry. Co. (C. C.)* 15 Fed. 177.

I conclude, therefore, that the legislation complained of is valid because within the powers reserved to the city by the ordinance under which the plaintiff is now occupying the street.

But if I am mistaken in this view it is still, in my opinion, valid because within the general police power of the city. The grant, permission, license, or authority, whatever it may be called, of plaintiff's grantor to occupy the street for railway purposes, was necessarily made and accepted subject to the right of the city, under its police power, to make such regulations concerning the use thereof as the public safety and welfare might from time to time require. The legitimate exercise of legislative power in securing the public safety, health, and morals is not within the inhibition of the federal Constitution against the impairment of obligations of contracts, the deprivation of property without due process of law, or the equal protection of the laws, for, as said by Mr. Chief Justice Fuller:

"The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury." *N. Y. & N. E. R. R. v. Bristol*, 151 U. S. 567, 14 Sup. Ct. 437, 38 L. Ed. 269.

Every grant, therefore, of a public franchise or right, is subject to the legitimate exercise of police power by the state or municipality, and it has been decided that the power to order and establish suitable police regulations authorizes municipal corporations to prohibit the use of steam locomotives in the public streets when such action does not interfere with vested rights. *Railroad Co. v. Richmond*, 96 U. S. 521, 24 L. Ed. 734.

There is no express stipulation in ordinance No. 599 that the grantee should be permitted to use steam locomotives as a motive power for the propelling of trains over the road therein specified, or that it might use freight cars thereon. The right granted was simply to lay "a railroad track and run cars over the same," and nothing is said about motive power or the character of the cars. The grantee, therefore, occupied the street subject to the general power of the city in respect to the use of the road when constructed. The legislation complained of, therefore, does not impair any vested rights expressly given by the ordinance, and it is not for the court to determine in this case whether

the power reserved to the city has been judiciously exercised. It is clearly not void as an unreasonable or arbitrary exercise of such power. At the time the city granted to the plaintiff's predecessors in interest authority or permission to occupy Fourth street for railway purposes, the street was an unimproved back street with scattering dwellings along it and no business houses. It is now practically in the heart of the business district and is one of the principal business streets of the city. It is frequented daily by a large number of persons, teams, and vehicles constantly traveling along and across the street during business hours. It is quite steep throughout the business district, and the noise, vibration, smoke, cinders, and soot from the moving steam locomotives and trains seriously interfere with the transaction of public and private business, and it is a constant source of danger and inconvenience to the public.

The court therefore cannot declare that the provisions of the ordinance sought to be enjoined are unreasonable or arbitrary, and, since it is within the legitimate police power of the municipality, it must be upheld.

It follows that the complaint must be dismissed, and it is so ordered.

SOUTHERN PAC. CO. et al. v. INTERSTATE COMMERCE COMMISSION.

(Circuit Court, N. D. California. February 28, 1910.)

1. COMMERCE (§ 98*)—RATES ESTABLISHED BY INTERSTATE COMMERCE COMMISSION—REVIEW BY COURTS.

The action of the Interstate Commerce Commission in fixing a rate to be charged by an interstate carrier under the legislative power conferred by Interstate Commerce Act Feb. 4, 1887, c. 104, § 15, as amended by Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 (U. S. Comp. St. Supp. 1909, p. 1158), can be reviewed by the courts only on the constitutional ground that it is confiscatory, and such claim should be clearly established to warrant their interference.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 98.*]

2. CARRIERS (§ 26*)—RATES ESTABLISHED BY INTERSTATE COMMERCE COMMISSION—REASONABLENESS.

A rate fixed by the Interstate Commerce Commission of \$3.40 per ton for the carriage of rough green fir lumber and laths from certain points in the Willamette Valley to San Francisco and adjacent points considered, and held not invalid as confiscatory.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 26.*]

In Equity. Suit by the Southern Pacific Company and others against the Interstate Commerce Commission. Decree for defendant.

Wm. F. Herrin, P. F. Dunne, W. W. Cotton, F. C. Dillard, and C. W. Durbrow, for complainants.

Luther M. Walter, Robt. T. Devlin, U. S. Atty., and Joseph N. Teal, for defendant.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This suit was brought to enjoin the enforcement of a rate of \$3.40 fixed by the Interstate Commerce Commission on rough green fir lumber and laths carried by the complainant railroad

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

companies from certain points in the Willamette Valley, in Oregon, to San Francisco and adjacent points; the Southern Pacific Company having on the 18th day of April, 1907, advanced its theretofore established rate on such lumber for such haul from \$3.10 to \$5 per ton. The pleadings, as changed since the cause was last presented to the court, no longer raise the point, then made, that the rates so fixed were below the cost of transporting the lumber.

It is well-established law that the fixing of the rates to be charged by public service corporations is a legislative function, from which it necessarily follows that when Congress, as it did, conferred upon the Interstate Commerce Commission the power, in causes properly brought before it, to determine what are and should be reasonable rates to be charged by the carriers of interstate commerce, its action in the premises is conclusive upon the courts, subject of course always to the inhibitions of the Constitution of the United States, which protect such companies, like everybody else, against confiscatory rates. In the case in hand, the main point relied upon by the counsel for the complainants at the bar was that it appears upon the face of the findings and decision of the Commission itself, that it did not fix the rate of \$3.40 on the lumber in question as a reasonable rate, in and of itself, but only as a reasonable rate in view of the conduct of the railroad company, under and by reason of which the complainants established their mills and produced the traffic. We do not so interpret the findings and report of the Commission. It appears that the rate so fixed by the railroad company as an inducement to the lumbermen of the Willamette Valley to establish mills there for the production of lumber for transportation to San Francisco and other points was \$3.10, which rate was continued for a number of years, and under which numerous mills were established by the lumbermen and a large amount of lumber produced by them and transported by the railroad companies. In respect to that matter, what the case shows is thus briefly stated by the Interstate Commerce Commission:

"Previous to 1898 no lumber was cut in that valley except such as was necessary to supply the local consumption. The ocean could only be reached at Portland upon the north after a rail haul of considerable length, and upon a comparatively high rate, so that lumber cut in the Willamette Valley could not find a market by water in competition with that produced in Portland. The rate to the south was so high as to prohibit shipments in that direction in competition with water carriage from Portland. About 1898 the Southern Pacific Company became convinced that it ought to adopt a policy which would develop the lumber industry along its lines in the Willamette Valley. At that time it had no affiliation with the Union Pacific Railroad or its allied lines, and therefore could obtain no outlet for this lumber through the Portland gateway. Since both the Oregon Railroad & Navigation Company and the Northern Pacific Company had extensive lumber interests of their own which they were bound to protect, the only possible market was to the south and to points in the east reached via the south.

"For several years rates had been in effect from Puget Sound territory and from Portland to Utah, Colorado, and other eastern destinations. In order that lumber produced in the Willamette Valley might be given a market in competition with Washington and Portland mills in this territory, it must go south to Sacramento and east over the lines of the Southern Pacific. There was also an extensive market in San Francisco and adjacent territory. This market could be reached from Portland and from points upon Puget Sound by water, and lumber arriving at San Francisco by water could there be loaded upon the cars and shipped by rail to nearby interior points and

to the eastern points above mentioned. In order, therefore, to give this lumber of the Willamette Valley a market it was absolutely essential to establish a rate from that territory to San Francisco, which was fairly equivalent to the water rate from Portland and from corresponding points. This was perfectly understood by all parties, and the determination of the Southern Pacific was to do precisely this thing.

"What actually occurred in that valley can be best shown by considering the history of the operations of the Booth-Kelly Company, which was the first operator in the field, and which is to-day the largest producer of lumber in that region. In 1897 Mr. Booth was running a mill in the southern part of Oregon for the cutting of pine, which is used mainly for sash and doors and cabinet purposes. An opportunity presented itself to lease a mill which had just been constructed for the manufacture of fir, and the Southern Pacific Company applied to him stating that a determination had been reached to make this lower rate and asking him to lease this mill. At that time the merchantability of Oregon fir in competition with Puget Sound fir and other lumber had not been demonstrated, but Mr. Booth, believing that the experiment was worth trying, leased this mill for a year, and the railroad company put in a rate of \$3.10 per ton. An actual test showed Mr. Booth that this lumber would sell in competition with other fir in the San Francisco market, and also convinced him that he could profitably manufacture upon the rate proposed. He therefore entered into negotiations with the Southern Pacific Company for the purchase of a tract of timber land embracing about 17,000 acres. In order to reach this land, it was necessary to construct a railroad some 20 miles in length, which the Southern Pacific undertook to do upon condition that Mr. Booth should ship over the road, for the first year, a certain number of car loads of lumber, that he should pay an arbitrary rate of so much per ton over this branch road, and that he should take off the lumber from the tract in question within a given time.

"Mr. Booth testified—and there can be no doubt of the fact—that previous to the making of this contract, and as the basis of all his operations, it was understood between him and the railroad company that a rate to San Francisco should be put in and maintained which was fairly equivalent to the water rate from Portland, and that he should also be given a rate via Sacramento to various eastern points in Idaho, Utah, and Colorado. In accordance with this understanding the Southern Pacific established in 1899 a rate of \$3.10 per ton upon lumber to San Francisco and bay points. This original rate applied to all kinds of lumber both green and dry. At first it was only applicable to the section in which the Booth mills were located, but was very soon extended to the entire Willamette Valley, including Portland. Under the stimulus of this rate the lumber business in the Willamette Valley rapidly developed. The Booth-Kelly Company extended its own operations, and many other mills sprang up, until, in 1904, that industry had reached very considerable proportions.

"In the latter part of 1903 the \$3.10 rate was withdrawn from Portland, and in January, 1904, it was withdrawn from the entire Willamette Valley, a rate of \$5 being established instead. The testimony in this case shows that the effect of the putting in of the \$5 rate was, or would have been if continued, to practically suspend the operations of these mills. They made this representation with great earnestness to the Southern Pacific Company, and finally the leading officials of that company, among others its chief traffic director, visited the scene of these operations. As a result of this personal inspection, and after further consideration, that company announced that while the rate never ought to have been made at the outset, inasmuch as it had been, that company would continue it for the future, but would limit it to rough lumber shipped green. Acting upon this announcement, the Southern Pacific Company did, in May, 1904, make effective once again this rate of \$3.10, which was now, however, applied not to all lumber, but only to rough green fir lumber and lath.

"As showing the importance which lumber manufacturers in this region attached to the \$3.10 rate, what occurred at the time this rate was withdrawn in 1904 in a particular instance may be mentioned. A certain operator who owned one mill already had arranged, in the year 1903, to purchase a

considerable quantity of timber and to erect a large mill. When rumors of the withdrawal of the \$3.10 became rife he suspended his negotiations, but after the rate was re-established in 1904, believing from what the officials of the Southern Pacific had said to him that this company had now finally determined upon the maintenance of this rate as a permanent policy, he purchased his land and resumed the building of his mill, and has since constructed still another mill, and purchased some 800,000,000 feet of timber. There can be no question but what the existence of this industry in anything like its present proportions in the Willamette Valley is almost entirely due to the establishment of this \$3.10 rate. Without it the mills would not have been built nor the timber which these operators own purchased, nor could the business have been profitably conducted during recent years upon the present rate of \$5 per ton. The complainants insist that a maintenance of the present rate will shut up their mills and very largely depreciate their timber investments.

"There are some 250 mills in the Willamette Valley, not including Portland, with a capacity of perhaps 1,300,000,000 feet per annum, although the actual cut of these mills has never exceeded in any one year 1,000,000,000 feet, of which about two-thirds is shipped out by rail over the lines of the defendants, the balance being consumed locally. A considerable part of this so-called local consumption is purchased by the railroad itself for its own use. The Booth-Kelly Company manufacture nearly one-seventh of the entire output of the valley, and there are two or three other large operators, but the great majority of these mills are small, with a capacity of from 10,000 to 20,000 feet in 10 hours. Green fir lumber weighs about 3,300 pounds to the 1,000 feet, and therefore an advance of \$1.90 per ton would be equivalent to \$3.13½ per 1,000 feet. The profit in manufacturing lumber in the Willamette Valley during the last seven or eight years has probably ranged from \$1.50 to \$2.50 per 1,000. These profits have often been greater and often less, but the above are perhaps the fair average limits. Most operators in this section own their own timber, but stumpage is frequently bought, and has ranged from 25 cents to \$1 per 1,000. In arriving at the above profit stumpage is always charged as a cost of production. The Booth-Kelly Company charges itself for stumpage 50 cents per 1,000, although under the price at which that company bought its land the actual cost would be somewhat less. If the cost of stumpage should be eliminated, the profits would be increased by 50 cents per 1,000 feet. It will be seen, therefore, that this advance in the freight rate exceeds by considerable the average profit of manufacture in the Willamette Valley plus the price of stumpage. This lumber competes with that produced at Portland and shipped from Portland by water to San Francisco. It was not denied that in the past Portland lumber had successfully met lumber from the Willamette Valley in San Francisco upon the former rates of transportation. The rate from the Willamette Valley is now increased by more than the profit in the manufacture of this lumber. There can be but one result—lumber reaching San Francisco by water must supplant that from the Willamette Valley in the San Francisco market. The rate of \$3.10 was intended to meet the water rate from Portland, and applied only at San Francisco and other bay points which could be reached by water. Lumber from Portland to an interior destination must be loaded upon the cars at the water line and transported by rail to the interior point. Lumber from the Willamette Valley to the same interior point was charged the \$3.10 rate to San Francisco plus the local rail rate from San Francisco to destination, thus maintaining the competitive equality between Portland and the Willamette. It will be seen, therefore, that the \$3.10 rate gradually increased as the distance from San Francisco Bay increased, until the \$5 limit was reached. The present rate of \$5 applies to all the territory which could formerly be reached at \$5 and less. Hence the advance to points distant from San Francisco Bay is less than \$1.90 per ton by a gradually diminishing amount until it reaches the old \$5 limit.

"It will also be remembered that the Willamette Valley now has an outlet to eastern destinations via Portland. When this original rate was established, there could be no movement through the Portland gateway, and a rate was made to eastern destinations via Sacramento. The movement to

the south over the Siskiyou and afterwards to the east over the Sierra Nevada was extremely expensive, and when the Southern Pacific and the Union Pacific became united in 1901 joint rates were established for the movement of this lumber through Portland over the Union Pacific lines, where the grades were much easier and the cost of operation much less. These mills therefore reach to-day via Portland the same eastern destinations which they formerly reached via Sacramento. These rates from the Willamette Valley to various eastern points are the same as from Portland, as a rule, and usually the same as from mills in Washington upon the west of the Cascades. Those rates have also been advanced, and proceedings are pending before the Commission for a restoration of the original rates, but the questions involved are entirely distinct from this. The defendant apparently concedes that whatever rate is established to eastern points from Portland should also be conceded these Willamette Valley mills.

"It follows, therefore, that the effect of this advance is to shut up, as to the Willamette Valley, the San Francisco market, and to limit the market in the vicinity of San Francisco. All other markets are open to these mills to exactly the same degree that they have been in the past. What, then, is the effect of withdrawing that particular market? The timber cut at these Willamette mills is known as Oregon fir, and is very similar to Washington fir except that the trees are smaller. The testimony fairly shows that grade for grade the lumber sells at the same price with Washington fir and with the same readiness. It would seem, however, that the percentage of high-grade lumber runs somewhat less with these mills than in Washington, and, still further, that the poorer grades are not as good here as in Washington.

"The testimony showed that this poorer lumber could not be shipped to eastern markets, and that the only market in which it could be disposed of was San Francisco and points in that immediate vicinity, and this seems probable, for there are few eastern points which can be reached at less than a 40 cent rate, and it fairly appears in this case that there are to-day few if any markets to which No. 2 lumber can be shipped upon a rate as high as that. As was very truly said by counsel for the defense in the argument of the Eastern Rate Cases 'the common board is everywhere,' and the Pacific Coast manufacturer cannot expect to send to the east this grade of his product. These lower grades must be disposed of in comparatively nearby markets. Mills upon the coast can market this lumber by water, interior mills in Washington seem to find a considerable local market, and the same is true of Portland, but these operations in the Willamette Valley have no local market of any account, and have relied in the past upon the San Francisco market for the disposing of this part of their output. To deprive them of this market, or to require them to take \$3.13 per 1,000 feet less for this part of their product, which is a considerable percentage of the whole, would turn a profitable into an unprofitable business.

"It appears probable, too, that the effect of withdrawing this market will be more serious upon the small mill than upon the two or three large operators who are affected by these rates. In order to ship lumber long distances it must frequently be dressed and kiln-dried. The larger mills have facilities for doing this, but the smaller operators are without such facilities; nor can they afford to provide them. They must sell their lumber in the rough, and they do sell a very considerable portion of it in this market.

"It appeared from figures furnished by the defendants that, during the year 1907, 7,108 cars of lumber moved from the Willamette Valley via Portland, and that 5,436 cars of commercial lumber moved south through Ashland. There was a further movement through Ashland of 3,326 cars of company lumber. The relative movement south was much less during this year than at any previous period, for the reason that the defendants were unable to furnish cars for the transportation of lumber in that direction. Of the cars moving south about one-half were to San Francisco and other bay points, and a large proportion of the remainder were to points affected by the advance; although it should be remembered that a portion of this southern movement was dry lumber to which the \$5 rate only applied. Mr. Booth testified that about 20 per cent. of this lumber moved south under the \$3.10

rate, and that the permanent withdrawal of this rate would practically shut down the operations of his company."

While it will be seen from the foregoing quotation from the report of the Commission that that body took into consideration the conduct of the railroad company under which the lumbermen undertook and developed the lumber industry in the Willamette Valley, the Commission, in fixing as it did the rate of \$3.40 on rough green fir lumber and laths for the haul in question, by no means limited the basis of its decision to the past action of the railroad companies, as will be seen from this further quotation from its findings and decision:

"The distance from Portland to San Francisco is about 750 miles. This rate of \$3.10 applied from mills just south of Portland as a blanket rate over about 250 miles up the Willamette Valley, the average distance over which lumber moved upon it being perhaps 625 miles. Upon this assumption the rate would yield about 5 mills per ton mile. All this lumber in reaching San Francisco must be hauled over the Siskiyou Mountains, where grades are extremely heavy, and the cost of operation unusually high. Taking the whole 750 miles, the grade does not exceed one-half of 1 per cent. for 500 miles, and operating conditions over this portion of the line are favorable; but for about 250 miles grades and curvatures are severe. The steepest grade is found just after leaving Ashland for the south, where for 36 miles the heaviest engine can only haul 375 gross tons. Over the entire 250 miles 500 tons would be an average load for such a locomotive. In practical operation it seems to be customary to make up trains at Ashland of from 20 to 25 cars and to send these trains over the mountains solid. Such a train requires for the first 36 miles out of Ashland three of these most powerful engines, but for the balance of the way can be handled by two. The fuel used is oil, which costs, reduced to the price of coal, \$2.80 per ton. Mills in the Willamette Valley are not situated near the river, and are not therefore as a rule upon the main line of the defendants, but are reached by short branch lines of different lengths. The service of collecting this lumber and putting it into the trains of the defendant upon its main line is therefore a somewhat expensive one.

"The present rate of \$5 per ton is equivalent to 25 cents per 100 pounds, and the defendants insist that this rate, tested by a comparison with lumber rates in different parts of the United States, taking into account the operating conditions which obtain here, cannot be regarded as extravagant. Comparisons with other lumber rates are not conclusive nor greatly profitable, since operating conditions are seldom the same, much less traffic and commercial conditions. The old rate of \$3.10 paid, as above stated, an average return of about 5 mills per ton mile. There are many instances within the knowledge of the Commission where lumber has been and is now being transported for a less charge than this. The \$3.10 rate was certainly a low one, but we are satisfied that it did yield when established, has ever since yielded, and would for the future yield, a substantial return over and above the cost of operation, and that its maintenance in the past has contributed much to the prosperity of the defendants.

"In 1898 no lumber moved from the Willamette Valley. In 1907 the defendants handled from these mills more than 12,000 car loads of revenue paying lumber. This development of the lumber industry has not only directly contributed a large amount of traffic, but has developed the entire country, and has thus added indirectly as much or perhaps even more to the net profits of the defendants. It is not susceptible of doubt that this development would not have taken place at the time it did, but for the putting in of the \$3.10 rate, as previously stated. The railroad from the southern line of Oregon north is owned by the Oregon & California Railroad Company, but these lines have been operated since before 1898 under lease by the Southern Pacific Company, which now also owns the capital stock of the Oregon & California Company. The Southern Pacific Company in its returns to this Commission does not state separately the result of operations upon

the lines of the Oregon & California Company, and we have nothing in this case from which we can make a critical examination of the results of those operations through a series of years. It does appear that in the year 1897 the gross earnings from operation upon these lines were \$1,436,037, and operating expenses \$1,112,835, leaving net earnings of \$323,202, and that the same figures for 1907, were: Gross earnings, \$6,417,153; operating expenses, \$4,766,350; net earnings, \$1,650,803. The mileage in 1897 was 654 miles, in 1907, 665 miles, of which about 300 miles are main line and the balance branches. It appears, therefore, that net earnings in 1907 were more than gross earnings had been 10 years before, and that present net earnings are about \$2,500 per mile. When it is remembered that more than half of this mileage consists of branch lines, not expensive to construct, it would appear the above returns are fairly compensatory.

"The above figures abundantly confirm the judgment of Mr. Huntington that a rate should be made which would develop the lumber industry of this region, and in our opinion the maintenance of this \$3.10 rate would be also for the advantage of the defendants in the immediate future. These mills are established, and they will continue to do business upon a margin of profit much smaller than would have been sufficient to induce their construction in the beginning. But it has been seen that their only market for poorer grades of common lumber is to the south, and that without a market for this class of lumber they cannot successfully compete with other mills upon the Pacific Coast. As already suggested, when the price of stumpage has sufficiently increased in other sections, this lumber in the Willamette Valley can be manufactured at a profit upon the \$5 rate, but for the present it seems highly probable that the continuance of the lower rate is necessary to a continuance of the business itself in anything like its present volume."

It will be seen from the last quotation from the findings of the Commission and from other parts of it that it expressly found that the old rate of \$3.10 established by the railroad company paid an average return to it of about 5 mills per ton mile, and that while that rate was a low one "it did yield when established, has ever since yielded, and would for the future yield, a substantial return over and above the cost of operation." In view of that finding, we cannot say that its increased rate to \$3.40 a ton is so unreasonable as to come within any inhibition of the Constitution of the United States. The jurisdiction which is invoked here ought, as was said by the Supreme Court of the United States in a recent and analogous case, to be exercised only in the clearest cases. The case referred to is a water rate case (*Knoxville v. Water Company*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371), where the court said, among other things:

"If a company of this kind chooses to decline to observe an ordinance of this nature, and prefers rather to go into court with the claim that the ordinance is unconstitutional, it must be prepared to show to the satisfaction of the court that the ordinance would necessarily be so confiscatory in its effect as to violate the Constitution of the United States. In *Ex parte Young*, 209 U. S. 123, 166, 28 Sup. Ct. 441, 456 (52 L. Ed. 714, 13 L. R. A. [N. S.] 932), the last word of caution by this court was said: 'Finally it is objected that the necessary result of upholding this suit in the Circuit Court will be to draw to the lower federal courts a great flood of litigation of this character, where one federal judge would have it in his power to enjoin proceedings by state officials to enforce the legislative acts of the state, either by criminal or civil actions. To this it may be answered, in the first place, that no injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed by all the judges of the federal courts.' The same thought, in effect, was expressed in *San Diego Land & Town Company v. National City*, 174 U. S. 739, 754, 19 Sup. Ct. 804,

810 (43 L. Ed. 1154): 'Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use.' And in *San Diego Land & Town Company v. Jasper*, 189 U. S. 439, 441, 23 Sup. Ct. 571, 572 (47 L. Ed. 892), after repeating with approval this language, it was said: 'In a case like this we do not feel bound to re-examine and weigh all the evidence, although we have done so, or to proceed according to our independent opinion as to what were proper rates. It is enough if we cannot say that it was impossible for a fair-minded board to come to the result which was reached.'

And the Supreme Court, in *Knoxville v. Water Company*, concluded its opinion in these timely and appropriate words:

"The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind. Regulation of public service corporations, which perform their duties under conditions of necessary monopoly, will occur with greater and greater frequency as time goes on. It is a delicate and dangerous function, and ought to be exercised with a keen sense of justice on the part of the regulating body, met by a frank disclosure on the part of the company to be regulated. The courts ought not to bear the whole burden of saving property from confiscation, though they will not be found wanting where the proof is clear. The Legislatures and subordinate bodies, to whom the legislative power has been delegated, ought to do their part. Our social system rests largely upon the sanctity of private property, and that state or community which seeks to invade it will soon discover the error in the disaster which follows. The slight gain to the consumer, which he would obtain from a reduction in the rates charged by public service corporations, is as nothing compared with his share in the ruin which would be brought about by denying to private property its just reward, thus unsettling values and destroying confidence. On the other hand, the companies to be regulated will find it to their lasting interest to furnish freely the information upon which a just regulation can be based."

The conclusion to which we have come in the case before us is that the complaint should be dismissed at the complainants' cost. It is so ordered.

NORQUET v. PARAMOUNT WORSTED MILLS.

(Circuit Court, D. Rhode Island. March 19, 1910.)

No. 2,864.

1. EVIDENCE (§ 598*)—WEIGHT AND SUFFICIENCY—RIGHT OF JURY TO DISREGARD TESTIMONY.

The rule that to warrant the recovery of damages the plaintiff must support his demand by a preponderance of evidence is as binding upon a jury as upon the judge, and their right to weigh the evidence and to determine disputed questions of fact does not entitle them to reject the positive and direct testimony of disinterested and unimpeached witnesses for the defendant without sufficient reason.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2450; Dec. Dig. § 598.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. EVIDENCE (§ 77*)—PRESUMPTIONS—FAILURE TO CALL WITNESSES.

The nonproduction of witnesses when witnesses are procurable creates a presumption that their testimony, if procured, would be unfavorable.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 97; Dec. Dig. § 77.*]

3. MASTER AND SERVANT (§ 276*)—INJURY TO SERVANT—ACTION—SUFFICIENCY OF EVIDENCE.

Plaintiff alleged that, when working as a weaver in defendant's mill in a room with 10 other weavers, he was on two occasions struck on the right side by a shuttle which flew from a defective loom, and injured; that on the second occasion he was knocked to the floor, where he lay unconscious. His testimony was not corroborated by any other person in the room at the time as to either occasion, but as to the second was directly contradicted by three unimpeached witnesses, two of whom were not in the employ of defendant at the time of the trial. There was also other evidence tending to show that on the second occasion he could not have been struck as he claimed. *Held*, that such evidence was not sufficient to support a verdict in his favor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 951, 959, 970; Dec. Dig. § 276.*]

At Law. Action by Napoleon Norguet against Paramount Worsted Mills. On motion by defendant for new trial. Motion granted.

A. B. Crafts, for plaintiff.

Vincent, Boss & Barnefield, for defendant.

BROWN, District Judge. The plaintiff, Norguet, claimed that while working for the defendant as a weaver he was on two different occasions struck on the right side and at nearly the same place by a flying shuttle, first on February 19, 1907, and afterwards on May 31, 1907.

The declaration alleged that on each occasion the shuttle flew from the loom in consequence of some defect in the loom, although no specific defect was set forth. The only evidence of a defect in either loom was the testimony of the plaintiff that on each occasion a loom fixer was called to the loom by a weaver, and had been engaged in fixing the loom immediately before the shuttle jumped.

The plaintiff testified that on February 19th the loom fixer also fixed the loom after the shuttle had struck the plaintiff.

On each occasion the loom fixer is said to have worked at the boxes of the loom on the right-hand side.

There was testimony to the effect that there are many causes for the jumping of a shuttle other than defects in the loom; such as tangled threads, knots, or a broken thread. The plaintiff, of course, assumed the risk of the jumping of the shuttle from such causes due to the negligence of his fellow servants.

Upon its petition for a new trial the defendant contends that the evidence was wholly insufficient to show a defect in either loom, and also contends that the plaintiff's testimony that he was struck by a shuttle on either occasion is wholly uncorroborated and untrue in fact.

On February 19th, the plaintiff testifies, he was engaged in running two looms, Nos. 9 and 10, and that between half past 8 and 9 o'clock in the morning, Tuesday, a shuttle flew from loom No. 20 just after

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a loom fixer had left it; that he was struck in the right side; and that after the shuttle flew the loom fixer returned to loom No. 20 and fixed it again. The plaintiff testifies that, although he suffered from the blow, he stayed at work until night, and that he continued to work each day until 11 o'clock on Saturday; that the mill closed at 11:30; and that he went to his home, sent for a doctor, and remained two weeks in bed.

The sole corroboration of the plaintiff's story is the testimony of the plaintiff's wife and of Dr. Gervais, who was called on Saturday, February 23d, and says he found marks on the plaintiff's body, a black and blue spot about $2\frac{1}{2}$ inches in diameter, and "a little hole in him" below the fourth rib.

It is to be noted that the plaintiff, who had worked in defendant's mill upwards of two years before the accident, did not produce a single witness in corroboration of his story. The defendant produced the records of the weaveroom, which showed that the plaintiff was credited with no cloth woven on looms Nos. 9 and 10, at which he says he was working at the time of the accident, but shows that cloth was credited to him from looms Nos. 13 and 14, as follows:

February 18th,	Loom 14,	57 $\frac{3}{4}$ yds.
" 19th,	" 13,	59 $\frac{1}{2}$ "
" 20th,	" 14,	59 $\frac{3}{4}$ "
" 23rd,	" 13,	61 $\frac{1}{2}$ "
" 23rd,	" 14,	59 $\frac{1}{2}$ "

A cut of about 60 yards of cloth is woven upon one loom in about two days.

The record does not show directly the actual amount woven on any particular day, but only the amount of cloth taken off the loom and credited to the weaver each day.

According to the record, the plaintiff during the previous week had worked on looms 13 and 14. The record also shows that plaintiff resumed work March 4th and 5th, when he worked on looms 5 and 6, and that after March 6th he worked on looms 13 and 14.

The plaintiff in rebuttal did not deny the accuracy of defendant's record, but testified that on February 19th he was weaving samples. There was evidence to show that the record produced did not contain an account of work that was paid for by the hour, and the defendant produced no testimony to show that the plaintiff was not credited for work done by the hour. As the record does not show at what time of day the cloth was taken off the looms, the defendant has not excluded the possibility that Norguet might have been working for some hours on looms 9 and 10.

The loom fixer denies that he had any knowledge of the occurrence testified to by Norguet, or that Norguet was struck by a shuttle at any time.

Norguet testified that his first accident was not as severe as the second.

As to the second accident the plaintiff testifies that it occurred May 31, 1907, Friday, on which date he finally left defendant's employment. He states that he was working in the same room, but on looms 13 and 14, and had the same boss and the same loom fixer as on February

19th; that his loom would not work; and that he called the loom fixer, who fixed the loom three times and informed him that it was all right. He states that the loom fixer started the loom, and "as soon as he started the shuttle flew out and hit me on the side, and I flew on the floor." Plaintiff says that he lost consciousness, that while he was on the floor and between the looms the boss gave him water, that he was struck on the right side "two inches from the first time," and that the shuttle came from loom 14 while he was working at loom 13.

Q. And the loom fixer was working on which loom?

A. At No. 14, at the right-hand side.

As the only evidence of a defective condition of the loom was the evidence that the loom fixer was required to fix it, there is nothing to show any defect except at the box on the right-hand side of loom 14. A shuttle flying because of a defect in the right-hand box must have gone towards the plaintiff's left side, and could not in its direct flight have struck him on the right side, since he was facing loom 13, as he testifies, and as was specifically found by the jury. That on this day a shuttle did fly from the right-hand side of loom 14 is established by the testimony of the loom fixer, Prendergast, not at the time of the trial in the defendant's employment, who says that he was called by the plaintiff to the loom, and that in trying the loom a shuttle flew out from the right-hand side and struck the handles of loom 14 on the left-hand side and dropped to the floor; that when the shuttle dropped Norguet kicked it into the middle of the shop and went off. He testified that the shuttle did not bound, but dropped on the floor; that it did not hit Norguet, but came about two feet from him. Upon cross-examination he was asked:

XQ. Will you swear that it did not hit him?

A. No, I wouldn't swear it did not hit him.

He testified that there were 10 weavers at work in the room. He also testified that after Norguet left he looked the loom all over and found no defect in it, but that he found the listing broken, and stated that the condition of the threads was the cause of throwing the shuttle out. He states that Norguet did not then say to him that the shuttle had hit him, that he made no repairs on the loom, and that the loom was afterwards operated.

Keenan, a weaver not now in defendant's employment, corroborates Prendergast, and says that he saw the shuttle come out, go across, hit the handles on the opposite side, and drop to the floor. He was asked:

Q. Did the shuttle hit Norguet at that time?

A. Not as I see it.

There was testimony that on the day of this occurrence, and shortly after the shuttle flew, Norguet claimed that he had been struck by a shuttle. In view of the jury's special finding that on May 31st the plaintiff was facing loom 13 and was struck on the right side by a shuttle flying from loom 14, and in view of the fact that the testimony that the loom fixer fixed loom 14 at the right-hand end was the only testimony of any defective condition in that loom, it seems to follow necessarily that the plaintiff could not have received a blow on his

right side from a direct flight of the shuttle due to any proven defect in defendant's machinery. The only possibility that he was struck as he says he was was from a rebound of the shuttle, and that there was a rebound is directly contradicted.

It seems impossible that the plaintiff could have been knocked to the floor and have lain on the floor unconscious without attracting the attention of a single one of his fellow operatives in the same room. In considering the question whether the verdict is against the evidence we cannot disregard the fact that the plaintiff has not produced as to either occurrence a single one of his fellow workmen to corroborate his testimony. On the other hand, as to the accident of February 19th, he is contradicted by the loom fixer and by the record of the weaverroom, though this, it must be conceded, does not preclude the possibility of the occurrence. As to the accident of May 31st he is directly contradicted by the loom fixer and a fellow workman, as well as by the boss, who denies the incident as to giving him water while he was on the floor.

Dr. Gervais also testified to finding marks of a second accident on the plaintiff's body. He was asked:

Q. Now, when you were called May 31st, did you see any marks on his body?

A. I did.

Q. What was that?

A. Another accident same as the first one. On the Thursday I happened to call there. There was no ecchymosis, that is, a kind of blue mark, when I was called; but this came later on a couple of days, and gave just about the same result, a couple of inches in diameter of a blue mark.

Q. Were these marks that you saw there on February 23d and May 31st in the same place?

A. A couple of inches difference.

Q. You saw a puncture of the skin, or a bruise?

A. Bruise.

Q. No puncture of the skin?

A. Not exactly, no.

There was evidence from Dr. Gervais and the plaintiff's wife as to illness following both the first and second accidents. There was evidence from the defendant tending to show that prior to either accident the plaintiff was ill. On cross-examination the plaintiff was asked whether he was not sick before February 19, 1907, and replied, "No."

XQ. Didn't you wear a silk bandage on your stomach in that mill on February 19, 1907?

A. No.

XQ. Have you ever worn a silk bandage?

A. No.

XQ. Have you ever worn a bandage on your stomach of any kind?

A. No.

Keenan testified to seeing him wear a blue serge bandage; that he had it when he came to work in the mill and wore it round his body.

Trainor testified that he wore a bandage in 1906, and there was further evidence tending to show impairment of plaintiff's physical condition for some reason other than either accident.

On redirect plaintiff was asked:

Q. Did you ever wear a bandage after the first accident?

A. After the first accident, yes.

Q. Did you ever wear it before?

A. No.

The general rule that a court is forbidden from condemning any one in damages except in behalf of a party who supports his demand by a preponderance of evidence was stated by the Circuit Court of Appeals for this circuit in *The Charles L. Jeffrey*, 55 Fed. 685, 5 C. C. A. 246. See, also, 17 Cyc. 754 et seq. This rule is as binding upon a jury as upon the judge; and the right of a jury to weigh the evidence and to determine disputed questions of fact does not relieve them of the duty of following the instruction of the court that they must decide disputed questions of fact according to the preponderance of proof. They cannot reject the positive and direct testimony of disinterested and unimpeached witnesses for the defendant without sufficient reason. It is the well-settled rule of law that the plaintiff must not only offer proof of negligence, but that he is under the obligation of supporting his case by a preponderance of proof.

To permit a plaintiff to sustain a case of this character upon his own bare and uncorroborated statements, without the support of eyewitnesses, when the occurrence, if true, would in all probability have attracted the attention of his fellow workmen, and when there was opportunity, if machinery was defective, to have had an examination made and discover and point out the defect, is dangerous.

The nonproduction of witnesses, when witnesses are procurable, creates a presumption that their testimony, if procured, would be unfavorable. *Graves v. U. S.*, 150 U. S. 118, 14 Sup. Ct. 40, 37 L. Ed. 1021; *Runkle v. Burnham*, 153 U. S. 216-225, 14 Sup. Ct. 837, 38 L. Ed. 694; *Clifton v. U. S.*, 4 How. 242, 11 L. Ed. 957.

It seems highly improbable that, if the plaintiff on May 31st received so violent a blow as to knock him to the floor and render him unconscious, he should not be able to find a single witness to the fact. It is contrary to the usual experience in these cases that there should be in a weaverroom an accident of this character and severity that was seen by no one. When the plaintiff's story, under such circumstances, is not only not corroborated, but is definitely contradicted by three well-appearing and unimpeached witnesses, it becomes especially necessary for the court to apply the rule of law that requires of the plaintiff the preponderance of proof.

I am of the opinion that the plaintiff has not produced a preponderance of proof as to the occurrence of either accident, or as to a defect in the defendant's machinery on either occasion.

When a case of this character is meritorious, it is the usual practice of attorneys to support the plaintiff's story by the testimony of corroborating witnesses and to give to the jury the benefit of the testimony of some at least of those persons who were present. Such corroboration is especially necessary where the case presented is of an unusual and extraordinary character, as when the plaintiff seeks to hold the defendant liable for the joint effect of duplicate accidents, of the same character, producing injuries at practically the same place on the plaintiff's body, and both due to similar defects in the defend-

ant's machinery, that are proved, not directly, but only indirectly, by similar proof that before each accident the looms were fixed by a loom fixer.

The production of decisions of various courts as to the minimum of proof upon which a plaintiff may be allowed to maintain a case is of much less assistance in the just settlement of the rights of the parties than the production of witnesses who will furnish evidence from which the true state of facts may be determined. The trial of cases in the ordinary way, by producing a fair amount of direct and corroborating testimony, will in a meritorious case obviate the unfavorable presumption that may arise from the production of a mere minimum of proof.

While there are many decisions to the effect that a plaintiff is excused from proof of specific defects in machinery when such proof is not procurable, such cases do not relieve a plaintiff from the duty of producing such proofs as are procurable by reasonable diligence and inquiry, or from the duty of establishing by a preponderance of proof the fact that the defendant was negligent. Especially is it true that such cases have no application to relieve a plaintiff of the burden of proving by a preponderance of evidence the actual occurrence of the event from which he alleges he received injuries.

Upon a consideration of the entire testimony in the case, and of the briefs and supplemental briefs of counsel, I am of the opinion that the verdict fails to administer substantial justice to the parties upon the proofs presented. See *Wilcox v. Rhode Island Co.*, 29 R. I. 292-296, 70 Atl. 913. I was of that opinion at the trial, and that opinion has been confirmed by a review of all the testimony.

Defendant's petition for a new trial granted.

VON HORST v. AMERICAN HOP & BARLEY CO. et al.

(Circuit Court, N. D. California. March 15, 1910.)

No. 14,942.

1. CORPORATIONS (§ 175*)—CAPITAL STOCK—ASSESSMENT FOR PAYMENT OF DEBTS—CALIFORNIA STATUTE.

Under the statutes of California as construed by its Supreme Court, the capital stock of a corporation, although fully paid up at par, is subject to assessment by the corporation for the payment of its debts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 654-656; Dec. Dig. § 175.*]

2. FRAUD (§ 41*)—PLEADING—SUFFICIENCY OF ALLEGATIONS.

General allegations of fraud are insufficient to invoke the action of a court of equity, unless accompanied by allegations of specific facts which tend at least to give that complexion to the transaction.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 36, 37; Dec. Dig. § 41.*]

3. CORPORATIONS (§ 189*)—SUIT BY STOCKHOLDER TO ENJOIN ASSESSMENT—FRAUD.

A bill by a stockholder to enjoin the enforcement of an assessment on his stock by the corporation for the payment of debts, which assessment the corporation has the legal power to make, on general allegations that it was made without notice to complainant and pursuant to a conspiracy

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to deprive him of his stock, is insufficient to entitle him to relief, where it alleges no facts which tend to prove such conspiracy or any improper motive and itself shows that the company has a large indebtedness which is past due and secured by a transfer of its entire property, and it does not appear that notice of the intended assessment, under the circumstances shown, was required by any statute or by-law.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 189.*]

In Equity. Suit by Louis Von Horst against the American Hop & Barley Company, Central Trust Company of California, J. Murray Earsman, and A. B. Parker. On demurrer to bill. Demurrer sustained.

This is a bill in equity to declare illegal and void and restrain the enforcement of an assessment by a corporation of its capital stock. The defendants have demurred to the bill for want of facts to warrant the equitable interference of the court.

The bill alleges, in substance, that complainant is the owner of 189,940 shares out of a total of 190,000 shares outstanding of the capital stock of the defendant American Hop & Barley Company; that said company is the owner of a large quantity of real estate devoted to the growing of hops which is of value very largely in excess of the indebtedness of said corporation; that in the year 1905 and after there had accrued an indebtedness in a large amount from said hop company to the defendant Central Trust Company, which it had been unable to pay, complainant at the request of the trust company, and for the purpose of the better securing the payment of said indebtedness, executed and delivered to the attorney of the trust company an irrevocable power of attorney or proxy authorizing and empowering said attorney to represent complainant at all stockholders' meetings of said hop company, and to vote thereat 170,000 shares of the stock thereof, and at the same time so arranged that said trust company should name and dictate the election of a majority of the members of the board of directors of the company and thereby manage and control the policy, affairs, business, and transactions thereof. And it is alleged that in pursuance of said arrangement there was caused to be chosen and elected by said trust company a majority of the directors of the hop company, and that thereby the trust company "has been enabled to control, and has controlled, the affairs of said hop company, and has excluded this complainant from having any voice or influence in the management. And that having, by the said means, placed your orator in a helpless condition, the said defendants have conspired and combined to utterly despoil and deprive this complainant of all and every part of his said capital stock and of all his valuable interests thereby represented in the said hop company and the property owned by it."

It is alleged that the hop company by and through its board of directors on or about the 24th day of January, 1908, made and executed a deed absolute in form of all its real property to the defendant trust company, but as security for the payment within two years from that date of the sum of \$200,000 then due and owing to the trust company, and the further sum of \$37,625.66, then owing by said hop company to diverse other creditors; that this deed was executed, delivered, and accepted upon the condition that the hop company had the right at any time within two years thereafter, upon paying the sums due to the trust company and said other creditors, to have a reconveyance of all of said lands and property; and that the trust company "agreed and bound itself to hold said lands as hereinbefore stated for the period of two years and to reconvey the same to said hop company upon the payment by the latter of the said indebtedness and all other indebtedness due from it to the said trust company."

After alleging that, "instigated and prompted by the trust company," and without notice to complainant, certain abortive attempts, not necessary to recite, were made by the directors of the hop company to levy assessments upon the stock of that corporation, which were thereafter abandoned, it is alleged that subsequently, "in further pursuance of said combination and con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

spiracy," while complainant was in Europe, and without notice to him, the board of directors of said hop company, at a meeting held for the purpose, proceeded to and did pass a resolution for the assessment of the stock of said corporation in the sum of 10 cents per share—the assessment here involved—and thereafter caused notice of such assessment to be published and have announced and declared that unless the assessment be paid said stock will be sold therefor, and that unless restrained defendants will at the date noticed sell the whole of said shares belonging to complainant and finally deprive him thereof and cause him irremediable loss and damage. It is alleged that "said pretended assessment is illegal and invalid because the whole of said capital stock of said corporation has been heretofore called in and actually and in good faith paid up in full and no part thereof is unpaid or subject to any call, and that the said pretended assessment is not levied or called in good faith, but for the purpose of 'freezing out' this complainant and maliciously and unlawfully depriving him of his property and rights and eliminating him from said hop company and all rights and interest therein."

It is alleged: That defendants, and particularly the defendant Earsman, the president of said hop company, "entertain a strong feeling of malice toward this complainant, and the said pretended assessment is only the beginning of a series of similar proceedings to impoverish this complainant; and the defendants have openly declared their intention to continue to harass this complainant by repeated and continuous assessments of the same kind." That the trust company is greatly embarrassed in its banking business because of the remonstrance of the bank examiner against its carrying so large an indebtedness against the hop company, and that "said trust company has inspired its codefendants herein and a majority of the board of directors of the hop company, and they and all of them have combined and conspired under the pretense of levying a series of assessments, to sell out and destroy all the rights and interests of this complainant as a stockholder of and in said last-named company, and to bid off all his said shares for and in the name of said company" with the purpose of bringing about a condition whereby "said trust company would be relieved of its obligation to hold said lands as security until January, 1910, and be enabled to make an immediate sale of said lands at a sacrifice so as to relieve its said embarrassment, but to the financial ruin of this complainant." That defendants, "in pursuance of said conspiracy to freeze your orator out, have concocted a scheme and plan for the reorganizing of said hop company as soon as this complainant can be eliminated therefrom, and for the financing of the affairs thereof, and so as to obtain and have for themselves and to the exclusion of this complainant all the equities, surplus, and profits to arise from said valuable properties after paying off the indebtedness now owing by said hop company." And finally it is alleged that before complainant departed for Europe "he was assured by the said trust company that his interests would be carefully guarded and protected, and that he might feel secure; but as soon as he was gone said defendants, as your orator is informed and believes, went actively to work to confiscate and destroy all his rights and interest and concocted the said scheme of pretended assessments upon his shares of capital stock to deprive him of his rights, and did not permit him to be notified of the holding of the meeting of the board of directors at which it was proposed or intended to levy the said pretended assessment."

These are the substantive averments of the bill. Some other matters are alleged, but they are not material.

S. C. Denson, for complainant.

F. A. Denicke, Edward B. Young, and Gavin McNab, for defendants.

VAN FLEET, District Judge (after stating the facts as above). The demurrer gives rise to two questions: First, whether under the law of this state the capital stock of a corporation, the par value of which has been fully paid up, is thereafter subject to assessment by the corporation for the payment of its obligations; second, if it is so

subject, whether the assessment here in question was so vitiated by fraud in its purpose and procurement as to entitle complainant to have it set aside.

1. As to the first question I feel justified in saying that so far as this court is concerned the inquiry is concluded and set at rest by the leading case, decided by the Supreme Court of the state, of *Santa Cruz Railroad Co. v. Spreckles*, 65 Cal. 193, 3 Pac. 661, 802, involving the precise question here. In that case, where the sections of the California Civil Code providing for the assessment of the stock of corporations were under consideration, the court, after a very careful review of the question both in department and in bank, reached the conclusion, and so held, that, under these provisions, corporate stock, notwithstanding the subscription price has been fully paid in and no part thereof remains subject to call, is nevertheless liable to assessment by the corporation for corporate purposes—in that case the payment of obligations incurred for operating expenses. It is true that the conclusion there reached was by a divided court, and this fact has led to a very earnest attack by complainant's counsel upon the integrity of the case as an authoritative decision, upon the ground, as claimed, that the opinion of the court (by Mr. Justice Ross) did not in fact receive the sanction of a majority of the court; it appearing that but one associate concurred generally, one concurred specially, the Chief Justice concurred in the judgment, while the other three justices dissented.

I do not feel called upon to analyze the attitude of the members of the court nor determine precisely how far it might affect the value of the case as authority upon a question presenting a sharp conflict of decision, for such is not the case here. This decision was rendered more than a quarter of a century ago, and during all the period elapsing since that date the doctrine as declared in the opinion of Judge Ross has stood without question in this state and has been received and accepted by the profession generally, I might say universally, bench and bar alike, as an authoritative determination of the question involved, and has been quoted and referred to as such, not only by text-writers, but in decisions of the same and other courts (*Green v. Abietine Medical Co.*, 96 Cal. 322, 31 Pac. 100; *Vermont Co. v. Declez Co.*, 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143; *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70), and it is safe to say that upon the faith of it millions of dollars have since its rendition passed hands in the transactions of corporations in this state without question. Under the circumstances, the question, involving as it does the construction of the statutes of the state, it would be asking much of this court, even if it entertained a serious doubt of the correctness of that construction, to reopen the question here, since obviously the initiative to that end should come from the courts of the state. But I find, moreover, that my own views as to the proper interpretation of the provisions of the Code involved are in full accord with those expressed by Judge Ross; and I am further satisfied, as suggested in that opinion, that the earlier case of *Sullivan v. Triunfo M. Co.*, 39 Cal. 459, there referred to, so necessarily involved the same question that, while it was not discussed, the conclusion arrived at must be regarded as sustaining the same view. Such being the result

of the decisions of the Supreme Court of the state, further inquiry into the subject here must be deemed foreclosed.

2. Does the bill state a case for equitable interposition on the ground of fraud? Very obviously to my mind it does not. It is averred generally and repeated in various forms that the defendants through malice and enmity and other improper motives have entered into a conspiracy to deprive complainant of his holdings in the defendant hop company through fraudulent and inequitable means by making repeated assessments upon the stock without right or necessity, in the expectation of selling out his stock without notice to him and without an opportunity to protect himself. But there is an absence of tangible facts to sustain these general averments. Mere general allegations of fraud are, of course, not sufficient. They must be pointed by specific facts which in and of themselves tend to impart that complexion to the transaction, or that, at least, are susceptible of that construction. Without such support the denunciation of a transaction as being the result of conspiracy and fraud is a mere hurtless conclusion, however strongly charged or frequently reiterated.

What is there in the bill, as the facts are stated, tending to impart the aspect of fraud to the transaction counted upon, or to sustain the repeated assertion of a conspiracy to "freeze out" the complainant and deprive him unjustly of his stock? The company was very heavily indebted and had hypothecated all of its tangible assets, its real estate, to the trust company as security for that debt. Neither of these facts is assailed in any way as wanting in good faith. This indebtedness, as appears from the bill, was due and payable; the allegation as to the conditions of the trust under which the deed was given and accepted being simply that the trust company was to hold the land without disposition for a period of two years to be reconveyed if the indebtedness should be liquidated within that time. The hop company could therefore pay its debt at any time, and, if it wanted to save its lands from forced sale, it must pay within the two years the trust was to exist. This being so, it was competent and proper for the debtor company to take any legal course to relieve itself of its obligations. The assessment of its stockholders was, then, as we have seen, one mode it could adopt, unless there was something in the contractual situation of the parties to prevent that course or make it inequitable. But nothing is alleged that could have that effect. The complainant himself had put the trust company in control of the affairs of its debtor, and there is no express averment of any promise or agreement on its part that the stock of the hop company should not be assessed. It is not alleged in any specific way that the assessment was not levied for a proper purpose, but simply that it was not levied "in good faith, but for the purpose of freezing out this complainant." Since fraud will not be presumed, but must be made to appear, this averment is not sufficient to negative the presumption that the assessment was levied for a proper purpose or cast discredit upon its bona fide character. The theory of the complainant seems to be that, because the lands held by the trust company were greatly in excess in value over the amount of the indebtedness, the trust company should be willing to let its demand await conditions which would enable it to be worked out of the land, and

that it is inequitable and unjust for assessments to be levied through its procurement upon the stock of the hop company. But there being no legal obligation on its part to take that course, there is nothing inequitable in any actionable sense in its seeking to have its debt paid through any proper means within its control. And the means being a legal one, the averment of a malicious or sinister motive behind its actions adds nothing to the bill. The motive with which a creditor pursues a perfectly proper remedy to secure payment of a debt does not affect his right to that remedy. And, of course, if one is pursuing a proper remedy to collect his debt, the fact of the debtor's situation being one which makes it difficult to meet his obligation offers no objection, legal or equitable. The averment that the complainant was promised by the trust company "that his interests would be carefully guarded and protected, and that he might feel secure," is, in the light of the other averments of the bill, too vague and indefinite to add anything of value to complainant's case. It does not appear from any fact disclosed that his interests or rights, in any legal sense, were being transgressed or ignored. Nor does the averment of a want of notice to complainant of the purpose to assess the stock add anything of substance to the bill. I know of no obligation independent of one created by specific agreement or by-law requiring notice to either a director or stockholder, absent from the country, of proceedings of a corporation to assess its stock. No such obligation is stated in the bill.

The bill, as I construe its averments, therefore, is wanting in equity, and the demurrer must be sustained.

It is so ordered.

NORTHAM et al. v. CASUALTY CO. OF AMERICA.

(Circuit Court, D. Montana. October, 2, 1909.)

1. INDEMNITY (§ 7*)—INDEMNITOR—JOINT TORT-FEASOR.

At common law, an indemnitor is a joint tort-feasor with the indemnitee, where, by reason of legal or other relations, the giving of the indemnity bond implies a request or demand from the indemnitor to the indemnitee, and a consideration inducing him to do the wrongful act, for the injurious consequences of which damages are claimed by a third person.

[Ed. Note.—For other cases, see Indemnity, Dec. Dig. § 7.*]

2. INDEMNITY (§ 7*)—STATUTES—CONSTRUCTION—"TO BE DONE BY."

Rev. Codes Mont. § 5653, provides that one who indemnifies another against an act to be done by the latter is liable jointly with the person indemnified, and separately to every person injured by such act. *Held*, that the phrase "to be done by" implies on the part of the indemnitee an agreement or obligation to commit the tort in question, as if the phrase were "an act required (or demanded or requested) to be done by" the indemnitee, and, as so construed, the section is merely declaratory of the common law.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 8; Dec. Dig. § 7.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

B. INSURANCE (§ 156*)—DEATH—EMPLOYER'S LIABILITY POLICY—ORIGINAL LIABILITY OF INDEMNITOR.

Rev. Codes Mont. § 6486, creating a right of action for wrongful death, gives such action to the heirs or personal representatives of the person killed against the person causing the death, or if he be employed by another who is responsible for his conduct, then against such other, and section 5653 declares that an indemnitor against the act to be done is liable jointly with the indemnitee, and separately to every person injured by such act. *Held* that, since section 6486 imposes imputed liability for wrongful death only on employers, it excludes all liability of indemnitors except for actual, as distinguished from imputed, wrongdoing, and hence an original action was not maintainable by the personal representatives of a deceased servant against an employers' liability insurance company that had insured the master against liability for injuries to employes, for the servant's death alleged to have resulted from the master's negligence in failing to maintain a reasonably safe place for the servant to work in its mines.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 156.*]

At Law. Action by Myrtle Northam and another against the Casualty Company of America. On demurrer to complaint. Sustained, with leave to amend.

Maury & Templeman and J. O. Davies, for plaintiffs.

Kremer, Sanders & Kremer, for defendant.

DIETRICH, District Judge. While John Northam was employed by the Boston & Montana Consolidated Copper & Silver Mining Company, a Montana corporation, as an underground miner in a mine owned by it in the state of Montana, a large piece of rock, becoming dislodged, fell upon him, inflicting injuries from which he soon thereafter died. The plaintiffs are the heirs at law of the deceased, and are here claiming damages in the sum of \$35,000 on account of his death, which they allege was due to the negligent failure of the mining company to maintain in a reasonably safe condition the place where the deceased was working. There is no charge that the conduct of the mining company was willful; nor has any judgment been recovered against it. The action is one at law, and the Casualty Company of America, alleged to be a corporation organized under the laws of the state of New York, and "doing business in the state of Montana, with resident agents therein," is the sole defendant. The only averments connecting the defendant with the injury complained of are as follows:

"(16) That before the commencement of this suit and before any of the acts herein set out were done by the Boston & Montana Consolidated Copper & Silver Mining Company, a corporation, the said defendant Casualty Company of America did, for a valuable consideration to it in hand paid by the said mining company, agree that it, the said Casualty Company of America, would hold harmless the said mining company from any and all loss and damages which it might sustain by reason of the acts of the said mining company herein set forth, and it, the said Casualty Company of America, did agree with it, the said mining company, that the said Casualty Company of America would indemnify the said mining company against any and all loss by reason of any and all such acts of the said mining company as are hereinbefore set out. Plaintiff alleges that this action at law is entirely between aliens on the one side, as plaintiffs, and a citizen of the United States on the other side, defendant."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

By its amended demurrer the defendant interposes numerous objections to the complaint, but all that have any merit are involved in the question whether or not, assuming that the plaintiffs state a cause of action against the mining company, the action is, by reason of the facts set forth in the above extract from the complaint, maintainable against the defendant. While it does not appear where the contract of indemnity referred to was executed or where it is to be performed, both parties assume that it is subject to the provisions of section 5653 of the Revised Civil Code of Montana, and that the construction to be given to that section is the most important, if not the controlling, consideration. The section reads as follows:

"One who indemnifies another against an act to be done by the latter is liable jointly with the person indemnified, and separately to every person injured by such act."

Primarily the question is whether the section is to be regarded only as a declaration of the common law, or whether it announces a rule of much broader import. Upon principle, prior to the enactment of and without such statutes, an indemnitor was and is held to be a tort-feasor jointly with the indemnitee, where, by reason of legal or other relations the giving of the bond of indemnity implies a request or demand from the former to the latter and a consideration, inducing him to do the wrongful act for the injurious consequences of which damages are claimed by a third party. Thus, one who is not a party to the writ may treat the plaintiff in the action as a joint tort-feasor with the sheriff, where his property is wrongfully seized in attachment by the sheriff who, upon demand, has received from the plaintiff an indemnifying bond as a condition of making the seizure. Illustrative are the cases of *Herring v. Hoppock*, 15 N. Y. 409; *Davidson v. Dallas*, 8 Cal. 227; *Lewis v. Johns*, 34 Cal. 629. The principle running through these and all cases where the indemnitor is held responsible is that, by his conduct, he has in a measure induced the indemnitee to do the wrongful act, and has contributed to the injury complained of.

It is contended on behalf of the defendant here that the phraseology of the Montana Code section referred to had its origin in the proposed (Field) New York Code of 1865, and that its author regarded it only as a declaration of the common law; that later, with kindred sections, it found its way into the California Code, and from that source it was later adopted by the Legislature of Montana. Whatever may be its relation to the "Field Code," it appears for the first time in the statutory law of Montana in the codification of 1895, grouped with other germane sections, under the title "Indemnity," constituting a chapter substantially identical with a chapter under the same head, appearing for the first time in the statutory law of California in the Civil Code of 1872, where the section corresponding to the one under consideration is numbered 2777. Both of these Codes (California and Montana) were, it is thought, adopted, not for the purpose merely of supplementing or modifying the common law, but as complete legal systems. Moreover, both Codes (California § 5, and Mon-

tana § 4653, carried into the Revised Codes as section 6215) contain the following provision:

"The provisions of this Code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof and not as new enactments."

The question, therefore, is whether the section under consideration is "substantially the same * * * as the common law"; plainly it is susceptible of various constructions. One view is that, in the phrase "act to be done," especial emphasis should be placed upon the word "act," thus making the section applicable only to injuries inflicted by the wrongful *acts* of the indemnitor as distinguished from those resulting from wrongful *omissions*. Another view is that the phrase implies only futurity, and that the word "act" is synonymous with "conduct," and embraces wrongs of omission as well as commission. Still another view is that the phrase "to be done by" implies upon the part of the indemnitee an agreement or obligation to do the act or make the omission constituting the tort, as if the phrase were "an act required (or demanded or requested) to be done by" the indemnitee; that is, the indemnitor gives a bond, in consideration of which the indemnitee agrees to or is induced to act or refrain from acting, to the injury of a third person. So understood, the section stands only as a declaration of the common law; and I am inclined to the view that such is the construction to be given to it.

Aside from any consideration of the intention of the framer of the proposed New York Code, we have here this situation: The Legislature of Montana, in legislating upon a subject touched by the common law, used language which may readily be understood as a definition only of a principle of the common law, and at the same time declared that if the provision is substantially the same as the common law, it must be taken as a continuation thereof. It is quite incredible that if the Legislature intended the most radical and sweeping innovation contended for by the plaintiffs, it would have so vaguely evinced such intention; and if we go farther and consider that for the expression of its intention the Legislature adopted the identical phraseology which, according to a more or less common understanding, was originally formulated as a declaration only of a rule of general law, the conclusion is almost irresistible that no material alteration of the common law was contemplated. As suggested by counsel for the plaintiffs, it is true that the intention of the framer of a statute is not controlling upon the courts; of itself, that has but little if any weight. Within the fair import of the language used, the fundamental inquiry always must be, What was the intention of the Legislature? and, where it is obscurely expressed, such intention may sometimes be illuminated by a reference to the origin of the precise phraseology of the statute and the meaning it was designed to convey, when presumptively or actually it appears that knowledge thereof was in the possession of the legislators at the time the statute was considered and adopted.

Having in view only that class to which this particular case belongs—suits for damages on account of death by wrongful act—there is

still another aspect of the question not without significance. It will be conceded that primarily the section under consideration does not confer upon the plaintiffs a right of action. At common law, generally speaking, there was no remedy in the nature of damages to surviving relatives for the death of one person, caused by the wrongful conduct of another. The section we are considering does not purport to provide such a remedy, and, in the absence of some other statutory provision therefor, this action could not be maintained by the plaintiffs. A right of action in such cases is conferred only by section 6486 of the Revised Codes of Montana, where it is provided that:

"When the death of one person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person."

Here we have a declaration that these plaintiffs may recover from "the person *causing* the death" of John Northam, and also from the "employer" of such person, if responsible for his conduct. No right of action is created against the indemnitor. It cannot be said that in enacting this section the Legislature was dealing alone with the responsibility of those who are actually and in fact guilty of wrongdoing; it was also dealing with imputed negligence. For the servant's wrongdoing the master is made responsible, although the latter may be entirely free from moral blame. To be sure, an indemnitor may be held liable, but not primarily or merely because he is an indemnitor. Wholly within the rule of the common law, a person may, by giving a bond of indemnity, in fact wrongfully contribute to the death of another, and therefore be held responsible as a "person *causing* the death," for which damages may be recovered. The point is that while the statute imposes responsibility upon all whose actual wrongdoing contributes to the death of another, whether they be employees or employers, indemnitees or indemnitors, responsibility for imputed wrongdoing is imposed upon but one class, namely, employers, and the rule of *expressio unius est exclusio alterius*, therefore, operates to exclude all liability of indemnitors except for actual, as distinguished from imputed, wrongdoing.

Plaintiffs cite but one case (that of *Moore v. Los Angeles Steel & Iron Company* [C. C.] 89 Fed. 73), wherein a statute similar to section 5653 of the Montana Revised Codes was considered. While it is true that the court there entertained the view that the statute greatly enlarged the common-law rule, it may be doubted whether the decision as a whole should be accepted as a precedent for a case like this. That, as I understand it, was a proceeding in equity, by which the injured persons sought to reach in the hands of the indemnitor the unpaid penalty provided for in the indemnity bond or policy of assurance. It was shown that no liability except the one in suit had arisen upon the bond. The indemnitee was insolvent, and plaintiffs sought "to recover of the insolvent debtor, the Los Angeles Iron & Steel Company, damages occasioned by its negligence, and also to enforce, in partial satisfaction for such damages, and therefore for his exclusive benefit,

the liability of the assurance corporation on said policy." By a course of reasoning, the court reached the conclusion that the statute "makes the policy of assurance inure directly to the benefit of the injured person," thus enabling him to sue the indemnitor upon the contract. Obviously this is a theory essentially different from and wholly inconsistent with that upon which this case is founded. The plaintiffs here are not, by garnishment or trustee process, endeavoring to reach an indebtedness due to the indemnitee; they do not limit their claims to the amount of the defendant's present liability upon the bond; they do not profess to sue upon a cause of action arising *ex contractu*. Their theory is that by virtue of the statute the defendant here is a tort-feasor, and that, as such, it may be sued directly at law, and that the recovery is limited not by the penalty of the bond, but only by the amount of the damages which the jury may find the plaintiffs have sustained. The suit is wholly upon a cause of action arising *ex delicto*, no cause of action arising *ex contractu* being involved. In that view, it is immaterial that the indemnitor may have limited its liability; for even if, under the terms of the bond, the mining company could, under no circumstances, recover from the defendant in excess of \$5,000 on account of the death of John Northam and its liability resulting therefrom, these plaintiffs might recover from defendant the full sum of \$35,000. The giving of the bond, it is urged, constitutes the defendant primarily a wrongdoer, and there being no contractual relation between it and the deceased or his heirs, the plaintiffs may recover from it as fully as they could recover from the mining company, were it a party defendant. I am unable to yield to that contention. As already intimated, in the absence of a construction by the Supreme Court of California, and especially of the Supreme Court of Montana, it is held that section 5653 of the Montana Revised Codes is to be accepted as a declaration only of the common law. As I understand the plaintiffs do not urge that if the statute be so interpreted, they have stated a cause of action against the defendant, and I shall therefore not consider the question whether, under a very liberal rule, the general language of the allegations in the complaint might be construed as charging defendant with actual wrongdoing.

The demurrer will be sustained, with leave to the plaintiffs to amend.

DODGE v. TOWN OF NORTH HUDSON.

(Circuit Court, N. D. New York. April 26, 1910.)

1. MUNICIPAL CORPORATIONS (§. 755*)—INJURIES—LIABILITY OF TOWN.

New York Highway Law (Laws 1908, c. 330) § 74, providing that every town shall be liable for all damages to person or property sustained by reason of any defect in its highways or bridges existing because of any neglect of the commissioner of highways of such town, created a liability of the town for negligence in relation to highways and bridges which did not exist at common law.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1587-1590; Dec. Dig. § 755.*]

2. ACTION (§ 27*)—TORTS—LOCAL OR TRANSITORY ACTION.

The action against a town for injuries to persons and property by a defect in highways and bridges given by New York Highway Law (Laws 1908, c. 330) § 74, is in tort, and is not local, but transitory, and may be maintained wherever a wrongdoer can be found.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 160-195; Dec. Dig. § 27.*]

3. DEATH (§ 8*)—WRONGFUL DEATH—PARTIES.

Where an action for wrongful death is brought in a state other than the one where the accident or injury resulting in death occurred, based on a statute authorizing such action, it is not necessary that the action be brought in the name of the person or party specified in the statute of the state where the injury occurred and the wrong was committed, as the one to bring it and enforce the right, the statute being remedial, the action may be brought under the procedure of the state where the action was commenced, and in the name of the one there authorized to bring such action under the similar laws of that state.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 12, 36, 52, 121, 133; Dec. Dig. § 8.*]

4. EXECUTORS AND ADMINISTRATORS (§ 518*)—APPOINTMENT OF ADMINISTRATOR—ASSETS—ACTION FOR WRONGFUL DEATH.

Where a nonresident suffers wrongful death in New York, the right of action for his death constitutes sufficient assets to entitle his domiciliary administrator to ancillary letters of administration in New York for the prosecution of such action.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 518.*]

5. DEATH (§ 31*)—WRONGFUL DEATH—ACTION BY FOREIGN ADMINISTRATOR—ANCILLARY LETTERS.

The domiciliary administratrix of the estate of a citizen and resident of Massachusetts appointed by the probate court of that state could not sue in the Circuit Court of the United States sitting in New York in the district where the defendant resides to recover damages for decedent's alleged wrongful death occurring in New York, as authorized by the statutes of that state without taking ancillary letters in New York.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 39; Dec. Dig. § 31.*]

Action by Josephine M. Dodge, as administrator of the goods, chattels, and credits of James E. Dodge, against the Town of North Hudson. On demurrer to complaint. Sustained.

Miller & Matterson, for plaintiff.

F. G. Fincke, for defendant.

RAY, District Judge. Evidently this is intended to be an action by the administratrix of James E. Dodge, deceased, to recover damages for the death of said Dodge caused by the actionable negligence or wrongful act or omission of the defendant, one of the municipal corporations (towns) of the state of New York, growing out of defects in its highway and bridge on which said Dodge was traveling, and can be maintained, if at all, under the provisions of the Code of Civil Procedure of the state of New York and its highway laws only. The amount of damages alleged and claimed is sufficient to give this court jurisdiction, so far as amount involved is concerned, but the complaint fails to allege that the plaintiff, at the time the action was commenced,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was a citizen of the state of Massachusetts, or of some state other than New York, unless the allegation that she is the administratrix, etc., of James E. Dodge, deceased, appointed by the courts of Massachusetts, is an allegation that she is a citizen of said state. Hence, it is claimed the complaint fails to show the requisite diversity of citizenship.

The further objection is raised that there is no allegation that plaintiff has been appointed administratrix of the estate of said Dodge in the state of New York, or that she has taken ancillary letters here, and that an action cannot be maintained in the Circuit Court of the United States for the Northern District of New York to recover damages resulting from death caused by the wrongful act or negligence of a town, or person, or corporation under the statutes referred to by an executor or administrator of the estate of a deceased person who was domiciled in another state, appointed by the probate or surrogate's court of such foreign state, the domicile of the deceased person at the time of the injury and death, the injury or negligence occurring in the state of New York. James E. Dodge, at the time of the injury resulting in his death, was a citizen and resident of the county of Middlesex, state of Massachusetts, and was traveling on the public highway in the town of North Hudson, county of Essex, N. Y., when he was injured so that he died at his home in Massachusetts of such injuries by reason of the actionable negligence of said town or of its officers. Thereafter, and on the 1st day of August, 1909, Josephine M. Dodge, residing in Massachusetts, widow of said James E. Dodge, was duly appointed sole administratrix of the estate of said decedent by the probate court of said county of Middlesex, state of Massachusetts, said court having jurisdiction, and she duly qualified as such, and thereafter brought this action. Notice of the time, place, etc., of the accident and of this claim was duly given as required by the New York statutes. It is the case of an administratrix of the estate of a resident and citizen of the state of Massachusetts appointed by the probate court of that state, suing in the state of New York, in the Circuit Court of the United States and in the district where defendant resides, to recover damages on a cause of action arising in the state of New York and given by the statutes of such state, without taking ancillary letters in such state.

This action is against one of the towns of one of the counties of the state of New York, organized and declared to be a municipal corporation. Section 74 of the highway law of the state of New York, in effect July 26, 1908, when this transaction complained of occurred, declares:

"That every town shall be liable for all damages to person or property sustained by reason of any defect in its highways or bridges existing because of the neglect of any commissioner of highways of such town." Laws 1908, c. 330.

This liability of the town for negligence in relation to highways and bridges does not exist at common law, but is given by statute, and by the statute mentioned. *People ex rel. Van Kenren v. Board of Town of Auditors of Town of Esopus*, 74 N. Y. 310, 315, 316; *Thompson on Highways*, 75, 76, 260, 261, and cases cited. The statute formerly imposed the duty to repair and keep in reasonably safe

condition highways and bridges on highway commissioners, and they were held liable in case they had funds only. Subsequently the duty was imposed on the town direct by the statute referred to. However, the action to recover damages for the negligence of the town or its commissioner is in tort, and is not local, but transitory, and can be maintained wherever the wrongdoer can be found. *Dennick v. Railroad Company*, 103 U. S. 11, 26 L. Ed. 439, cited and approved; *Stewart v. Baltimore & Ohio Railroad Co.*, 168 U. S. 445, 448, 18 Sup. Ct. 105, 42 L. Ed. 537. The negligence consists in failing to perform a duty imposed by statute, and the liability is now imposed on the town itself.

The cause of action now referred to (two are set out in the complaint; one to recover damages for the death, and the second to recover damages for the destruction of the vehicle in which Dodge was riding when he received his injuries), being for damages for a tort causing or resulting in death, no recovery could be had by the executor or administrator of the deceased under any common-law rule or remedy, but the action can be maintained under the provisions of the Code of Civil Procedure of the state of New York, sections 1902, 1903, of which provide as follows:

"1902. Action for Death by Negligence.—The executor or administrator of a decedent, who has left, him or her surviving, a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued. Such an action must be commenced within two years after the decedent's death.

"1903. For Whose Benefit Recovery Had.—The damages recovered in an action, brought as prescribed in the last section, are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff, as if they were unbequeathed assets, left in his hands, after payment of all debts, and expenses of administration. But the plaintiff may deduct therefrom the expenses of the action, and his commissions upon the residue; which must be allowed by the surrogate, upon notice, given in such a manner and to such persons, as the surrogate deems proper."

This statute removes the common-law obstacle to a recovery of damages resulting from the death of the person injured in cases where such person might have recovered had he lived. *Stewart v. Baltimore & Ohio Railroad Co.*, 168 U. S. 445, 449, 18 Sup. Ct. 105, 106, 42 L. Ed. 537. It was there said:

"As heretofore noticed, the substantial purpose of these various statutes is to do away with the obstacle to a recovery caused by the death of the party injured," and "a negligent act causing death is in itself a tort, and, were it not for the rule founded on the maxim '*actio personalis moritur cum persona*,' damages therefor could have been recovered in an action at common law."

And, referring to the statutes of the various states similar to New York Code of Civil Procedure, quoted, the court said:

"The purpose of the several statutes passed in the states, in more or less conformity to what is known as '*Lord Campbell's Act*,' is to provide the means for recovering the damages caused by that which is essentially and in its nature a tort. Such statutes are not penal, but remedial, for the benefit of the persons injured by the death."

In the same case it is held:

"For purposes of jurisdiction in the federal courts, regard is had to the real, rather than to the nominal, party"—citing cases.

In the case referred to and from which these quotations are made the plaintiff's intestate was killed by the negligence of the defendant in the state of Maryland. The action was brought by the personal representative of the deceased in the District of Columbia on the Maryland statute which provides that:

"Every such action * * * shall be brought by and in the name of the state of Maryland"—

while a similar statute in the District of Columbia provides that:

"The action shall be brought in the name of the personal representative of the deceased."

As was said in *Pollard v. Bailey*, 20 Wall. 520, 22 L. Ed. 376:

"A general liability created by statute without a remedy may be enforced by an appropriate common-law action. But where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed."

Notwithstanding this rule, cited by the court, the Supreme Court held that the personal representative of the deceased could maintain the action given by the Maryland statute and removing the obstacle to the maintenance of such an action for damages for the death, and said:

"The two statutes differ as to the party in whose name the suit is to be brought. In Maryland, the plaintiff is the state; in the district, the personal representative of the deceased. But neither the state in the one case, nor the personal representative in the other, has any pecuniary interest in the recovery. Each is simply a nominal plaintiff. While in the district the nominal plaintiff is the personal representative of the deceased, the damages recovered do not become part of the assets of the estate, or liable for the debts of the deceased, but are distributed among certain of his heirs. By neither statute is there any thought of increasing the volume of the decedent's estate, but in each it is the award to certain prescribed heirs of the damages resulting to them from the taking away of their relative. For purposes of jurisdiction in the federal courts, regard is had to the real, rather than to the nominal, party."

This case demonstrates that when suit is brought in a state other than the one where the accident or injury resulting in death occurred, based on such a statute, that of the state where the injury occurred and the wrong was committed, it is not necessary to bring the action in the name of the person or party specified in that statute as the one to bring it and enforce the right. The statute being remedial, the action may be brought under the procedure of the state where the action is commenced, and in the name of the one there authorized to bring such an action under the similar laws of such state. In *Lang v. Houston*, etc., 75 Hun, 151, 27 N. Y. Supp. 90, affirmed 144 N. Y. 717; 39 N. E. 858, it is held that our statute gives a right of action to the personal representative of a citizen of a foreign state injured by negligence here, such injury resulting in death. In that case deceased was a citizen of Pennsylvania where his will was proved and letters testamentary issued to the executors named. Ancillary letters were

issued in New York to another person, who brought the action under the statute. The court said:

"This statute is a remedial one, enacted for the purpose of compelling those who negligently cause the death of persons to compensate the surviving husband, widow, or next of kin of the person so killed, and, like all such statutes, should be so construed as to give, instead of withholding, the remedy intended to be provided. *Lamphear v. Buckingham*, 33 Conn. 237; *Haggerty v. Central R. Co.*, 31 N. J. Law, 349. The important portion of the section is that which gives a right of action, and not that part which provides who may enforce it; the latter is an incidental provision. There is nothing in the words of the statute, nor in the circumstances attending its enactment, from which it can be inferred that the Legislature intended only to give a right of action in case the person killed was a citizen of this state, or left property in this state. The words of the statute are 'the executor or administrator of a decedent * * * may maintain an action to recover damages.' These words are broad enough to include ancillary executors or administrators, and nowhere in the sections relating to this subject are there found words indicative of an intent to exclude ancillary representatives, nor is there any reason that we can see why they may not maintain an action, unless we hold that the statute does not apply to persons killed who are not residents of this state."

The remarks of the court, "The important portion of the section is that which gives a right of action, and not that part of which provides who may enforce it; the latter is an incidental provision," are significant and in accord with the *Stewart Case*, *supra*. In *Leonard v. Columbia Steam Navigation Co.*, 84 N. Y. 48, 38 Am. Rep. 491, it was held that the administrator of a deceased person killed by negligence in the state of Connecticut, such person being a citizen of New York and residing here, could maintain an action for damages based on the statute of Connecticut similar to ours in the New York courts. See, also, *Wooden v. Western N. Y. & Pa. R. Co.*, 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803. It thus appears that it is not necessary that the person named in the statute sued upon as the one to bring it shall bring it. The procedure of the state where the action is brought governs, while the statute of the state where the injury was done gives the right of action.

Here, the statutes of the state of New York give the right of action, but the one removing the common-law obstacle to a recovery says that the executor or administrator of the decedent may maintain it. But does this preclude the administratrix of the estate of such decedent from maintaining the action in the Circuit Court of the United States in the district where the defendant resides, he or she having been duly appointed by the court of the decedent's residence and domicile, and having jurisdiction to make the appointment? Here, the administratrix is a nominal plaintiff; the widow and three minor children are the real plaintiffs, and the action is for their benefit. *Stewart v. Baltimore & Ohio Railroad*, *supra*. Can the Circuit Court of the United States in the Northern District of New York, Second circuit, recognize an administratrix appointed by the probate court of the state of Massachusetts, First circuit, as a plaintiff seeking to enforce this statute, or, to put it another way, can an administratrix of the principal administration, that of the residence of the decedent, maintain an action in the Circuit Court of the United States of another state? If this can be done in such a case as this, it forms an exception to the general rule.

In *Johnson v. Powers*, 139 U. S. 156, 157, 11 Sup. Ct. 525, 526 (35 L. Ed. 112) the court said, per Mr. Justice Gray:

"The plaintiff certainly cannot maintain this bill as administrator of Stewart, even if the bill can be construed as framed in that aspect; because he admits that he has never taken out letters of administration in New York; and the letters of administration granted to him in Michigan confer no power beyond the limits of that state, and cannot authorize him to maintain any suit in the courts, either state or national, held in any other state. *Stacy v. Thrasher*, 6 How. 44, 58 [12 L. Ed. 337]; *Noonan v. Bradley*, 9 Wall. 394 [19 L. Ed. 757]."

In *Noonan v. Bradley*, 9 Wall. 394, 399 (19 L. Ed. 757) the court, per Mr. Justice Field, said:

"The first plea puts in issue the representative character of the plaintiff in the state of Wisconsin. It denies that, as to the causes of action stated in the declaration, he is or ever has been administrator of the effects of the deceased, and thus raises the question whether an administrator appointed in one state can, by virtue of such appointment, maintain an action in another state to enforce an obligation due his intestate. And upon this question the law is well settled. All the cases on the subject are in one way. In the absence of any statute giving effect to the foreign appointment, all the authorities deny any efficacy to the appointment outside of the territorial jurisdiction of the state within which it was granted. All hold that in the absence of such a statute no suit can be maintained by an administrator in his official capacity, except within the limits of the state from which he derives his authority. If he desires to prosecute a suit in another state he must first obtain a grant of administration therein in accordance with its laws."

Stacy, Administrator, v. Thrasher, etc., 6 How. 44, 45, 12 L. Ed. 337, is to the same general effect. See, also, *Brown v. Fletcher's Estate*, 210 U. S. 82, 90, 91, 28 Sup. Ct. 702, 52 L. Ed. 966.

It will be seen that cases for the recovery of assets belonging to the estate of a deceased person might not be maintainable by an executor or administrator appointed in another state without taking ancillary letters in the state where such assets are situated. There might be creditors in the state where the assets are situated whose rights should be protected, and hence on grounds of sound public policy the executor or administrator of the estate of a deceased person appointed in another state should not be recognized or permitted to interfere or administer. However, both the state courts, and the United States Courts in a state refuse recognition to an executor or administrator appointed in another state in cases such as the one at bar.

In *Dennick v. Railroad Company*, 103 U. S. 11, 26 L. Ed. 439, A., a citizen and resident of the state of New York, was injured and died in the state of New Jersey. If death had not ensued, the party inflicting or causing the injury, B., a citizen of New Jersey, would have been liable in an action for damages. C. was appointed administrator of the estate of the deceased in New York. New Jersey had a statute removing the common-law obstacle to recovery in such cases, and providing for a recovery similar to ours, and not inconsistent therewith. The recovery under the New Jersey statute was for the benefit of the same class of persons as under the New York statute. Held, that the New York administrator could maintain an action on the New Jersey statute in the New York courts or in the Circuit Court of the United States in New York; that it was not necessary the action

should be brought by an administrator appointed in New Jersey in the first instance. But this is not a holding that an administrator appointed in one state may maintain an action in the courts of another state, or in the courts of the United States held in another state.

In *J. B. & J. M. Cornell Co., Lt., et al. v. Ward*, 168 Fed. 51, 52, 93 C. C. A. 473, the question in such a case as this was squarely before the Circuit Court of Appeals, Second Circuit, Lacombe, Ward, and Noyes, sitting, and it was expressly held that an administrator appointed in New Jersey, of which state the deceased was a citizen, could not maintain an action in the Circuit Court of the Southern District, state of New York, where the accident occurred and the injury was received, as the New Jersey administrator could not be recognized in New York, either in the state or federal courts, there being no statute permitting it. In that case the plaintiff had been permitted to recover in the Circuit Court of the United States, but the Circuit Court of Appeals reversed the judgment, saying:

"The accident occurred in the state of New York, the statutes of which state provide that the executor or administrator of a decedent, who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect, or default by which the death was caused. The damages recovered do not constitute any part of the decedent's estate. They are exclusively for the benefit of such husband or wife or next of kin. Code Civ. Proc. N. Y. §§ 1902, 1903. There is a similar statute in New Jersey. The deceased was a resident of Newark, N. J., and plaintiff was appointed administrator by the surrogate's court in that state. At the time of bringing suit he had not taken out ancillary letters in New York, and no statute of that state gives a foreign administrator, who has not received such an appointment, any right to sue in the courts. It is well settled that an administrator appointed in one state cannot as such maintain an action in another state, which has not either by the issue of ancillary letters or by some special provision of statute given him authority so to sue. *Noonan v. Bradley*, 9 Wall. 394, 19 L. Ed. 757; *Dennick v. Central Railway Co.*, 103 U. S. 11, 26 L. Ed. 439. The objection was duly raised on the trial, and exception was reserved. The objection is fatal, and the judgment must be reversed. Fortunately this error will not deprive the plaintiff of any substantial right. It appears that subsequent to the trial he has taken out ancillary letters, and the Circuit Court has power to allow amendment which will enable him to prosecute the suit as such administrator. *Van Doren v. Pennsylvania R. R.*, 93 Fed. 260, 35 C. C. A. 282; *Hodges v. Kimball*, 91 Fed. 845, 34 C. C. A. 103."

It was said by the counsel for the plaintiff on the argument that ancillary letters cannot be obtained in New York, as Dodge left no assets here. If he had not died, he had a cause of action for personal injuries and another for injury to his personal property arising in New York. Our surrogates' courts have quite generally held that such facts give the right to ancillary letters in this state. The cases cited show this. This being so, Mrs. Dodge may now take ancillary letters here, or possibly letters in chief, and amend and plead such grant of letters under the authority of *J. B. and J. M. Cornell Co., Lt., et al. v. Ward*, *supra*. It will not be necessary for the administratrix to discontinue this case and commence a new action.

If our courts should hold that letters in chief, or ancillary, cannot issue in such a case as this—that is, that our Legislature has provided that an action may be maintained by the executor or administrator of

the deceased person to recover damages for death caused by wrongful act in the state, but has denied the right to obtain the appointment within the state of an executor or administrator to commence such action in the case of the citizen of another state injured here, thereby nullifying the other statute in many cases, and in such a case as this—I should hold that our Legislature, by giving the right to bring and maintain the action to the executor or administrator of the deceased, had thereby recognized the executor or administrator of the foreign state, and authorized him to bring the action here. But our courts have not so settled the law. The remedy of the plaintiff is to apply for and take ancillary or principal letters in New York and then amend. By so doing no right will be lost. The widow and children of Dodge are not without remedy in case it can be shown his death and the destruction of his property, or either, resulted from the negligence of the town or of its commissioner of highways.

The demurrer is sustained, but the plaintiff may have 60 days in which to procure the appointment of an administrator here, and file and serve an amended complaint on payment of the costs of the action to this time.

VALIQUET v. VALIQUET.

(Circuit Court, D. New Jersey. June 28, 1909.)

DIVORCE (§ 331*)—FOREIGN DIVORCE—JUDGMENT FOR ALIMONY—ACTION ON.

A decree in a suit for divorce requiring the defendant to pay to the complainant during her lifetime a stated sum per week as alimony is not final in character nor does it establish any fixed and certain liability against the defendant for installments not due which will sustain an action at law or a suit in equity in a court of another state.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 841, 842; Dec. Dig. § 331.*]

In Equity. Suit by Agnes Valiquet against Louis P. Valiquet. On demurrer to bill. Demurrer sustained.

John G. Pheil, for complainant.

William P. Martin, for defendant.

CROSS, District Judge. The facts set up in the bill of complaint, summarized, are: That the complainant is a resident and citizen of the state of New York, and that the defendant is a resident and citizen of the state of New Jersey. That on November 13, 1893, the complainant, then being the wife of Louis P. Valiquet, the defendant, instituted an action for divorce from the bonds of matrimony against him in the Supreme Court of the state of New York, held in and for the county of Kings, in said state, of which state both the complainant and defendant were then residents. That such proceedings were thereon had that on July 19, 1894, a decree was entered in said court

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that the marriage between the complainant and the defendant be dissolved, and that the complainant be freed from the obligation thereof. That it was also thereby decreed that the complainant should have leave to apply at the foot of said decree for such other and further relief as she might thereafter become entitled to have. That pursuant to said decree the complainant afterwards applied to one of the justices of said Supreme Court, at a Special Term of said court held in the county of Kings January 9, 1902, for permanent alimony and counsel fees in said action. That counsel having been heard by said court, it was decreed, among other things:

"That said defendant pay to your oratrix the sum of \$12 per week during her natural life, as a suitable allowance to your oratrix for her support and maintenance, and that said allowance be paid in manner following, that is to say: That the said sum of \$12 be paid as aforesaid into the hand or upon the order of your oratrix, at the office of Geo. F. Elliott, Esq., 215 Montague street, in the borough of Brooklyn, city of New York, and state of New York, as of Wednesday, the 8th day of January, 1902, and a like sum on each succeeding Wednesday during the natural life of your oratrix, and that the above-mentioned decree of divorce be amended to that effect."

That pursuant to said decree the defendant, still being a resident of the city and state of New York, paid to the complainant, at divers times up to January 28, 1905, the sum of \$1,848, being the alimony awarded her by said decree to December 28, 1904. That since the above date the defendant has not paid the complainant any other or further sum under said decree, except the sum of \$50 paid her on or about June 22, 1905. That the defendant removed from the jurisdiction of the state of New York in the late summer of 1905, and since that time has willfully remained away from that jurisdiction for the purpose, as the complainant believes and charges, of escaping the payment of any further alimony, and that he now resides at the city of Newark, in this state. That two certain orders were procured from judges of the Supreme Court of New York, requiring the defendant to show cause why he should not be punished for failure to make the payments directed by said decree. That said orders were never served upon the defendant. That there is now due and owing to the complainant the sum of \$2,494, with interest, for alimony accrued under and since the said decree, after making allowance for all payments made on account thereof. That the defendant has no real or personal property in the state of New York. That he is now, and always has been, in receipt of a good salary, and that he has at all times been, and is, well able to pay the complainant for alimony according to the said decree.

The bill of complaint closes with the prayer that the said decree may be given full force and effect in the state of New Jersey, that the defendant may be compelled to carry out the terms of said decree as fully as if he were within the state of New York, and that upon final hearing he may be directed and decreed to pay the said sum now remaining due to the complainant by virtue of said decree of the New York Supreme Court, and that he may be directed and decreed to continue the payment of alimony according to the terms of said decree, and also her costs of suit, with reasonable counsel fee, and that she may have such other and further relief in the premises as may be

agreeable to equity. The bill has been demurred to, and a large number of causes assigned. It will be unnecessary, however, to consider them in detail. The only question requiring decision is whether the foreign decree, upon which the suit is based, is of such a character that it will support the present suit.

It will be noticed that the decree was dated January 9, 1902, and the only alimony then due and thereby decreed to be paid was \$12, which was to be paid as of January 8, 1902. The bill, however, admits payment to the complainant, under the decree, of \$1,848, and it must therefore be assumed that included therein was the \$12 decreed to be due and payable when the decree was signed. In other words, the bill shows that all of the alimony which had accrued, according to the decree, at or prior to the time it was entered, has been paid. As to the alimony thereafter and from time to time made payable, the decree was not a final judgment for a fixed sum; consequently the case is ruled by *Israel v. Israel*, 148 Fed. 576, 76 C. C. A. 32, 9 L. R. A. (N. S.) 1168, in which Judge Bradford, speaking for the Circuit Court of Appeals for the Third Circuit, dealt with the question now presented in so able and exhaustive a manner as to render it quite unnecessary for me to attempt a restatement of his argument.

The complainant rests her case upon *Barber v. Barber*, 21 How. 582, 16 L. Ed. 226. That case, however, is passed upon by the Court of Appeals in *Israel v. Israel*, and held to be "overruled, or at least modified," by the later case of *Lynde v. Lynde*, 181 U. S. 183, 21 Sup. Ct. 555, 45 L. Ed. 810. There is no difference between the case of *Israel v. Israel*, *ubi supra*, and that at bar, except that the former was an action at law, while this is a suit in equity; but the principle there laid down, and the one upon which the case turned, was so broad and comprehensive that it unquestionably controls this suit as absolutely as though it were an action at law. The foreign decree sued on herein was not final in character, and did not establish any fixed and certain liability against the defendant beyond what has been paid, and which, if it were unpaid, would be insufficient in amount to confer jurisdiction upon this court.

The demurrer will be sustained, with costs.

CATEN v. EAGLE BUILDING & LOAN ASS'N.

(District Court, W. D. Pennsylvania. May, 1909.)

INTERPLEADER (§ 35*)—CONTEST BETWEEN PLAINTIFF AND INTERVENING CLAIMANT OF FUND—COSTS AND FEES.

Where the defendant in an action by a trustee in bankruptcy answered that it had in its hands a sum belonging to the bankrupt, but which was claimed as assignee by his wife, who thereupon intervened, and the only issue tried was between her and the plaintiff, the defendant, which occupied the position of a mere stakeholder, is not liable for costs, and is entitled to the allowance of a reasonable attorney's fee.

[Ed. Note.—For other cases, see *Interpleader*, Cent. Dig. § 76; Dec. Dig. § 35.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

Action by one Caten, trustee in bankruptcy of Charles J. Meyer, against the Eagle Building & Loan Association. On motions after verdict.

Albert York Smith, for trustee.

Poth & Bonsall, for defendant.

J. M. Friedman, for Mrs. Elmira Meyer.

YOUNG, District Judge. Four motions were filed in this case after verdict. They all raise the question as to whether the defendant, the Eagle Building & Loan Association, should pay any portion of the costs, and also as to whether that association is not entitled to a reasonable attorney's fee. The facts necessary to an understanding of this case are as follows:

Upon the bringing of the suit by the trustee in bankruptcy against the Eagle Building & Loan Association, that association answered that it had in its hands the sum of \$500 belonging to the bankrupt, Charles J. Meyer, but at the same time set up in its affidavit of defense that Mrs. Meyer, the wife of the bankrupt, claimed to be the equitable assignee of the shares of stock upon which the fund sued for would be realized. Thereupon Mrs. Meyer was allowed to intervene and become a party defendant. The sole question at the time of trial was whether or not there had been an assignment of the stock by the bankrupt to his wife, and, as there was no evidence to support such an assignment, the verdict was for the plaintiff against both defendants. The Eagle Building & Loan Association now claims that, having set the money apart at the time the suit was brought and being willing to pay it into court, and Mrs. Meyer having been made a party defendant by proceedings equivalent to an interpleader, they ought not to be compelled to pay any of the costs, and ought at the same time be allowed a reasonable attorney's fee.

We think that the facts in this case warrant the conclusion that the Eagle Building & Loan Association should pay none of the costs, inasmuch as that association was ready and willing at all times to pay over the money to the proper party. As the association was a mere stakeholder, but having received notice from the wife, it could not pay out the money. It was necessary for it, therefore, to employ an attorney, upon the bringing of suit, to properly represent it in the court, so that the money might go to the person entitled to it, whether to the plaintiff as trustee, or to Mrs. Meyer as assignee. These circumstances, we think, in equity justify the fixing of a reasonable fee for those services. We are of the opinion that the sum of \$25 would be sufficient to pay for the services which the defendant was put to as a stakeholder.

Let an order be drawn relieving the Eagle Building & Loan Association of the costs, and also directing that the sum of \$25 be retained by the association out of the money in its hands, the balance to be paid to the plaintiff as trustee in bankruptcy.

This disposes of all the rules granted in the case.

**BARBER ASPHALT PAVING CO. v. FORTY-SECOND ST., M. & ST. N.
AVE. RY. CO.**

(Circuit Court, S. D. New York. March 31, 1910.)

Suits by the Barber Asphalt Paving Company and by the Union Trust Company of New York against the Forty-Second Street, Manhattanville & St. Nicholas Avenue Railway Company; by the Pennsylvania Steel Company and another against the New York City Railway Company and the Metropolitan Street Railway Company, and by the Morton Trust Company against the Metropolitan Street Railway Company and others. On petition by the receiver of the Forty-Second Street, Manhattanville & St. Nicholas Avenue Railway Company for an order directing the Metropolitan Street Railway Company, and Adrian H. Joline and Douglas Robinson, as its receivers, to recognize the rights of the Forty-Second Street, Manhattanville & St. Nicholas Avenue Railway Company to maintain and operate a street surface railway through Manhattan, on Amsterdam avenue, between Seventy-First street and 125th street, and to use the present road and equipment in common with the Metropolitan Street Railway Company or its receivers and the Ninth Avenue Railway Company, or by joint operation with them, or either or any of them. Petition dismissed, without prejudice, with leave granted to the receivers to institute suit in any court to establish the respective rights of the parties.

Kellogg & Rose, for Barber Asphalt Paving Co.

Miller, King, Lane & Trafford, for Union Trust Co.

Byrne & Cutcheon, for Pennsylvania Steel Co. and another.

Jas. L. Quackenbush, for New York City Ry. Co.

J. Parker Kirlin, for Metropolitan St. Ry. Co.

Dexter, Osborn & Fleming, for receiver of New York City Ry. Co.

Masten & Nichols, for receivers of Metropolitan St. Ry. Co.

Bowers & Sands, for Forty-Second St., M. & St. N. Ave. Ry. Co.

Evarts, Choate & Sherman, for receiver of Forty-Second St., M. & St. N. Ave. Ry. Co.

Bronson Winthrop, for Morton Trust Co.

LACOMBE, Circuit Judge. The receiver of the Forty-Second Street, Manhattanville & St. Nicholas Avenue Railway Company asks for an order directing the defendant Metropolitan Street Railway Company, and Adrian H. Joline and Douglas Robinson, as its receivers, to recognize the right of the Forty-Second Street, Manhattanville & St. Nicholas Avenue Railway Company to maintain and operate a street surface railroad in the borough of Manhattan, city of New York, on Amsterdam avenue, between Seventy-First street and 125th street, and to use in the operation of its street surface railroad on Amsterdam avenue, between said streets, the present electric conduit or electric construction tracks and equipment now laid and existing and in use in Amsterdam avenue, between said streets, in common with said Metropolitan Street Railway Company, or Adrian H. Joline and Douglas Robinson, its receivers, and the Ninth Avenue Railroad Company, or by joint operation with them or either or any of them.

The court is not inclined to dispose of the numerous and difficult questions here presented in any such summary manner. As to the subsidiary or alternative relief prayed for, the receivers of the Metropolitan Street Railway and the receivers of the Forty-Second Street, etc., Railway are authorized, but not instructed, to enter into negotiations with each other touching the operation of cars within the limits above set forth; and in the event of such negotiations resulting in nothing the receiver of the last-named road is authorized to bring suit, in any court, to establish any right which he may be advised said road possesses, and he may make the receivers of the Metropolitan Street Railway Company defendants in such suit.

This disposition of the pending motion is not to be construed as indicating the expression of an opinion one way or the other upon any of the points presented by the petition and answers or discussed on the argument.

UNITED STATES v. WON SHONG.

(District Court, E. D. New York. March 9, 1910.)

Deportation proceedings by the United States against Won Shong. Case remanded to Commissioner for further findings and ruling.

William J. Youngs, U. S. Atty. and William P. Allen, Asst. U. S. Atty.

James A. Donegan, for defendant.

CHATFIELD, District Judge. The government has shown that Won Shong is a Chinese person who has not a certificate, and who is in the United States under such circumstances that the burden, when arrested, is put upon him to prove his right to be here. He has endeavored to do that by claiming that he was born in this country, and has offered the testimony of three witnesses who either saw or knew of his presence in San Francisco when he was a child of a few weeks old, with the exception of one witness, whose first acquaintance with the boy was when the father stated him to be in the neighborhood of three years of age. Won Shong when taken into custody was asked certain questions and made certain statements under those circumstances, which, while not in the nature of a confession, yet are competent as admissions, inasmuch as it cannot be held that there was duress at the time. But these statements and admissions relate only to his whereabouts at the time a census was taken in 1905, and his inability to give the names of the men who later were his witnesses, or any one else who could prove that he had been born in the United States. The testimony of that interview is clear, and is not disputed by the defendant, inasmuch as he has not gone on the stand.

The inspector who made the census in 1905 was called as a witness, but was unable to give testimony from actual recollection of anything connected with the defendant himself. He merely furnished from a memorandum or by the aid of refreshed recollection negative testimony which contradicted the statement of Won Shong at the time

of his arrest that he was in a laundry at 1514 Broadway, Brooklyn, when the census was taken. The testimony of Mr. Wiley as to the census of 1905 could only prove that the present defendant, Won Shong, was not where he said he was in 1905, and hence that his statement at the time of his arrest was false, or that, if there, a discrepancy in the two statements exists which is not explained. The facts contained in the census return cannot be used as evidence against Won Shong beyond being made the basis of a finding that they do not describe the same person as he now says he is, or do not show the recital which should have been recorded by him at that time if he now tells the truth.

The testimony of the three witnesses as to his birth and residence in San Francisco is substantially corroborative of each other, and a reading of the testimony does not enable the court to conclude that the testimony is either true or false. The commissioner has upon hearing the testimony found against the credibility of the three witnesses. The defendant has not himself testified, and the Commissioner, upon the issue of fact, has decided that Won Shong has not sustained the burden of proof.

On the condition of the record, I do not think that I can find that any material error was committed in the findings of fact by the commissioner, but, in the absence of any ruling by the commissioner as to what use he made of the census return of 1905, it is impossible to tell whether he relied upon the failure of Won Shong to give testimony and upon his disbelief of the three witnesses furnished by Won Shong, or whether he relied upon the census statement. I am inclined to send the matter to the commissioner for a definite finding and ruling upon that question, and to take the testimony of Won Shong unless he refuses to testify, before I determine that the issue is entirely one of fact.

In accordance with this memorandum, I will sustain the appeal and send the matter back to the commissioner for the taking of further testimony and for a further finding.

**GUARANTY TRUST CO. OF NEW YORK v. METROPOLITAN ST. RY.
CO. et al.**

(Circuit Court, S. D. New York. March 22, 1910.)

In Equity. Suit by the Guaranty Trust Company of New York against the Metropolitan Street Railway Company and others. On mandate from Circuit Court of Appeals.

Davies, Stone & Auerbach, for complainant.

J. Parker Kirlin, for Metropolitan St. Ry. Co.

Masten & Nichols, for receivers of Metropolitan St. Ry. Co.

LACOMBE, Circuit Judge. The mandate from Circuit Court of Appeals, modifying and affirming decree of foreclosure (177 Fed. 925), has been filed in this court. The attention of receivers and of the special master is called to its provisions, so that the necessary inventories, statements of liabilities, and advertisements required thereby may be filed or published in due time before the day of sale, which by a recent decretal order was adjourned to May 12, 1910.

MEMORANDUM DECISIONS.

In re ABRAHAM'S. (Circuit Court of Appeals, Second Circuit. March 7, 1910.) Petition to Review Order of the District Court of the United States for the Eastern District of New York. Motion to dismiss for failure to file record on review within the time prescribed by the rules. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Motion to dismiss petition to revise granted. See our opinion in Re Brown (October 12, 1909), 174 Fed. 339.

AMERICAN LAUNDRY MACH. MFG. CO. v. TROY LAUNDRY MACH. CO., Limited. (Circuit Court of Appeals, Second Circuit. April 4, 1910.) No. 182. Appeal from the Circuit Court of the United States for the Northern District of New York. Bill by the American Laundry Machinery Manufacturing Company against the Troy Laundry Machinery Company, Limited. Decree for defendant (171 Fed. 870), and complainant appeals. Affirmed. Church & Rich (Frederick F. Church, of counsel), for appellant. Livingston Gifford and Edgar B. Stocking, for appellee. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. We incline to the opinion that, though the machine of the patent is an improvement over those of the prior art, the changes which produced this result were quite obvious and did not require the skill of the inventor. What Wendell accomplished had substantially been done before, and when the new demand came for larger machines the prior art showed the skilled mechanic how to construct them. The entire subject has been carefully considered by the judge of the Circuit Court, and nothing need be added to his opinion (171 Fed. 870). The decree is affirmed.

In re **BANZAI MFG. CO.** (Circuit Court of Appeals, Second Circuit. March 7, 1910.) Petition to Review Order of the District Court of the United States for the Southern District of New York. Before **LACOMBE**, **COXE**, and **WARD**, Circuit Judges.

PER CURIAM. Motion for leave to file nunc pro tunc is granted. The case is within the exception noted in *Re Brown* (October 12, 1909, C. C. A.) 174 Fed. 339.

CHAPMAN v. YELLOW POPLAR LUMBER CO. et al. (Circuit Court of Appeals, Fourth Circuit. March 16, 1910.) No. 826. On Motion to Correct Decision Denied. **J. F. Bullitt**, for the motion. **John H. Holt** and **John F. Hager**, opposed. Before **PRITCHARD**, Circuit Judge, and **BOYD** and **DAYTON**, District Judges.

PER CURIAM. This is a motion filed for the purpose of having the decree of the court filed herein on February 13, 1909 (see 169 Fed. 81, 94 C. C. A. 452), amended. An examination of the pleadings filed in the cause shows that the complaint only declared for the trees that had been actually taken and used by the defendant company, and the opinion and decree of this court are in accordance therewith. It is now insisted that the decree should have also provided for a recovery on account of the trees that were permitted to be used by others while in the possession of the defendant. Neither the original or bill of revivor and supplement state facts upon which a recovery of the amount now claimed could be had in this proceeding. The motion is denied without prejudice.

DARDEN et al. v. KIRBY LUMBER CO. et al. (Circuit Court of Appeals, Fifth Circuit. May 16, 1910.) No. 2,023. In Error to the Circuit Court of the United States for the Eastern District of Texas. **W. D. Gordon**, **Presley K. Ewing**, and **Jno. L. Little**, for plaintiffs in error. **Thos. B. Greenwood** and **Oswald S. Parker**, for defendants in error. Before **PARDEE** and **SHELBY**, Circuit Judges, and **FOSTER**, District Judge.

PER CURIAM. The judgment of the Circuit Court is affirmed.

EASTERN PAPER BAG CO. v. CONTINENTAL PAPER BAG CO. (Circuit Court of Appeals, First Circuit. April 26, 1910.) No. 863. Appeal from the Circuit Court of the United States for the District of Maine. **Samuel R. Betts** and **Francis T. Chambers** (James J. Cosgrove, on the brief), for appellant. **Albert H. Walker**, for appellee. Before **COLT** and **LOWELL**, Circuit Judges, and **ALDRICH**, District Judge.

PER CURIAM. We have examined the carefully drawn opinion of the learned judge sitting in the Circuit Court (175 Fed. 101). With its conclusions we agree, and we find nothing material to add to its reasoning. The decree of the Circuit Court is affirmed, and the appellee recovers its costs of appeal.

EIDMAN v. LEWISOHN et al. (Circuit Court of Appeals, Second Circuit. April 4, 1910.) No. 178. In Error to the Circuit Court of the United States for the Southern District of New York. On writ of error to review a judgment of the Circuit Court entered in favor of the plaintiffs by direction of the court, a jury having been duly waived. **Henry A. Wise** (W. L. Wemple, of counsel), for plaintiff in error. **Hoadly**, **Lauterbach & Johnson** (H. Siegrist, Jr., and F. R. Minrath, of counsel), for defendants in error. Before **COXE**, **WARD**, and **NOYES**, Circuit Judges.

PER CURIAM. We agree with the judge of the Circuit Court in thinking that the payment under protest was sufficient. All of the other questions have been repeatedly decided in favor of the plaintiffs by this and other federal courts. *Eidman v. Tilghman*, 136 Fed. 141, 69 C. C. A. 139. The judgment is affirmed.

GAY et al. v. HUDSON RIVER ELECTRIC POWER CO. et al. (two cases). (Circuit Court of Appeals, Second Circuit. March 21, 1910.) No. 257. Appeal from the Circuit Court of the United States for the Northern District of New York. M. D. Mann, for appellant. Abram J. Rose and George B. Curtiss, for appellee. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The judge of the Circuit Court (173 Fed. 1003) finds that the contract under consideration is fair to all concerned and one in all respects desirable for the receivers of the Empire State Power Company to undertake. In his judgment it is not disadvantageous to the bondholders or general creditors and is within the power of the court to authorize and the receivers to make. We are unable to say that this is not a correct view of the situation. Even if the contract were one that we would not approve in the first instance, we think that a large discretion should be given to the receivers and the Circuit Court in the management of the property. It should be a very marked breach of discretion to justify our interference. We have examined the contract and the objections made to it with care, and are satisfied that they are not well taken. The order in question should be affirmed.

JONES v. DILLINGHAM. (Circuit Court of Appeals, Fifth Circuit. May 16, 1910.) No. 2,015. Appeal from the Circuit Court of the United States for the Southern District of Texas. Jno. B. Warren, for appellant. H. O. Head and T. M. Kennerly, for appellee. Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. The decree of the Circuit Court is affirmed.

LAKE PROVIDENCE BANK v. WINTER. (Circuit Court of Appeals, Fifth Circuit. May 16, 1910.) No. 2,060. Appeal from the District Court of the United States for the Western District of Texas. Clifton F. Davis, for appellant. D. T. Land, for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The evidence is not sufficient to show that the claimant bank paid the note in question with its own funds. We concur in the opinion of the referee, found in the record, holding that appellant's claim be rejected and disallowed. As the trustee took no appeal, and seems to be satisfied with the judgment as given by the court below, the same is affirmed.

MARINE IRON WORKS v. WIESS. (Circuit Court of Appeals, Fifth Circuit. April 5, 1910.) No. 1,955. In Error to the Circuit Court of the United States for the Eastern District of Texas. George C. Greer, for plaintiff in error. R. C. Duff and J. W. Terry, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. After a full and careful examination of the errors assigned in the record of this case, in the light of the oral argument and briefs, a majority of the judges are of opinion that the judgment of the Circuit Court should be affirmed in the main; but all concur in holding that, under the facts shown by the record, the amount of the judgment should be reduced by the profit agreed to be paid to plaintiff, Wiess, on the judicial sale of the John H. Kirby. It is therefore ordered that this cause be remanded to the Circuit Court, with instructions to give the plaintiff below 10 days within which to en-

ter a remittitur to the judgment of \$2,870, whereupon the said judgment shall be affirmed; otherwise, the court to set aside the said judgment and grant a trial de novo. The costs of this court to be paid by the defendant in error.

In re MEADOWS, WILLIAMS & CO. (Circuit Court of Appeals, Second Circuit. April 4, 1910.) No. 147. Petition to Review Order of the District Court of the United States for the Western District of New York. In the matter of Meadows, Williams & Co., bankrupts. Petition of Edward F. Walsh, trustee, to review an order of the District Court. 173 Fed. 694. Dismissed. Edward L. Jellinek, for petitioner. Kenefick, Cooke & Mitchell (James McC. Mitchell, of counsel), for respondent. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. This controversy comes here on petition to review an order of the District Court for the Western District of New York (173 Fed. 694), directing the trustee in bankruptcy of Meadows, Williams & Co. to deliver to Alice H. Douglas two certificates, for 100 shares each, of the preferred stock of the Great Northern Railway Company. The proof establishes the fact that Mrs. Douglas bought and paid for 200 shares of the stock of the Great Northern Railway Company. The certificates were issued in her name. They were bought and paid for prior to the adjudication in bankruptcy. The trustee in bankruptcy refuses to deliver them to her. We think the general creditors of the bankrupt have no interest whatever in these shares. They belong, without reduction of any kind, to Mrs. Douglas. She is as much entitled to their possession as she would be to have any other property of hers which was left in the safe-keeping of the bankrupts returned to her upon demand. The case of *Richardson v. Shaw*, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, which arose in this circuit, is a complete answer to the contention of the trustee. The petition to review should be dismissed, with costs.

MERCHANTS' & FARMERS' BANK v. PENSACOLA BANK & TRUST CO. (Circuit Court of Appeals, Fifth Circuit. May 16, 1910.) No. 2,021. Appeal from the Circuit Court of the United States for the Southern District of Mississippi. P. Z. Jones and A. C. McNair, for appellant. C. H. Alexander and Charlton A. Alexander, for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. From our examination of the evidence, we conclude that this case was properly ruled in the Circuit Court, and the decree of that court is therefore affirmed.

MOORE BROS. et al. v. A. DREHER & CO. et al. (Circuit Court of Appeals, Fifth Circuit. May 16, 1910.) No. 2,041. In Error to the District Court of the United States for the Northern District of Alabama. C. B. Powell and R. Dupont Thompson, for plaintiffs in error. John W. Tomlinson, James E. Zunts, C. L. Odell, and W. S. Welch, for defendants in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The judgment of the Circuit Court is affirmed:

MORRIS & CUMINGS DREDGING CO. v. MORAN TOWING & TRANSPORTATION CO. (Circuit Court of Appeals, Second Circuit. March 12, 1910.) No. 157. Appeal from the District Court of the United States for the Eastern District of New York. Pierre M. Brown, for appellant. James J. Macklin (De Lagnel S. Berier, of counsel), for appellee. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Decree affirmed, on opinion of District Court. 163 Fed. 610.

PENNSYLVANIA FIRE INS. CO. v. TEXAS & P. RY. CO. (Circuit Court of Appeals, Fifth Circuit. May 16, 1910.) No. 1,958. In Error to the Circuit Court of the United States for the Eastern District of Louisiana. John F. Tobin, for plaintiff in error. Chas. E. Fenner, W. B. Spencer, and Chas. Payne Fenner, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The limitation in the printed part of the policy, restricting the time within which suit is to be brought on the policy, does not control, because the rider makes the policy one for indemnity. On the merits the case was correctly ruled in the Circuit Court, and it is affirmed.

QUEEN INS. CO. OF AMERICA v. LEGGETT et al. (Circuit Court of Appeals, Fifth Circuit. March 22, 1910.) No. 1,913. Appeal from the Circuit Court of the United States for the Southern District of Mississippi. A. A. Armistead, for appellant. W. B. Baskin and Stone Deavours, for appellees. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. In the opinion of a majority of the judges, this case was correctly ruled in the Circuit Court (see *Scruggs & Echols v. American Central Insurance Company* [No. 1,906 of the docket of this court, recently decided] 176 Fed. 224), and the decree appealed from is affirmed.

RISLEY et al. v. CITY OF UTICA et al. (Circuit Court of Appeals, Second Circuit. March 21, 1910.) No. 256. Appeal from the Circuit Court of the United States for the Northern District of New York. See, also, 173 Fed. 502. Thomas S. Jones and W. H. Corbin, for appellants. John D. Kernan, Edwin H. Risley, and Henry M. Love, for appellees. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The order appealed from merely preserves the status until final hearing, and it was stated on argument that proofs were being taken and the case would soon be ready for submission. In view of the fact that the appeal is from an order granting a temporary stay and that the Circuit Court entered an order, upon the consent of all parties in interest, that the money in controversy in the hands of the treasurer of the city of Utica be held by him until the further order of the Circuit Court, it seems best to grant the motion to dismiss the appeal; but such dismissal is not to be taken as indicating any further expression of opinion on the questions which have been argued here. Appeal dismissed.

In re SCHMIDT. (Circuit Court of Appeals, Second Circuit. March 7, 1910. On Petition for Rehearing, March 12, 1910.) No. 290. Appeal from the District Court of the United States for the Southern District of New York. On motion to dismiss for want of jurisdiction. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Motion to dismiss appeal denied. *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986

On Petition for Rehearing.

Whether the case be held to come under *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, or *Coder v. Arts*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, the proper method of review is by appeal. Petition for reargument of motion to dismiss appeal is denied.

UNIQUE SHIPPING CO. v. J. M. GUFFEY PETROLEUM CO. (Circuit Court of Appeals, Second Circuit. April 4, 1910.) No. 201. Appeal from the

District Court of the United States for the Southern District of New York. Wing, Putnam & Burlingham (Charles C. Burlingham, of counsel), for appellant. Wheeler, Cortis & Haight (Charles S. Haight and John W. Griffin, of counsel), for appellee. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. We entirely concur in the conclusions of the commissioner and District Judge. Decree (169 Fed. 905) affirmed, with interest and costs.

UNITED STATES FIDELITY & GUARANTY CO. v. FARMERS' & MERCHANTS' BANK. (Circuit Court of Appeals, Fifth Circuit. May 16, 1910.) No. 2,047. Appeal and Cross-Appeal from the Circuit Court of the United States for the Southern District of Mississippi. G. Q. Hall and Wm. M. Hall, for appellant and cross-appellee. P. Z. Jones and A. C. McNair, for appellee and cross-appellant. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. A majority of the judges are of opinion that the fraudulent action of the cashier involved in this case was within the conditions of the bond said cashier gave with the appellant as his surety, and therefore that the appellant was properly adjudged liable, as determined by the decree of the Circuit Court, which is affirmed.

VILLAGE S. S. Co., Limited, v. STANDARD OIL CO. (Circuit Court of Appeals, Second Circuit. March 7, 1910.) No. 161. Appeal from the District Court of the United States for the Southern District of New York. This cause comes here upon appeal from a decree of the District Court dismissing a libel. The action was brought to recover a balance of freight withheld by the respondent from charter hire of the steamship Drumgeith to compensate for the failure of the ship to deliver certain cases of oil shipped from New York to Whampoa, China. The opinion of the District Judge is found in 171 Fed. 243. Charles R. Hickox, for appellant. Charles C. Burlingham, for appellee. Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The District Judge has stated the facts very clearly and fully and we see no reason to dissent from his conclusions. It stands admitted that the Drumgeith received on board 149,160 cases, and the master testified that the ship's tally books at Whampoa, where she discharged into lighters sent by the consignee, showed the discharge of only about 148,619 cases. The Chinese stevedores and tallymen were employed and paid by the ship, and the circumstance that the agent of the consignee suggested that these particular individuals might be employed, at the same time warning the captain of their untrustworthiness unless carefully supervised by Europeans, does not relieve the ship of the burden of proving delivery of all cases received. In view of the shortage shown by the ship's tally books, the general testimony of the captain and first officer that, when discharge was completed, no cases were left on board, is not sufficient to establish full delivery. The decree is affirmed, with interest and costs.

WESTON ELECTRICAL INSTRUMENT CO. v. EMPIRE ELECTRICAL INSTRUMENT Co. et al. (Circuit Court of Appeals, Second Circuit. March 7, 1910.) No. 129. Appeal from the Circuit Court of the United States for the Southern District of New York. Bill by the Weston Electrical Instrument Company against the Empire Electrical Instrument Company and others. Decree for defendants (166 Fed. 867), and complainant appeals. Affirmed. William Houston Kenyon and Richard Eyre, for appellant. John W. Griggs, Franklin Pierce, and C. H. Studin, for appellees. Griggs, Baldwin & Pierce, for appellee Cooke. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. This court absolutely and entirely rejects the not uncommon view that the fiction of distinct corporate existence can be made to serve as a shield against the consequences of individual wrongdoing. Upon the presentation of a case showing active participation by an officer of a corporation in the infringement of a patent, we have been, and shall be, not slow to disregard the corporate device and enforce personal responsibility. But in the present case, although we have diligently gone through the whole record, we have been unable to find evidence—direct or circumstantial—sufficient to warrant a finding that the defendant Cooke personally did, or caused to be done, any act of infringement. Nor is there evidence to justify a finding that the corporation was in fact a partnership, and to hold said defendant personally liable for the infringing acts of others. In view of these broad conclusions, and of our approval of the results reached by the judge at circuit, and his reasoning necessary to those results, we think that no useful purpose would be served by re-examining the evidence here, or by repeating the discussion of the legal principles involved. The decree of the Circuit Court is affirmed, with costs, upon the opinion of that court.

AMERICAN SNUFF CO. v. OLD INDIAN SNUFF MILLS. (Circuit Court, S. D. New York. March 26, 1910.) Memorandum of decision upon motion for preliminary injunction. Wise & Lichtenstein, for complainant. Charles Dushkind, for defendant.

NOYES, Circuit Judge. In view of the conflicting affidavits, and of the decision in *Weyman v. Soderberg*, 108 Fed. 63, this case is too doubtful to warrant the issuance of a preliminary injunction. It cannot be said—to use the language of the complainant's brief—that "there is no doubt as to the final outcome of the case" and that the "complainant is bound to succeed." The motion for a preliminary injunction is denied.